IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM NEW SOUTH WALES COURT OF APPEAL

No S110/2010 &
S219/2010

BETWEEN

WESTPORT INSURANCE CORPORATION
(ABN 48 072 715 738)
First Applicant/Appellant

ASSETINSURE PTY LIMITED
(ABN 65 066 463 803)
Second Applicant/Appellant

MUNICH REINSURANCE COMPANY OF AUSTRALASIA LIMITED
(ABN 51 004 804 013)
Third Applicant/Appellant

and

XL RE LIMITED
(ABN 54 094 352 048)
Fourth Applicant/Appellant

SCOR SWITZERLAND LTD
(ABN 92 098 315 176)
Fifth Applicant/Appellant

GORDIAN RUNOFF LIMITED
(ABN 11 052 179 647)
Respondent

APPELLANTS'/APPLICANTS' SUBMISSIONS

Part I: Certification

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

Part II: Issues

(1) Notice of Appeal

2 What is the appropriate standard of reasons required to be given (pursuant to s 29(1) of the *Commercial Arbitration Act 1984* (NSW) (**CAA**)) by a commercial arbitration panel chaired by an eminent retired appeal court judge in the following contexts:

10 (a) when determining whether it was reasonable for the appellants (**Reinsurers**) to be required to indemnify the respondent within the meaning, and on the proper construction, of the proviso to s 18B(1) of the *Insurance Act 1902* (NSW) (**IA**)?; and/or

(b) when applying considerations of general justice and fairness pursuant to s 22(2) of the CAA to determine whether the Reinsurers should be required to indemnify the respondent?

(the Reasons Ground)

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(2) Grounds of Special Leave Application Referred to the Full Court

3 Does s 18B(1)(a) of the IA apply to terms of reinsurance treaties that identify which underlying insurance contracts written by the respondent are covered by the treaties? (**the Section 18B Ground**)[1]

4 Did the error of the arbitrators in failing to conclude that the respondent's loss was caused by entering into a D&O policy with a 7 year reporting period involve an error of law within the scope of s 38(5)(b) of the CAA capable of correction by the courts below? (**the Causation Ground**)[2]

(3) Notice of Contention

5 In relation to the Causation Ground, was there a manifest error of law on the face of the award (within the scope of s 38(5)(b)(i) of the CAA)?[3]

6 In relation to the Section 18B and Causation Grounds, were there errors of law on the face of the award the determination of which may add, or may be likely to add, substantially to the certainty of commercial law (within the scope of s 38(5)(b)(ii) of the CAA)?[4]

7 Was the respondent's loss not caused by entering into a D&O policy with a 7 year reporting period, but caused by the underlying policy covering claims made both within 3 years and up to 7 years from its inception?[5]

8 In order for the respondent to raise additional grounds to uphold the award, it is necessary for the respondent to meet the requirements for leave under s 38 of the CAA in relation to the additional grounds?[6]

9 Are grounds set out in [10]-[13] below questions of law which satisfy the criteria for leave under s 38(5) of the CAA?[7]

10 Should the arbitrators have found that the FAI D&O Run-off policy was within the respondent's established acceptance and underwriting policy?[8]

11 Should the arbitrators not have found that the reinsurance treaties only applied to D&O policies with 3 year reporting periods?[9]

12 Should the arbitrators have found that the limitations of cover applied to D&O policies with operation periods of less than 3 years but with extended reporting periods?[10]

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[1] Ground 5 Amended Special Leave Application (AB5:2022); Para 3(a) Order dated 3 September 2010 (AB5:2244)
[2] Ground 6 Amended Special Leave Application (AB5:2022); Para 3(b) Order dated 3 September 2010 (AB5:2244)
[3] Ground 1 Notice of Contention (AB5:2254)
[4] Ground 2 Notice of Contention (AB5:2254)
[5] Grounds 3 and 4 Notice of Contention (AB5:2254)
[6] Ground 5 Notice of Contention (AB5:2255)
[7] Ground 6 Notice of Contention (AB5:2255)
[8] Ground 7 Notice of Contention (AB5:2255)
[9] Ground 8 Notice of Contention (AB5:2255)

13 Should the arbitrators have found that there were material differences between the different reinsurance treaties the subject of the dispute?[11]

14 Should the CA have held that the appeal against the award should have been dismissed in any event by reason of the matters in [10]-[13] above?[12]

Part III: Section 78B of the *Judiciary Act 1903*

15 Consideration has been given to the question whether notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

16 The New South Wales Court of Appeal (**CA**) judgment is reported at (2010) 267 ALR 74; [2010] NSWCA 57. The primary judgment is not reported (the internet citation is [2009] NSWSC 245).

Part V: Facts

17 The dispute that was the subject of the award dated 10th October 2008 by F Hoffman, G E Fitzgerald AO QC and I Brown concerned an indemnity claimed under three excess of loss reinsurance treaties. The treaties covered certain professional indemnity and directors and officers ("**D&O**") insurance contracts underwritten by the respondent and attaching in the period 1st January 1999 to 31st March 2000 (later extended to 30 June 2000). The main factual issue was whether the treaties covered a D&O run-off policy issued to FAI Insurance Limited ("**FAI D&O Run-Off Policy**").

18 The respondent had a 60% share of FAI's D&O cover at the time of the acquisition of FAI by HIH Winterthur International Holdings Limited (first announced on 23rd September 1998 but not completed until mid-1999). FAI wished to have run-off D&O cover after the completion of the acquisition.

19 On 23rd December 1998, the respondent agreed to accept a 60% share of the FAI D&O Run-Off Policy which provided cover in respect of any claims that may arise in the seven year period after the effective date in respect of wrongful acts by the former directors and officers of FAI prior to that date (the seven year reporting period). The effective date of the policy was subsequently agreed to be 31st May 1999.

20 The treaties were entered into between December 1998 and March 2000. The $10 million in excess of $10 million layer was agreed in December 1998. The $5 million in excess of $5 million layer and the $3 million in excess of $2 million layer were negotiated between late June 1999 and 1st March 2000. The Reinsurers first became aware of the FAI D&O Run-

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[10] Ground 9 Notice of Contention (AB5:2255)
[11] Ground 10 Notice of Contention (AB5:2255)
[12] Grounds 11 and 12 Notice of Contention (AB5:2255-2256)

Off Policy when they were notified of circumstances that may give rise to a claim under the treaties shortly after 23rd February 2001.

