COMMERCIAL ARBITRATION BILL 2011

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Michael Mischin (Parliamentary Secretary)**, read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [5.16 pm]: I move —

That the bill be now read a second time.

The Commercial Arbitration Bill 2011 will repeal the Commercial Arbitration Act 1985 and provide a new procedural framework for the conduct of domestic commercial arbitrations. The bill facilitates the use of arbitration agreements to manage domestic commercial disputes and will ensure that arbitration provides a cost-effective and efficient alternative to litigation in Australia. The current act is part of uniform domestic arbitration legislation that applies in all Australian states and territories.

At the May 2010 meeting of the Standing Committee of Attorneys-General, ministers agreed to update the uniform legislation. This updated law would be based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. The UNCITRAL model law reflects the accepted world standard for arbitrating commercial disputes. New South Wales took the lead in developing this model bill and was the first jurisdiction to introduce legislation based on the model Bill to provide business with up-to-date domestic arbitration laws. The reform of domestic arbitration legislation is particularly timely when one has regard to developments in international arbitration. The regularity and certainty that is conducive to efficient commerce are fostered by uniform national laws that reflect accepted international practice.

Notably, the jurisdictions with which Australia competes for international arbitration work do not have different national and international arbitration laws, and nor should we. I also note that the commonwealth government has enacted the International Arbitration Amendment Act 2010 to amend the International Arbitration Act 1974 to increase the effectiveness, efficiency and affordability in international commercial arbitration.

At the April 2009 meeting of the Standing Committee of Attorneys-General it was agreed that the UNCITRAL model law could form the basis for the reform of domestic arbitration legislation. It was also agreed that additional provisions, consistent with the UNCITRAL and necessary for domestic dispute management, would be appropriate. There are a number of good reasons for adopting the UNCITRAL model law as the basis for domestic law. First, the UNCITRAL model law has legitimacy and familiarity worldwide. It has provided an effective framework for the conduct of international arbitrations in many jurisdictions, including Australia, for more than 24 years. It provides a well-understood procedural framework to deal with issues such as the appointment of arbitrators, jurisdiction of arbitrators, conduct of arbitral procedures and the making of awards and, therefore, is easily adapted to the conduct of domestic arbitrations. Indeed, jurisdictions such as New Zealand and Singapore have based their domestic arbitration legislation on the UNCITRAL model law and it has proven appropriate. Second, basing domestic commercial arbitration legislation on the UNCITRAL model law creates national consistency in the regulation and conduct of international and domestic commercial arbitration. The commonwealth International Arbitration Act 1974 gives effect to the model law in relation to international arbitrations. Many businesses, including legal ones, operate domestically and internationally, and one set of procedures for managing commercial disputes makes sense. Third, practitioners and courts will be able to draw on case law and practice in the commonwealth and overseas to inform the interpretation and application of its provisions.

Following the ministers' agreement at the April 2009 standing committee meeting on the UNCITRAL law as the way forward, a draft model commercial arbitration bill was drafted by New South Wales. The draft bill was sent out for targeted consultation with stakeholders. Feedback was sought, in particular, on the appropriateness, adequacy and desirability of additions and amendments to the UNCITRAL model law, tailored to domestic dispute management and related matters. Seventeen initial submissions were received. These were carefully considered and have informed the bill before the house today.

The bill is based upon the text and spirit of the UNCITRAL model law. This delivers consistency with the commonwealth's international arbitration law and the legitimacy and familiarity of internationally accepted practice. However, the UNCITRAL model law does not provide a complete solution to the regulation of domestic commercial arbitration. The bill, therefore, supplements the model law to provide appropriately for domestic dispute management. At the April 2009 standing committee meeting, ministers agreed on two principles to guide the drafting of the uniform legislation. They were that the bill should give effect to the overriding purpose of commercial arbitration—namely, to provide a quicker, cheaper and less formal method of finally resolving disputes than litigation—and that the bill should deliver a nationally harmonised system for

international and domestic arbitration, noting the commonwealth's review of the International Arbitration Act 1974.

The PRESIDENT: Order! Excuse me interrupting; how long is your second reading? Can I just inquire how much there is to go?

Hon MICHAEL MISCHIN: About as much as I have already said.

The PRESIDENT: In that case, noting the time, I will interrupt proceedings to take members' statements.

Point of Order

Hon NORMAN MOORE: As a point of clarification, I understand that the rule does state that at that point in time we take members' statements, but it also provides that once members' statements have been completed, we can read in bills. Would it be possible for the speech to be finished and then do members' statements? Then we would not need to come back to complete this second reading speech. I was thinking about this myself and wondered whether this could become sort of the practice of the house that we do not read in bills after members' statements have been taken. But it is entirely up to you, obviously.

