COMMERCIAL ARBITRATION BILL 2011

Introduction and First Reading

Bill introduced, on motion by **Mr C.C. Porter (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [12.13 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 a uniform domestic arbitration legislation scheme that applies in all Australian states and territories. This uniform legislation has not kept pace with changes in international best practice, and still reflects the old English arbitration acts. 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 is fostered by uniform national laws that reflect accepted international practice. In addition, the ability of Australian courts to deal with international arbitration is based on their experience with domestic arbitration.

Notably, the jurisdictions with which Australia competes for international arbitration works 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 effectiveness, efficiency and affordability in international commercial arbitration. In addition to these legislative changes, the first dedicated international dispute resolution centre in the Sydney CBD has been opened. All this will help ensure that Sydney and Australia capitalise on the booming market in commercial dispute resolution, ensuring that business and the legal system are operating in essentially one commercial arbitration environment, whether domestically or internationally.

At the April 2009 meeting of the Standing Committee of Attorneys-General, it was agreed that the UNCITRAL model law would form the basis for the reform of domestic arbitration legislation. It was also agreed that additional provisions, consistent with the UNCITRAL law 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 the 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 for dealing with issues such as the appointment of arbitrators, the jurisdiction of arbitrators, the conduct of arbitral proceedings and the makings of awards, and therefore is easily adapted to the conduct of domestic arbitrations. Indeed, jurisdictions such as New Zealand and Singapore have based their own 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 make 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 government takes this opportunity to thank all those who contributed to the development of the bill.

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 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.

I turn now to some of the details of the commercial arbitration framework established by the provisions of the bill. 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 to agree on not only the number of arbitrators, but also 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. Clause 12 sets out the grounds on which the appointment of an arbitrator may be challenged and obliges proposed arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

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 when a tribunal determines that it has jurisdiction. Interim measures are dealt with in part 4A of the bill. It provides the power to arbitral tribunals to grant interim measures for purposes such as maintenance of the status quo and the preservation of assets and evidence. The bill also contains the power to grant enumerated interim and procedural orders in addition to those contained in the UNCITRAL model law.

Arbitral tribunals are granted the flexibility, unless the parties otherwise agree, to conduct an arbitration on a "stop-clock" basis in which the time allocated to each party in the hearing is recorded progressively and strictly enforced. This can enable arbitral tribunals to conduct arbitrations in a manner that is proportionate to the amount of money involved and the complexity of the issues in the matter. Similarly, clause 33B, contained in part 6 of the bill, enables an arbitral tribunal to limit the costs of arbitration, or any part of the arbitral proceedings, to a specified amount unless otherwise agreed by the parties. This gives arbitral tribunals the flexibility to cap costs on the basis of proportionality—another mechanism to ensure that arbitrations can be conducted in a manner proportionate to the money and complexity of the issues involved.

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. Clause 24B imposes a duty on parties to do all things necessary for the proper and expeditious conduct of arbitral proceedings. Clause 25 provides the powers of an arbitral tribunal in the event of the default of one of the parties. Additional powers to those contained in the UNCITRAL model law are provided in clause 25 to ensure that arbitral tribunals have sufficient powers to deal with delay by parties or failure to comply with a direction of the tribunal.

Clause 27A enables parties, with the consent of the arbitral tribunal, to make an application to the court to issue a subpoena requiring a person to attend arbitral proceedings or to produce documents. Clause 27D provides that an

arbitrator can act as a mediator, conciliator or other non-arbitral intermediary, if the parties so agree, to provide further flexibility for parties to agree on how their disputes are to be determined. If, however, a mediation or conciliation is not successful, an arbitrator is prevented from resuming as an arbitrator without the written consent of all parties.

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 an award 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 they were 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, on motion by **Mr M. McGowan**.