21 The central factual controversy in the arbitration was as to the terms of the reinsurance treaties. The arbitrators made the following findings:

a) the reinsurance treaties only covered D&O policies which had up to three year reporting periods and found that the reinsurance treaties did not cover the FAI D&O Run-Off policy {award [81], AB1:14};

b) the respondent could have sought a special acceptance from the Reinsurers with respect to the FAI D&O Run-off policy but did not {award [84]-[85], AB1:15-16};

c) the same employee of the respondent was negotiating the FAI D&O Run-off policy and the reinsurance coverage at the same time {award [21], AB1:5};

d) the evidence suggested that the applicants would not have agreed to cover the FAI D&O Run-off policy if asked {award [85], AB1:15-16}; and

e) the arbitrators were not persuaded that the FAI D&O Run-off policy was within the respondent's own underwriting policy {award [79], AB1:14}.

22 The respondent contended that ss 18 and 18B(1) of the IA allowed the respondent to claim an indemnity under the treaties, despite the findings summarised at [21(a)-(e)]. The arbitrators found that s 18B applied to the respondent's liability for the claims brought against the former directors of FAI within a three year period from 31st May 1999. The arbitrators declared that, subject to the monetary limits under the treaties, the respondent was entitled to an indemnity in respect of its liability for those claims.

23 The primary judge granted leave to appeal from the award under s 38(5) of the CAA only on the question of whether there was error in relation to the application of s 18B(1). Having concluded that sec 18B(1) did not apply to terms of the treaties that defined the scope of the reinsurance, the primary judge set aside the award.

24 The respondent applied to the CA for leave to appeal and the Reinsurers applied for leave to cross-appeal in relation to the refusal of the primary judge to permit the Reinsurers to contend that s 18B(1) of the IA does not apply to reinsurance contracts. The CA granted the respondent leave to appeal, allowed the appeal and dismissed the cross-appeal.

Part VI: Argument

25 The Reinsurers' submissions in relation to the Section 18B Ground and the Causation Ground (which are questions referred to the Full Court in relation to the grant of special leave) will be addressed first because they provide the essential background to the Reasons Ground which is principally concerned with the operation of the proviso to s 18B(1). The proviso to s 18B(1) is a statutory safeguard designed to ensure that the fact a contractual

provision falls within the literal terms of s 18B will not, of itself, disentitle reliance on the term by (re)insurers. It requires an examination of "all the circumstances" to determine whether it is reasonable for the (re)insurer to be bound to indemnify the (re)insured.

26 The Reinsurers' central propositions are (1) s 18B(1) has no relevant application to the terms of reinsurance treaties that identify which underlying insurance contracts are covered by the terms of the reinsurance treaties; and (2) even if s 18B(1) potentially applies, on the arbitrators' approach, the correct conclusion in relation to the causation test under s 18B meant that the section did not apply (because the issue of the FAI D&O Run-off Policy caused the respondent's loss). (The second proposition only arises on the arbitrators' approach that the respondent's "loss" was its liability under the FAI D&O Run-off Policy.)

27 It is only if these propositions are not accepted that the proviso to s 18B(1) comes into play. The legislative materials reveal that the NSW Parliament intended s 18B to regulate reliance by insurers on particular provisions in consumer insurance contracts, but do not suggest any concern about perceived abuses by reinsurers. The potential application of s 18B(1) to provisions in reinsurance treaties only arises because the reference to "insurance" in Part 6 of the IA has been interpreted to include "reinsurance" (*HIH Casualty & General Insurance v RJ Wallace* (2006) 68 NSWLR 603 at 615 [26] – a case about s 19 which was introduced into the IA by an earlier amendment in 1974[13]). The proviso to s 18B has a particularly important role to play when the question is the application of the section to a provision in a reinsurance contract. Careful consideration (having regard to the objects of the legislation and the proviso) should have been given to all the circumstances before any determination that s 18B operated to prevent the Reinsurers from enforcing the reinsurance treaties according to their terms (as found by the arbitrators).

28 In fact, the arbitrators simply stated that they were "comfortably satisfied" that it was reasonable for the Reinsurers to indemnify the respondents without giving any, or any adequate, reasons for that conclusion. No chain of reasoning was exposed, no consideration was given to the object of the legislation and the proviso and no explanation was given as to how the conclusion could stand in the face of the findings of the arbitrators summarised at [21(a)-(e)] above. The Reasons Ground of the appeal can only be properly considered in the context of the s 18B and Causation Grounds. It is not an abstract question about the nature of quasi-judicial decision-making divorced from the circumstances of this case.

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[13] *Commercial Transactions (Miscellaneous Provisions) Act 1974* (NSW). The introduction of s 19 was not prompted by a Law Commission report and there was no discussion in the legislative materials as to the intended ambit of s 19. See also *AssetInsure v New Cap Reinsurance* (2006) 225 CLR 331 at 361 [86], 343 [28] where "insurance" in s 562A of the *Corporations Act 2001* (Cth) was held to include "reinsurance" after an analysis of the Harmer Report and explanatory memorandum to the *Corporate Law Reform Act 1992* (Cth).

(1) The Section 18B Ground

Legislative Context

30 Section 18B was introduced into the IA in 1983 following a NSW Law Reform Commission (Report No 34 (1983)) (**LRC Report**) which was principally concerned with problems in insurance law relating to non-disclosure and misrepresentation, but also addressed the use of basis of contract clauses by insurers. The use of such clauses was perceived to be a technique adopted by insurers to overcome difficulties in relying on a non-disclosure or misrepresentation to repudiate liability under an insurance contract {[2.10], [3.9], [4.6] and [7.4] LRC Report}.

31 Basis of contract clauses typically provide that a proponent for insurance warrants the truth of answers to questions in a proposal form and/or deem the truth of those answers to be a condition precedent to the liability of the insurer – regardless of whether the answer is material to the subsequent loss giving rise to a claim on the policy ([2.10] LRC Report).

32 The LRC Report recommended the introduction of an amendment to the IA based on s 138 of the *Consumer Credit Act 1981* (NSW) {[4.5] LRC Report}. In addition to considering basis of contract clauses, the LRC Report addressed the use of exclusion clauses where there was no causal nexus between the loss and the exclusion clause {[7.33] LRC Report}.