Ruling by President

The PRESIDENT: I am actually bound by the standing orders but if the house resolves differently, so be it. If the Leader of the House wishes, he can take some action to continue the speech. The parliamentary secretary can seek leave and the house can grant that leave.

Hon MICHAEL MISCHIN: I seek leave to continue the second reading speech.

The PRESIDENT: The parliamentary secretary seeks leave to continue his second reading speech until it is completed.

Point of Order

Hon KEN TRAVERS: Point of order, just so that we are all clear on the process, would it then be your intention to still allow for 40 minutes of members' statements or is the intention to delete from members' statements the time taken by the second reading speech?

Hon Norman Moore: It is not my intention —

Hon KEN TRAVERS: I am not suggesting that it is; I just think it is worth getting it clear.

The PRESIDENT: Certainly not. It is my intention that the parliamentary secretary seeks leave just to complete this second reading speech. Is that correct?

Hon MICHAEL MISCHIN: That is so.

Leave granted.

Debate Resumed

Hon MICHAEL MISCHIN: The purpose of the law, also agreed to by ministers, is found in clause 1C in part 1A of the bill—the paramount object provision—to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense. Stakeholders advocated for and endorsed the inclusion of a paramount object clause, noting the absence of such a provision as a weakness in the present uniform commercial arbitration acts. Part 1 of the bill applies the bill to domestic commercial arbitration and clarifies that it is not a domestic arbitration if it is an international arbitration for the purposes of the commonwealth act. Part 2 of the bill defines an arbitration agreement and requires a court before which an action is brought to refer that matter to arbitration if it is the subject of an arbitration agreement and a party so requests. Part 3 deals with the composition of arbitral tribunals and provides flexibility and autonomy to parties in selecting the arbitrator or arbitral tribunal to decide their dispute. It enables parties not only to agree on the number or arbitrators but the process by which they will be selected and how they may be challenged. It also provides a default position should the parties not be able to reach agreement.

The jurisdiction of arbitral tribunals is dealt with in part 4, which makes it clear that an arbitral tribunal is competent to determine whether it has jurisdiction in a dispute but also enables a party to seek a ruling on the matter from the court where a tribunal determines that it has jurisdiction. Interim measures are dealt with in part 4A of the bill.

Part 4A also provides for the recognition and enforcement of interim measures, issued under a law of Western Australia or of another state or territory, in certain circumstances. The grounds for refusing recognition or enforcement of an interim measure are also contained in part 4A. The conduct of arbitral proceedings are dealt with in part 5 of the bill, which provides that parties must be given a fair hearing and that they are free to agree on the procedure to be followed by an arbitral tribunal, or, in the absence of agreement, for the arbitral tribunal to

conduct the arbitration as it considers appropriate. This ensures that parties and arbitral tribunals are granted flexibility to adapt the conduct of the proceedings to the particular dispute before them.

Part 5 includes some provisions additional to those in the model law to ensure that arbitrations can be conducted efficiently and cost effectively.

Part 5 also provides an optional confidentiality regime. Confidentiality is viewed as one of the key benefits of arbitration for parties dealing with sensitive commercial topics. These provisions are drafted consistently with those of the commonwealth act and provide a default position if an alternative confidentiality regime is not agreed upon by the parties. As parties often assume that arbitration is both private and confidential, the provisions apply on an opt-out basis to cover situations in which an arbitration agreement does not cover confidentiality. Part 6 of the bill covers the making of awards and the termination of proceedings.

The UNCITRAL model law has been supplemented by additional provisions to deal with the issue of costs and the awarding of interest. As stakeholders overwhelmingly suggested that harmonised treatment of costs and interests across international and domestic legislation was desirable, these are dealt with consistently with the commonwealth act. Recourse against awards is dealt with in part 7 of the bill, which outlines the circumstances in which an application can be made for the setting aside of an award, or grounds upon which parties can appeal an award, if parties have agreed to allow appeals under the optional provision.

Recognition and enforcement of arbitral awards is dealt with in part 8 of the bill, which allows for the recognition of awards irrespective of the state or territory in which it was made, and which outlines the grounds on which enforcement can be refused.

The Commercial Arbitration Bill 2011 will ensure that Western Australian domestic arbitration laws reflect accepted international practice for resolving commercial disputes and it will provide businesses with a cost-effective and efficient alternative to litigation.

I commend the bill to the house.

Debate adjourned and bill referred to the Standing Committee on Uniform Legislation and Statutes Review, pursuant to standing orders.