

EXPLANATORY MEMORANDUM

COMMERCIAL ARBITRATION (AMENDMENT) BILL 1991

Issued by authority of Attorney-General, Bernard Collaery MLA

EXPLANATORY MEMORANDUM

Commercial Arbitration (Amendment) Bill 1991

Outline

The Commercial Arbitration (Amendment) Bill 1991 amends the *Commercial Arbitration Act 1986* to make it uniform with commercial arbitration legislation in the States and Northern Territory.

The Bill contains provisions dealing with commercial agreements which provide for arbitration in the event of a dispute between the parties. It contains machinery provisions for the arbitration process where those details are not provided for in the agreement of the parties.

Financial Considerations

There are no financial implications of this Bill.

Clause Notes

- Clause 1 provides that the Act may be cited as the Commercial Arbitration (Amendment) Act 1991.
- Clause 2 provides that the Principal Act is the *Commercial Arbitration (Amendment) Act 1986*.
- Clause 3 provides that the amendments made by this Act apply to arbitration agreements, whenever they were made, and to arbitrations made under such agreements. It also contains transitional provisions.
- Clause 4 Amends section 4 of the Principal Act by defining 'arbitrator' as including more than one arbitrator, where appropriate.
- Clause 5 replaces section 6 of the Principal Act with a new section 6 drafted in accordance with the agreed legislative model. The change does not affect the meaning of the provision.

- Clause 6** amends section 7 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 7** amends section 12 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 8** replaces section 15 of the Principal Act with a new section 15 drafted in accordance with the agreed model. The change does not affect the meaning of the legislation.
- Clause 9** amends section 16 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 10** amends section 18 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 11** amends section 19 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 12** replaces section 20 in the Principal Act with a new section 20. The section provides for representation of parties in proceedings before an arbitrator or umpire. The new section 20 sets out in sub-clause (1) the situations in which a party may be represented by a legal practitioner, while sub-clause (2) contains the situations in which a party may be represented by a person who is not a legal practitioner. A legal practitioner may represent a party if a party to the proceedings is, or is represented by a legally qualified person or if the value of the claim is more than \$20,000 (or such other amount as is set by regulation) while a party may be represented by someone who is not a legal practitioner if that party is an incorporated or unincorporated body and the representative is an officer, employee or agent of that body. Both kinds of representation are permitted if both parties agree or if the arbitrator or umpire gives leave. Sub-clause (3) provides that leave shall be given if the arbitrator or umpire is satisfied that it is likely to shorten proceedings or reduce costs, or that the party seeking leave would be unfairly disadvantaged if it was not given. Once leave is given, it overrides any agreement to the contrary between the parties. The provisions of sub-clauses (3) and (4) are substantially the same as those in sub-sections (2) and (3) of the section which will be repealed. Sub-clauses (5) and (6) contain interpretive provisions dealing with references to legal practitioners. These new provisions are not substantially different in effect from the provisions to be repealed.

- Clause 13** amends section 21 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 14** amends section 22 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 15** amends section 23 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 16** amends section 24 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 17** replaces section 26 of the Principal Act with a new section 26 providing for the consolidation of arbitration proceedings. Some of the provisions in the new section 26 have the same effect as those in the repealed section, but in addition it provides for the consolidation, on the application of one of the parties, of proceedings not all of which have the same arbitrator. Clause 17 also replaces section 27 of the Principal Act with a new section 27 providing for the settlement of disputes other than by arbitration. Parties may seek settlement by mediation, conciliation, or through an intermediary. Where an arbitrator acts as an intermediary, he or she is bound by the principles of natural justice, unless the parties agree otherwise in writing. If that action fails to resolve the dispute, the same arbitrator may conduct the subsequent arbitration proceedings.
- Clause 18** amends section 28 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 19** amends section 29 of the Principal Act to comply with the model legislation, without altering the effect of the provision.
- Clause 20** amends section 31 of the Principal Act by making a number of minor changes to comply with the model legislation. It also repeals sub-section (2) and substitutes a new sub-section (2) as well as adding sub-section (3) and (4). The new sub-section (2) provides that unless a contrary intention is expressed in the arbitration agreement, where arbitration proceedings have been commenced for the recovery of a debt or liquidated damages and payment of the whole or part of the debt or damages is made during the proceedings, interest is payable at a rate to be determined by the arbitrator provided that it does not exceed the rate payable on a judgement debt of the Supreme Court. Sub-section (3) provides that arbitration proceedings are deemed to have commenced if a dispute to which the agreement applies has arisen, and one party

to the agreement has served notice on the other party, or has secured the appointment of an arbitrator. Sub-clause (4) provides that section 31 does not authorise the awarding of interest upon interest, does not apply in relation to any amount upon which interest is payable as of right, and nor does it affect the damages recoverable for the dishonour of a bill of exchange.

Clause 21 makes technical changes to section 32 of the Principal Act to comply with the model legislation. It also adds to section 32 a new sub-section (2) which provides that interest under an arbitrator's award shall cease to accrue after a judgment is entered in court in terms of that award. In such a case interest would accrue on the amount under normal provisions relating to judgements.

Clause 22 amends section 33 of the Principal Act by removing sub-section (2), which contained provisions similar in effect to the new sub-section 32(2) added by Clause 21.

Clause 23 amends section 34 of the Principal Act by making technical changes to sub-section (1) and also repealing sub-section (3) and substituting a new sub-section (3), which provides that a provision in an arbitration agreement which requires parties to pay their own costs of the arbitration, or (excepting rights of indemnity or subrogation) that a particular party to the agreement shall pay the costs of another party, shall be void. This is substantially similar to the existing provisions, but has been reworded to comply with the model legislation.

Clause 23 also repeals sub-section (5) replaces it with a new sub-section (5), which provides that where a sum of money is paid into court to satisfy a claim to which an arbitration agreement applies, the arbitrator shall take this into account. Sub-section (6) is also repealed and replaced by a new sub-section (6), which provides that the arbitrator shall take into account any offer of compromise made (and the terms of such offer) in respect of a claim to which an arbitration agreement applies. The new sub-sections (5) and (6) are of substantially the same effect as the repealed sub-sections.

Clause 24 amends section 35 of the Principal Act to comply with the model legislation, without altering the effect of the provision.

Clause 25 amends section 36 of the Principal Act to comply with the model legislation, without altering the effect of the provision.

Clause 26 amends section 38 of the Principal Act by repealing sub-section (5) and substituting a new sub-section (5). This provides that the Supreme Court shall not grant leave to appeal unless it considers that the determination of the question of law concerns the rights of one or more parties to the arbitration agreement, and there is an error of law which is manifest on the face of the award or evidence that the arbitrator made an error of law and that determination of the question of law is likely to add to the certainty of commercial law. This is substantially similar in effect to the existing provisions of the Principal Act, but amends it to comply with the model legislation. Clause 26 also amends section 38 by adding a new sub-clause (6) which provides that the Supreme Court may make any granting of leave to an applicant conditional on compliance with any appropriate conditions. The existing sub-section (6) is re-numbered as sub-section(7) and is altered in a minor technical manner.

Clause 27 amends section 41 of the Principal Act to correct a minor typographical error.

Clause 28 amends section 46 of the Principal Act in accordance with the agreed model. The change does not affect the meaning of the provision.

Clause 29 amends section 52 of the Principal Act to comply with the model legislation, without altering the effect of the provision.

Clause 30 amends section 53 of the Principal Act to comply with the model legislation, without altering the effect of the provision.

Clause 31 amends section 55 of the Principal Act to correct a minor typographical error.