33 There is no doubt that the NSW Parliament intended s 18B to address perceived abuses by insurers in relying on particular provisions in consumer insurance contracts. It is unsurprising that there is nothing in the statutory background to suggest that the NSW Parliament was concerned with perceived abuses in relation to reinsurance contracts because reinsurance is transacted between professionals in the insurance and reinsurance markets.

34 The LRC Report accepted that the drafting of s 18B "could be improved" but chose to add the proviso as a safeguard rather than alter the drafting of the section (because it mirrored s 138 of the *Consumer Credit Act*) {[7.33] LRC Report}. The proviso was specifically intended to cater for situations where there was no causal nexus between the loss and an exclusion clause, but it is still reasonable for the insurer to rely on the exclusion. The specific example given in the LRC Report was a motor vehicle policy which excluded a claim where a driver is unlicensed or disqualified even though the accident was the fault of another driver. It was accepted that it might still be reasonable on policy grounds for the insurer to rely on the exclusion {see also the second reading speech (Hansard 1325)}.

Section 18B(1)

35 Section 18B(1) regulates provisions which define the circumstances in which the (re)insurer is bound to indemnify so as to exclude or limit its liability "on the happening of particular events or on the existence of particular circumstances." The natural reading of the

section is that it is intended to regulate provisions that operate by reason of events that occur after the entry into an otherwise binding and enforceable contract. This flows from the use of the futurity of the phrase "on the happening" in s 18B(1)(a) and the reference in s 18B(1)(b) to the "happening of those events or the existence of those circumstances" being of a kind which the insurer considers "likely to increase the risk of loss occurring."

36 It is also legitimate to have regard to s 18A (introduced at the same time as s 18B) which regulated the rights of insurers flowing from the non-disclosure of circumstances known to the insured at the time of entry into the insurance contract. This is consistent with the construction of s 18B as being only intended to regulate provisions which exclude or limit an insurer's obligation to pay a claim because of some conduct of the insured after the contract was entered into or because of an event or circumstance (being a feature of the claim) that arose after entry into the contract. The legislative context summarised above at [30]-[34] is entirely consistent with this construction.

37 It follows that not all provisions which, in a literal sense, limit or exclude the liability of a (re)insurer are regulated by s 18B(1). This was accepted by the CA at [167], [252], AB4:1977, AB5:2001.

38 It cannot be doubted that s 18B(1) does not apply to provisions defining the financial or temporal scope of the cover or the type of insurance provided (such as professional indemnity or public liability), or terms which make the insurance conditional on the availability of reinsurance {all examples given by the CA at [252], AB5:2001}. Terms of this type "limit" the liability of the insurer in a literal sense and might even be said, in a literal sense, to impose a limitation arising because of the happening of an event (eg the claim arising outside the temporal scope of the cover or the failure to obtain reinsurance) or the existence of a circumstance (a loss exceeding the limit of indemnity). However, these provisions are not regulated by s 18B because the limiting feature of the provision is not connected with some post-contractual conduct of the insured or a factual attribute relating to the claim which arises after entry into the insurance policy.

39 The text of s 18B (and the legislative context) also makes it clear that the section can only have potential application to provisions directed to "events" or "circumstances" which are capable of having a relevant (for the purposes of the section) causal nexus with the "loss" giving rise to the claim. Thus, to use the example in the LRC Report, whether a driver of a vehicle is licensed may (or may not depending on the circumstances) have a causal nexus with circumstances giving rise to an insurance claim. By contrast, a financial limit in an insurance policy can never involve a relevant (for the purposes of s 18B) causal nexus

between the "loss" and the "event" or "circumstance." The limitation is simply a cap on the insurer's financial exposure unrelated to the circumstances of the loss.

40 It is equally apparent from the text of s 18B that it does not give an insured an entitlement to claim under a policy where the characteristics of the loss do not give rise to a prima facie entitlement to an indemnity. For instance, if, under a policy indemnifying a company for theft by an employee occurring during the period of the cover, a theft occurred after the end of the cover as the culmination of conduct by the employee in the policy period, s 18B would not operate to give the insured a right to an indemnity. That is because the loss within the policy period is a factual attribute or feature which is a necessary part of a prima facie entitlement to an indemnity under the policy (from which there may be derogation by other terms and conditions of the policy).

41 This type of factual attribute or feature (as a necessary part of a claim) has been described by this Court, in the context of s 54 of the *Insurance Contracts Act 1984* (Cth), as a restriction or limitation "inherent in [the] claim" (*FAI Insurance v Australian Hospital Care* (1997) 204 CLR 652 at 659 [41]). It was for this reason that, in relation to claims made policies, s 54 is not engaged if a demand had not been made at all in the policy period of a claims made policy (*FAI* at 660 [44]) but is engaged if a demand was made in the policy period but not notified by the insured (at 660 [46]). Section 54 could relieve the insured of the consequences of its failure to notify the demand, but had no application to the situation where a demand had not been made. The making of the demand within the policy period was a necessary attribute of a claim before the policy had any prima facie application at all.

42 The primary issue of statutory construction that arises in this case, therefore, is whether a stipulation in a reinsurance treaty (that only D&O policies with reporting periods of less than 3 years are covered) is a provision that has the attributes that render it apt to be regulated by s 18B(1) at all. It is a question which must be addressed in the specific context of treaty reinsurance.

Treaty Reinsurance

43 The essential relevant feature of treaty reinsurance is that a treaty is a contract for reinsurance by which the reinsurer and reinsured agree that insurance contracts having agreed characteristics will be automatically ceded to the treaty (see Edelman et al, *The Law of Reinsurance*, Oxford University Press at [1.33], *Tariff Reinsurances v Commissioner of Taxes* (1938) 59 CLR 194 at 215).

44 A contract of reinsurance is formed when the reinsured enters into a conforming insurance contract (a contract with the agreed characteristics) because the conforming insurance contract provides the subject matter of the contract of reinsurance (*Wasa*

International Insurance v Lexington Insurance [2009] UKHL 40, [2010] 1 AC 180 at [33], *Associated Provincial Assurance v Producers and Citizens Co-operative Assurance* (1932) 48 CLR 341 at 363, 388-9).

45 A provision in a reinsurance treaty identifying the characteristics that an insurance contract must have to be covered by the treaty is a necessary feature of a reinsurance treaty. Unlike facultative reinsurance where the reinsurer will decide whether to cover an insurance contract on a case by case basis, treaty reinsurance automatically covers insurance contracts with the specified characteristics without any underwriting assessment by the reinsurer. The treaty will cover any underlying insurance contracts (with the specified characteristics) that incept during the period of the treaty. If a non-conforming insurance contract is entered into by the reinsured it is not covered by the treaty at all.

46 In this way, it can be seen that a provision in a reinsurance treaty stipulating the characteristics of an underlying insurance contract must have to be covered by the treaty is analogous with a provision in a claims made insurance policy that stipulates the policy only covers demands made by a third party in the policy period. The entry into a conforming insurance contract by the reinsured is a feature or attribute which is an essential part of cover under the treaty and a restriction or limitation which is inherent in the claim. A treaty reinsurer is not "bound to indemnify" the reinsured at all in relation to a non-conforming insurance contract (even in the provisional sense in which that phrase is used in s 18B(1)).[14]

47 The flawed step in the reasoning of both the arbitrators and the CA was the implicit characterisation of the reinsurance treaties as providing "cover" for all D&O policies entered into by the respondent and the stipulation that only D&O policies with 3 year reporting periods were covered as an "exclusion or limitation" which derogated from a prima facie entitlement to cover for the purposes of s 18B {award [90]-[91], AB1:17; CA at [169] and [252], AB4:1977, AB5:2001}. This implicit characterisation of the provisions of the treaties was contrary to the contractual findings.

48 The arbitrators specifically rejected the respondent's contentions that the treaties covered <u>any</u> D&O policy {award [79], AB1:14} and that the applicants would have agreed to cover the FAI D&O policy if they had been approached {award [85], AB1:15-16}. The arbitrators made an unambiguous contractual finding that the reinsurance treaties did not cover the FAI D&O Run-off Policy {award [79]-[81], AB1:14}.

49 Against this background, there was no scope for the arbitrators to conclude that s 18B(1) applies to what were termed "three year claims" {award [88], AB1:16; CA [71],

[14] The treaty will only cover such a policy by agreement in the form of a 'special acceptance'.

AB4:1945}. There can only be "three year claims" under the reinsurance treaties if the underlying insurance contract is covered by the treaties. On the factual findings of the arbitrators, which are unimpeachable under the CAA, there was simply no cover. The reference to "three years claims" reveals the flawed thinking that lay behind the error in concluding that s 18B applied. The primary judge was right to identify it as a legal error falling within the scope of s 38(5) of the CAA and set aside the award (at [101]-[103], AB4:1719-1720).

50 The error in the approach to s 18B by the arbitrators becomes particularly stark when proper consideration is given to the nature of the "loss" under a reinsurance contract. English cases have consistently rejected the suggestion that the subject matter of reinsurance is the reinsured's contractual liability (most recently, and authoritatively, in *Wasa* [2010] 1 AC 180 at [33], [113]-[115]). This flows from the proposition that the subject matter of the reinsurance is the same as the insurance which has been a principle of Australian reinsurance law since at least 1933 (*Associated Provincial* 48 CLR 341 at 363, 388-9). It necessarily follows that the "loss" under a reinsurance contract is the same as the "loss" under the underlying policy (*Royal & Sun Alliance plc v Dornoch* [2005] 1 Lloyd's Law Reports IR 544 at [23]-[24]; *AIG Europe (Ireland) Limited v Faraday Capital Limited* [2008] Lloyd's Rep IR 454; [2007] EWCA Civ 1208 at [8]-[11]).

51 In this case, the "loss" for the purposes of s 18B is the underlying liability of the directors of FAI which may be the subject of an indemnity under the FAI D&O Run-off Policy. There could never be any relevant causal nexus between the "loss" (properly characterised) and the "circumstance" (the 3 year reporting period stipulation). The circumstances giving rise to a director's liability can never have any relevant causal nexus with a provision of a reinsurance treaty which stipulates that only D&O policies with up to 3 year reporting periods fall within the scope of the reinsurance treaty. The provision in the reinsurance treaty is not of a type that is regulated by s 18B.

52 The approach for which the Reinsurers contend does not introduce an unexpressed distinction, directed to the scope of cover, into s 18B(1) (as the CA concluded at [166], AB4:1976-1977). It gives proper effect to the true ambit of s 18B(1) having proper regard to the objects the section is intended to achieve. This approach is consistent with the principle that a remedial provision should be given a beneficial construction which is consistent with the text of the section (*Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638, 640). It is still necessary to have regard to the objects the remedial provision seeks to achieve and not impermissibly extend its scope to provisions not having the characteristics sought to be regulated by the section.

53 The Reinsurers' contention does not elevate form over substance. The line of authorities concerning s 54 of the *Insurance Contracts Act 1984* (Cth) (referred to by the CA at [168], AB4:1977) makes it clear that it is still necessary to pay close attention to the nature of the elements with which the statutory provision deals when looking to the substance of the contractual provision (*FAI Insurance v Australian Hospital Care* (1997) 204 CLR 652 at 658 [39]).

54 The restriction that is inherent in the respondent's claim, which s 18B does not operate to relieve, is the indisputable fact (on the arbitrators' findings) that the FAI D&O Run-off Policy was not covered by the reinsurance treaties {award [81], AB1:14; CA [65], AB4:1944}.

Leave under s 38(5)(b)(ii) of the CAA (Grounds 1 and 2 Notice of Contention)

55 In the CA, the Reinsurers confined the basis on which leave to appeal was sought in relation to the s 18B(1) ground to s 38(5)(b)(ii) of the Arbitration Act {CA [116], AB4:1961}. Section 38(5)(b)(ii) permits the grant of leave to appeal where there is strong evidence of an error of law the determination of which may add, or be likely to add, to the certainty of commercial law. The CA correctly accepted that a judicial exposition of the meaning of a statutory provision affecting the operation of insurance markets in Australia plainly satisfies the criterion of an issue likely to add to the certainty of commercial law {CA [173], AB4:1978-1979}. However, the CA erroneously concluded that leave should not have been granted on the basis that there was no "strong evidence" of an error of law because the "approach employed by the arbitrators involves an entirely arguable construction and application of s 18B" {CA [170], AB4:1978}.

56 The respondent seeks to uphold the conclusion of the CA that there was no strong evidence of an error of law and seeks to challenge the conclusion of both the primary judge and the CA that the s 18B issue was one that may add to the certainty of commercial law. These questions fall to be determined by reference to the leave criteria under s 38(5)(b) of the 1984 Act (not the new criteria under s 34A(3)(c) of the *Commercial Arbitration Act 2010* (NSW) – although similar considerations arise under s 34A(3)(c)(ii) which is directed to questions "at least open to serious doubt" which are of "general public importance").

57 It is accepted that the "strong evidence" ground under sec 38(5)(b)(ii) requires the establishment of a strong prima facie case of legal error by the arbitrators {CA [120]-[123], AB4:1962-1964}. The test, however, does not involve demonstrating the approach of the arbitrators was not reasonably arguable. This imposes a standard effectively equivalent to the manifest error standard where the error must be evident or obvious "leaving little or no doubt on a preliminary basis" {CA [116], AB4:1961}.

58 The criteria under the "strong evidence" ground is "rather less strict" than the manifest error ground {CA [126], AB4:1964-1965; *Pioneer Shipping v BTP Tioxide (The Nema) No 2* [1982] 1 AC 724 at 742-3}. The Reinsurers were only required to establish that their contention had sufficient substance to be characterised as a strong prima facie case (that is, strongly arguable). The contentions at [30] to [54] above reveal, at a minimum, a strong prima facie case of legal error by the arbitrators justifying a grant of leave to appeal.

59 The CA fell into error because it took the view that the approach of the arbitrators in relation to s 18B(1) was entirely arguable {CA [170], AB4:1978}. The text of s 18B(1) is not a model of clarity and was recognised to have room for improvement by the LRC Report. The fact that the text provided room for more than one view does not detract from the fact that the Reinsurers had established a strong prima facie case of error.

60 The respondent's apparent contention is that "manifest error" and "strong evidence" of error means the same thing and the only difference between the two limbs of s 38(5)(b) is that sub-section (b)(ii) allows error to be found beyond the face of the award. This is a construction which is contrary to the text of s 38(5) and the relevant context of s 38(5) being a statutory embodiment of *The Nema* guidelines. The respondent's contention should be rejected. Both the CA and the primary judge were plainly right to conclude that a judicial determination in relation to s 18B was likely to add to the certainty of commercial law by giving clarity to a statutory provision which is not easy to construe.

Special Leave

61 The Section 18B Ground warrants the grant of special because (1) reinsurance contracts entered into between 1983 and 2009 which cover long tail liabilities (professional indemnity risks, D&O risks, long tail pollution and asbestos liabilities, defective works liabilities) may produce claims for many years to come; (2) the issue entails reappraisal of fundamental principles of reinsurance law not looked at by this Court for over 70 years and only recently reconsidered by the House of Lords; and (3) the Section 18B Ground provides the essential context in which the Reasons Ground (for which special leave has been granted) falls for consideration.

(2) Causation Ground

62 The Reinsurers submit that, on the correct analysis of the nature of the "loss" for the purposes of s 18B, there can never be any relevant causal nexus between the "loss" and the "circumstance" which is a proposition that compels the conclusion that s 18B has no relevant application (see [50]-[52] above).

63 The arbitrators, however, equated the "loss" with the respondent's "liability on the 3 year claims."{award [91]-[92], AB1:17-18}. The CA accepted that, on this approach, the

arbitrators fell into error in failing to conclude that the existence of the FAI D&O Run-Off policy was the cause of the respondent's loss {CA [258], AB5:2002}. Once the arbitrators had identified the "loss" as the respondent's liability under the FAI D&O Run-Off policy {CA [183], AB4:1981}, the arbitrators should have concluded that s 18B(1) does not regulate the Reinsurers' right to refuse an indemnity because a causal link exists between the "loss" (the respondent's liability) and the "circumstance" (the issue of the FAI D&O Run-Off policy). A threshold requirement for the application of s 18B has not been met. It is submitted that the CA was plainly right in this conclusion.

64 However, the CA did not uphold the primary judge's decision (setting aside the award) on this basis because the CA concluded that the error on the causation issue was not an error of law or an error falling within either limb of s 38(5).

Leave under s 38(5)(b) of the CAA – (Grounds 1 and 2 Notice of Contention)

65 The Reinsurers contend that the CA should have concluded that the error was in relation to a question of law because it involved a legal conclusion as to whether, on the facts as found, the statutory criteria for the application of s 18B had been met {*Vetter v Lake Macquarie CC* (2001) 202 CLR 439 at 450 [24] and 451 [27]}. If a legislative provision requires a causation test to be met to establish an entitlement to compensation or a benefit, the causation question is a question of law. This is because the question is ultimately one of statutory construction which must be determined in light of the subject, scope and objects of the legislative provision (*Allianz Australia Insurance v GSF Australia* (2005) 221 CLR 568 at 581-2, 586-7, 597-8)

66 Thus, a determination as to whether a compensable injury had occurred "as a direct result of an act of violence" (under s 7(1) of the *Victims Compensation Act 1996* (NSW)) posed a question of law for the purpose of an appeal to the District Court of NSW under s 39(1) of the Act (see also *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668 at 687 [82]). The same approach was taken in *Workers Compensation (Dust Diseases) Board of NSW v Smith* [2010] NSWCA 19 in relation to an appeal limited to a question of law on a causation issue in an asbestos case arising out of s 8(1)(b) of the *Workers Compensation (Dust Diseases) Act 1942* (NSW).

67 In *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at 126 [28], this Court held that the Administrative Appeals Tribunal had erred in law in failing to pose and answer the correct question when determining whether a soldier's incapacity "arose out of, or was attributable to, any defence service" within the meaning of s 70(1) and (5) of the *Veteran's Entitlement Act 1986* (Cth).

68 The causation question posed by s 18B determines whether the provision applies at all. It is not a free-standing evaluative question involving a visceral response on the part of the tribunal, but a question involving a determination of principle and statutory purpose (see *I & L Securities v HTW Valuers* (2002) 210 CLR 109 at 119 [26] Gleeson CJ).

69 In *Roncevich*, the question was remitted to the AAT for further determination on the evidence. Remitter is neither necessary nor appropriate here. The arbitrators' determination of the primary facts is not open to challenge and no reconsideration of the evidence arises. The correct application of the causation test under s 18B permits of only one conclusion, s 18B does not prevent the Reinsurers from relying on the stipulation that D&O policies with reporting periods of more than 3 years are not covered.

70 The respondent contends in Ground 4 of the Notice of Contention that the CA should have concluded that "the cause of the respondent's loss was the fact that the underlying policy not only covered claims made within three years, but claims made in years four, five, six and seven." (which presumably seeks to uphold the arbitrators' conclusion at [92] of the award, AB1:17-18). The respondent would have had no liability if it had not issued the FAI D&O Run-off Policy. There was no finding (or evidence to support a finding) that the respondent would have issued a D&O run-off policy with a shorter reporting period.

71 The arbitrators' error was manifest on the face of the award (within the scope of s 38(5)(b)(i)) as it could and was revealed by relatively short argument based on the award alone. The logic of the conclusion was inescapable leaving little or no room for doubt even on a preliminary basis.

72 Oddly, the CA concluded that the error was not strongly arguable (within the scope of s 38(5)(b)(ii)) {CA [183], AB4:1981} despite concluding correctly that the arbitrators were in error {CA [258], AB5:2002}. The final conclusion of the CA on this issue inevitably reveals that there was a strong prima facie case of error because the error on the causation issue did not involve sustained and sophisticated argument on either the facts or the law.

73 The determination of the causation issue does add substantially to the certainty of commercial law both for the reasons accepted by the CA {[173],AB4:1978-19790 and because the conclusion applies equally to any case where the issue is whether an insurance contract is within the agreed scope of a treaty. This is an important conclusion on the proper ambit of s 18B(1) in a reinsurance context. The significance of the error is not unique to the facts of this case because, as was accepted in the court below (and never disputed by the respondent), scope of cover and class of business are important working concepts in insurance and reinsurance {CA [166], AB4:1976-1977}.

Special Leave

74 The Causation Ground warrants the grant of special leave for similar reasons as the Section 18B Ground (see [61] above) and because of the consideration identified in [73] above.

(3) Reasons Ground

75 The analysis of the context in which s 18B was enacted in 1983 reveals that the proviso to s 18B(1) is an important safeguard written into the legislation to address concerns raised by the Insurance Council of Australia (and accepted by the NSW Law Reform Commission) about the drafting of the section {CA [147], AB4:1971-1972; LRC Report [7.33]-[7.34]}. The legislature included the proviso to ensure that the fact a term fell within the literal words of s 18B(1) did not, of itself, disentitle reliance on the term by an insurer.

76 The arbitrators dismissed the Reinsurers' arguments as to the application of the proviso to s 18B(1) (and s 22(2) of the CAA) with the following words – "we are comfortably satisfied that it would be reasonable within the meaning of s 18B(1), and entirely consistent with 'considerations of general justice and fairness' within the meaning of the reinsurance treaties, for the reinsurance treaties to apply in relation to the 3-year claims." {award [88], AB1:16; CA [71], AB4:1945-1946}.

77 The Reinsurers contend that the arbitrators in effect gave no reasons (and certainly no adequate reasons) as to why the proviso to s 18B(1) or s 22(2) did not operate to allow the Reinsurers to rely on the terms of the reinsurance treaties as found by the arbitrators. It was insufficient simply to state their conclusion in the terms they did {CA at [198], AB4:1984-1985}.

78 It is important to state at the outset that this ground of appeal does not rest on this Court preferring the approach of the Victorian Court of Appeal in *Oil Basins v BHP Billiton* (2007) 18 VR 346 at 364-5 [50]-[52] to that of the CA at [215] and [220], AB4:1991, 1993. The CA rejected a requirement of reasons to the judicial standard and adopted the formulation of the requirement as to a reasoned award in England enunciated in *Bremer Handelsgesellschaft v Westzucker* [1981] 2 Lloyd's Rep 130 at 132-3 (see also *Bay and Hotel Resort v Cavalier Construction* [2001] UKPC 34). That is, the arbitrators "should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in light of what happened, they should reach their decision and what that decision is." (emphasis added)

79 The Reinsurers contend that on this standard the arbitrators failed to give adequate reasons because they did not state why they were "comfortably satisfied" that it was

reasonable for the Reinsurers to be required to indemnify the respondent in light of the findings summarised at [21(a)-(e) above].

80 The CA's analysis as to why the arbitrators reasons were adequate starts from the premise that a consideration of the proviso to s 18B involved an evaluative task on a question of fact on which there was no right of appeal {CA at [198], AB4:1984-1985}. For the reasons discussed at [55]-[60] above in relation to the Causation Ground, the starting premise is false because ultimately consideration of the proviso involved a question of statutory construction to be determined in light of the subject, scope and objects of the legislative provision (*Allianz* 221 CLR 568 at 581-2, 586-7, 597-8). If the arbitrators had disclosed their reasons, it may well have revealed an error on a question of law through a failure properly to understand the legislative purpose behind the enactment of the proviso as a safeguard against an over-literal application of s 18B.

81 The CA's analysis at [198], AB4:1984-1985 accepts that a court judgment must identify the found facts on which an evaluative assessment is based. It is submitted that the *Bremer v Westzucker* test is to the same effect because of the requirement to state why, in light of what happened (the found facts) the arbitrators should reach their decision. This, at a minimum, requires the decision-maker to state which of the found facts support the evaluative conclusion. The arbitrators did not identify which of the found facts gave them the comfort they expressed in their evaluative assessment. As Basten JA observed in *Najdovski v Crnojlovic* (2008) 72 NSWLR 728 at 733 (a judgment relied on by the CA), even in the case of evaluative judgments not amenable to precise justification, reasons may be inadequate if a process of reasoning is not revealed. That is precisely what the Reinsurers contend happened in this case. A number of facts were found by the arbitrators but the relationship of those facts to the ultimate conclusion in relation to the proviso to s 18B is impenetrable because no process of reasoning was provided.

82 The arbitrators were not, in any event, involved in some intuitive fact finding exercise incapable of precise explanation. The arbitrators were engaged in a process of statutory construction to determine whether s 18B was engaged at all. The proviso to s 18B required a consideration of all the circumstances which inevitably required of the arbitrators a statement of reasons identifying why found facts favourable to the Reinsurers were to be disregarded in favour of a conclusion that it was reasonable to require the Reinsurers to indemnify the respondent.

83 The proposition that s 29(1)(c) of the CAA required a statement of reasons which, at a minimum, obliged the arbitrators to state the chain of reasoning as to why the ultimate conclusion flowed from the primary facts is consistent with all the authorities and academic

material cited by the CA at [198], AB4:1984-1985 and [211]-[216], AB4:1989-1992 (see, in particular, *Bremer v Westzucker* [1981] 2 Lloyd's Rep 130 at 132-3; Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England,* 2nd Ed, 1989, Butterworths at 377-8, {CA at [210], AB4:1988} *Soulemezis v Dudley (Holdings)* (1987) 10 NSWLR 247 at 277, *Najdovski* 72 NSWLR 728 at 733; *Oil Basins* 18 VR 346 at 364-5 [50]-[52]).

84 The Reinsurers also contend that, in assessing the standard of reasons required of commercial arbitrators, it is appropriate to have regard to the nature of the dispute, the parties choice as to the tribunal and the procedural steps the parties adopt for their resolution of the dispute. Each of these elements reflect the parties' agreement as to what they expect from the arbitrators. The CA was wrong, with respect, at [216], AB4:1991-1992 to approach the question of the requirement of the standard of reasons with a presumption that the parties expect all arbitrations to be shorn of complexities and technicalities when the evidence of the conduct of the arbitration suggests otherwise. To do so would fail to give effect to the contractual intentions of the parties.

85 A complex dispute determined after a hearing lasting several days, attended by the formalities of legal proceeding (including lengthy written and oral submissions presented by experienced senior counsel) calls for reasons of a judicial standard (*Oil Basins* 18 VR 365-6 at [53]-[55], *Warley v Adco Constructions* (1992) 8 BCL 300 at 305 (Kirby P)). When the parties have chosen an eminent retired appeal court judge as chairman there is a legitimate expectation that reasons of a high degree of sophistication will be given (*Cypressvale v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 485 (Queensland Court of Appeal, Fitzgerald P, McPherson and Davies JJA).

86 A requirement for an award with reasons of a judicial standard in a complex arbitration does not mean that the arbitrators must produce the same judgment to be expected of a judge hearing the same commercial dispute in court. Because findings of primary fact are not open to appeal, there is no requirement to analyse the evidence in a way which would permit review by an appellate court. It is sufficient for relevant findings to be stated succinctly by reference to the evidence. Equally, because arbitration is not part of a judicial process leading to incremental development of law, the arbitrators' duty was no more than to state the relevant principles of law which govern the dispute with sufficient clarity and precision to allow the parties to understand the relevant legal framework and allow an appellate court to identify any error of law having a character that meets the s 38(5) criteria. This often will be a less exacting standard than might be required from a judge particularly in a difficult or developing area of the law. If the application of a statute is determinative of the dispute, the arbitrators' in a complex arbitration must by succinct reasons reveal a proper understanding of

the context or the legislation and its objects. Where there is little or no relevant distinction between the judicial standard and arbitral standard of reasons is in the explanation of the application of the principles of law to the facts as found and the process of reasoning leading to the ultimate conclusion. In a complex dispute which has been attended by steps which mirror complex commercial litigation, the parties expect, and are entitled to, comparable sophistication in the explanation of the process of reasoning to that to be expected from a judge.

87 The arbitrators' process of reasoning in relation to the proviso to s 18B is impenetrable. There is nothing to suggest an appreciation that the proviso was intended to guard against over-literal application of s 18B, no identification of the factual findings that supported the conclusion and, critically, no explanation why the conclusion could stand in the face of the findings summarised in [21(a)-(e)] above. That is, the reasons do not reveal whether the statutory requirement to consider all the circumstances had been met.

88 The failure of the arbitrators to provide adequate reasons for enlivened the court's power to vary the award under s 38(3)(a) of the CAA (by substituting its own reasons). The findings of fact at [21(a)-(e)] compelled the conclusion that it is reasonable that the applicants should not be required to indemnify the respondent. The stipulation that the reinsurance treaties did not cover D&O policies with reporting periods longer than 3 years was freely-negotiated by sophisticated and well-resourced commercial parties. It could not rationally be concluded that the applicants should provide an indemnity for "three years claims" when the FAI D&O Run-Off policy was known not to be covered by the reinsurance treaties and it was found would not have been accepted by the applicants if they had been asked.

89 Considerations of general justice and fairness under s 22(2) of the CAA inevitably lead to the same conclusion. In the particular circumstances of this case, remitter to the arbitrators for the provision of further reasons is unnecessary because only one conclusion on the application of the proviso (and s 22(2) of the CAA) is open once proper regard is had to the found facts.

Grounds 5 to 12 of the Notice of Contention

90 The CA held at [280]-[283], AB5:2009 -2010 that a respondent to an appeal under s 38(5) of the CAA must satisfy the leave criteria under s 38(5) in order to bring forward additional grounds to affirm an award. The CA held that each of the so-called "points of contention" were challenges to factual findings of the arbitrators (this is apparent from the formulation of the Notice of Contention in this Court) which, even if capable of characterisation as questions of law, do not meet the s 38(5) criteria.

91 The CA was plainly right on these points. Section 38(5) evinces a legislative intention that appeals on questions of law from arbitral awards should be restricted to those questions satisfying the s 38(5)(b) criteria. The objectives of the CAA would be substantially undermined if a respondent had an unrestricted right of appeal on questions of law.

92 It should be noted also that in bringing Grounds 7 to 10 of the Notice of Contention before this Court, the respondent is seeking effectively to re-open the key findings of fact of the arbitrators which will involve a review of most of the evidence in the arbitration (hence the size of the appeal books). The so-called "points of contention" were not dealt with in the primary judgment and the CA did not consider it appropriate to make detailed findings on the points {CA [290]-[303]; AB5:2012-2013}. None of the grounds are of a type that is likely to have attracted a grant of special leave by this Court. The Reinsurers will reserve any further response to the Notice of Contention to its submissions in reply.

Part VII: Legislation

93 The legislative provisions relevant to the argument in this case (in the form they took at the time of the hearings and decisions below) are set out in the annexure A.

94 Since the CA decision, the *Commercial Arbitration Act 1984* (NSW) has been repealed and replaced by the *Commercial Arbitration Act 2010* (NSW) (although the uniform legislation in the other States and Territories remains in the same form as the 1984 Act). The provisions of the *Commercial Arbitration Act 2010* (NSW) equivalent to those of the 1984 Act relevant to the appeal are set out in annexure B.

95 The *Insurance Act 1902* (NSW) remains in the form it was in at the time of the hearing and decisions below. However, by the *Insurance Regulation 2009* (NSW), contracts of reinsurance entered into after 1 September 2009 are exempted from the operation of s 18B. Section 18B continues to have application to contracts of reinsurance entered into between 1983 and 1 September 2009.

Part VIII: Orders sought

96 The appeal be allowed.

97 The Orders of the New South Wales Court of Appeal made on 1 April 2010 be set aside.

98 In lieu of the Orders of the New South Wales Court of Appeal:

(a) the respondent's appeal to the New South Wales Court of Appeal be dismissed with costs;

(b) alternatively, the proceedings be remitted to the Equity Division of the Supreme Court of New South Wales for determination as to the appropriate

relief to be granted under sec 38(3) and/or 42 of the *Commercial Arbitration Act 1984* (NSW).

99 The respondent pay the appellants' costs of the arbitration except:

(a) the costs of and incidental to the respondent's successful application for leave to amend its amended points of claim and amended reply pursuant to the interim award of F Hoffman, G E Fitzgerald AO QC and I Brown dated 26th November 2007; and

(b) the costs thrown away consequent upon the appellants' successful application to amend their pleadings pursuant to the order made by the arbitrators on 14th July 2008.

100 The respondent pay the costs of the proceedings in the Equity Division of the Supreme Court of New South Wales.

101 The respondent pay the costs of the application for special leave to appeal and the appeal.

102 Such further or other Orders as this Honourable Court deems fit

3 December 2010

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ANNEXURE A

Section 18A of the *Insurance Act 1902* (NSW)

18A Misrepresentation and non-disclosure

A contract of insurance that is entered into, reinstated or renewed after the commencement of this section is not void, voidable or otherwise rendered unenforceable:

(a) by reason only of a false or misleading statement made in or in connection with the contract or a proposal, offer or document that led to the entering into, reinstating or renewing of the contract unless the statement was material to the insurer in relation to the contract of insurance and:

(i) the statement was fraudulent, or

(ii) the insured knew or a reasonable person in the insured's circumstances ought to have known that the statement was material to the insurer in relation to the contract of insurance, or

(b) by reason only of an omission of matter from the contract or a proposal, offer or document that led to the entering into, reinstating or renewing of the contract unless the matter omitted was material to the insurer in relation to the contract of insurance and:

(i) the omission was deliberate, or

(ii) the insured knew or a reasonable person in the insured's circumstances ought to have known that matter material to the insurer in relation to the contract of insurance had been omitted.

Section 18B of the *Insurance Act 1902* (NSW)

18B Limitation on exclusion clauses

(1) Where by or under the provisions of a contract of insurance entered into, reinstated or renewed after the commencement of this section:

(a) the circumstances in which the insurer is bound to indemnify the insured are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of particular events or on the existence of particular circumstances, and

(b) the liability of the insurer has been so defined because the happening of those events or the existence of those circumstances was in the view of the insurer likely to increase the risk of loss occurring,

the insured shall not be disentitled to be indemnified by the insurer by reason only of those provisions of the contract of insurance if, on the balance of probability, the loss in respect of which the insured seeks to be indemnified

was not caused or contributed to by the happening of those events or the existence of those circumstances, unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify the insured.

(2) The onus of proving for the purposes of subsection (1) that, on the balance of probability, loss in respect of which an insured seeks to be indemnified was not caused or contributed to by the happening of particular events or the existence of particular circumstances is on the insured.

Section 22 of the *Commercial Arbitration Act 1984* (NSW)

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)

(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

Section 29 of the *Commercial Arbitration Act 1984* (NSW)

29 Form of award

(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall:

(a) make the award in writing,

(b) sign the award, and

(c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award.

Section 38 of the *Commercial Arbitration Act 1984* (NSW)

38 Judicial review of awards

(1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order:

(a) confirm, vary or set aside the award, or

(b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement:

(a) with the consent of all the other parties to the arbitration agreement, or

(b) subject to section 40, with the leave of the Supreme Court.

(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

(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.

ANNEXURE B

Section 31 of the *Commercial Arbitration Act 2010* (NSW)

31 Form and contents of award

(1) The award must be made in writing and must be signed by the arbitrator or arbitrators.

(2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.

(3) The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 30.

(4) The award must state its date and the place of arbitration as determined in accordance with section 20.

(5) The award is taken to have been made at the place stated in the award in accordance with subsection (4).

(6) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) must be delivered to each party.

Section 34A of the *Commercial Arbitration Act 2010* (NSW)

34A Appeals against awards

(1) An appeal lies to the Court on a question of law arising out of an award if:

(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section, and

(b) the Court grants leave.

(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.

(3) The Court must not grant leave unless it is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties, and

(b) that the question is one which the arbitral tribunal was asked to determine, and

(c) that, on the basis of the findings of fact in the award:

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

(4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.

(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the "appeal period").

(7) On the determination of an appeal under this section the Court may by order:

(a) confirm the award, or

(b) vary the award, or

(c) remit the award, together with the Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration or, where a new arbitrator has been appointed, to that arbitrator for consideration, or

(d) set aside the award in whole or in part.

(8) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(9) Where the award is remitted under subsection (7) (c) the arbitrator must, unless the order otherwise directs, make the award within 3 months after the date of the order.

(10) The Court may make any leave which it grants under subsection (3) (c) subject to the applicant complying with any conditions it considers appropriate.

(11) Where the award of an arbitrator is varied on an appeal under this section, the award as varied has effect (except for the purposes of this section) as if it were the award of the arbitrator.