COMMERCIAL ARBITRATION BILL

The Hon. J. H. KENNAN (Attorney-General)—I move:

That this Bill now be read a second time.

The Bill now introduced is the culmination of more than ten year's work by Ministers, legal officers and Parliamentary Counsel. In 1974, the Standing Committee of Attorneys-General resolved "to consider the existing legislation and reports on commercial arbitration with a view to preparing a model Bill to form the basis of uniform legislation".

The process of arbitration and the principles governing it are complex. The law governing commercial arbitration tends to be a mixture of common law and statute law, as augmented by the terms of the particular contract which has given rise to the need for arbitration.

The need for reform and restatement of this area of the law has been recognized in a number of Australian jurisdictions: South Australia's Law Reform Committee examined the subject in a report of 1969; Victoria's Chief Justice's Law Reform Committee has considered the matter twice—in 1974 and again in 1977; the Queensland Law Reform Commission reported on the subject in 1970, the Australian Capital Territory Law Reform Committee in 1974, the Western Australian Law Reform Commission in 1974 and the New South Wales Law Reform Commission in 1976. This degree of concern over the subject led the Standing Committee of Attorneys-General to begin examining the matter, with a view to the passage of a uniform law, in 1974.

This is the second Bill to be introduced and considered. The first model Commercial Arbitration Bill was introduced in the Victorian Parliament on 9 December 1981 to enable interested parties to submit comments upon the proposed legislation. The Bill was settled following extensive deliberations by Ministers, officers, Parliamentary Counsel's Committee and a Special Committee of Standing Committee officers.

The model Bill was also introduced in the New South Wales Parliament in the autumn sessional period of 1982. The Standing committee set a deadline of 30 June 1982 for public comments to be made. A number of substantial submissions were received and have since been considered by the Standing Committee of Attorneys-General.

The Commercial Arbitration Bill is thus an important example of co-operation between Commonwealth, State and Territory Governments. If it is well received, as I expect it should be, identical legislation will be introduced in other jurisdictions, and Australia should eventually have a uniform system of arbitration for the settlement of commercial disputes.

UNIFORM COMMERCIAL ARBITRATION BILL

A uniform bill was introduced into the Victorian Legislative Countil on 1 May 1982. The text of the second reading speech is published here. (Hansard, Pare.Debs. LC 2 May 1984 at pages 2602-2605)

The use of arbitrators to attempt to settle disputes in the commercial field has had a very long history. The settling of a commercial dispute by arbitration enables the parties to put their case before a tribunal of their own choosing, with arbitrators who profess some expertise in the area which is the subject matter of the dispute. The major advantages to the parties from an arbitration in preference to a court hearing are, generally, savings in time and cost, flexibility, and the availability of expertise.

A Chartered Institute of Arbitrators has been in existence in the United Ringdom for some years. That institute was the main force behind changes to the English Arbitration Act of 1979.

Arbitration in Australia has developed in similar fashion to that in the United Kingdom. In Australia the Institute of Arbitrators of Australia has chapters in each jurisdiction throughout Australia. This institute was formed in 1974 by those engaged in or interested in arbitration in Australia. The institute has more than 600 members, whose occupations include accounting, architecture, building, engineering, insurance, law, naval architecture, quantity surveying and real estate.

Commercial enterprises operating throughout Australia should greatly appreciate the availability of a uniform system of arbitration, for which this Bill is the model. Commercial contracts will be able to be drawn to include a reference to arbitration in the event of a dispute and the parties to those agreements will be assured that the law will be consistently applied throughout Australia.

Although the Bill is quite large, many of the provisions relate to purely procedural matters, and so I shall simply draw honourable members' attention to some of the more important aspects of the legislation. The notes of clauses are substantial and should be referred to for assistance in interpretation of the many complex clauses of the Bill.

JURISDICTION

The Supreme Court will have primary jurisdiction in matters related to commercial arbitration, although it is provided in clause 4(2) for the parties in coming to an agreement to arbitrate to nominate the County Court as having jurisdiction in relation to disputes arising out of that particular agreement.

APPOINTMENT OF ARBITRATORS

The Bill makes provision for the court to appoint an arbitrator or arbitrators, where an arbitration agreement is silent as to who should arbitrate, or where a person appointed dies or otherwise ceases or fails to act. The court may replace an arbitrator. Apart from this role, the possibility for court intervention is to be kept to a minimum.

CONDUCT OF PROCEEDINGS

The arbitrator will have a wide discretion as to the manner in which arbitrations are conducted. He must act according to law, but may otherwise conduct proceedings as he thinks fit.

On application to the court, a party to an arbitration will be able to obtain a writ or summons requiring any person to appear or to produce documents. Parties to an arbitration shall appear in person, and may only be legally represented where the arbitrator is satisfied that a party would otherwise be unfairly disadvantaged.

An arbitrator will have power to make interim awards. This is frequently necessary in order to preserve the *status quo*, to safeguard property or to protect the interests of a party pending a full hearing. An arbitrator will have the power to order specific performance of an agreement in circumstances in which such a remedy would be available in the court.

Awards made in arbitration proceedings will be final and binding. Unless the arbitration agreement makes specific provision as to costs, the arbitrator will have a discretion as to ordering by whom costs will be paid. There is also provision for an interest component to be included in the award, and for interest to be paid on any sum ordered to be paid by a party, so that the aggrieved party can receive interest on any sum owed from the date on which the dispute arose until payment is made. Such a provision takes account of commercial interests and recognizes the need for the law in this area to operate in a commercially realistic fashion.

In relation to the conduct of proceedings, I consider that some explanation is required of the rather unusual provision found in clause 22 (2). In the initial draft, this subclause provided:

> "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 as amiable compositeur or ex aequo et bono."

These expressions derive from the rules of the United Nations Conference on International Commercial Arbitration, and are specifically included to ensure that our legislation is consistent with those rules.

However, in the interests of ensuring that all legislation is as intelligible as possible to those lacking a "classical" education, I have adopted an equivalent common English usage. Honourable members will find the original expressions and their source in the marginal note to the sub-clause.

POWERS OF THE COURT

There will be no jurisdiction in the court to set aside an arbitrator's award on the ground of error of fact or law on the face of the award.

The new commercial arbitration system is intended to supplant the jurisdiction of the court where an agreement permits arbitration as a means of dispute resolution. It will encourage the development of a speedy and economical means for resolution of disputes by experts in their field.

To appeal from an arbitrator's award, consent of the parties is required, or the leave of the court must be obtained. The court will, however, have strong powers to deal with instances of deliberate delay by a party, and incompetence on the part of an arbitrator.

FOREIGN AWARDS AND AGREEMENTS

The proposed arbitration system is specifically intended to encourage arbitration in settlement of disputes arising under international agreements. Parties from countries which are signatories to the United Nations Convention on the recognition and Enforcement of Foreign Arbitral Awards will be encouraged to arbitrate in Australia, and the court will have the power to enforce arbitral awards made overseas.

This Bill is the result of a major, and all too rare, co-operative effort between the States, the Commonwealth and the Northern Territory. It is being introduced in this Parliament now, to enable its provisions to be considered. Any subsequent recommendations will be evaluated before the spring sessional period at which time it is anticipated that uniform legislation should be able to be introduced in other Australian jurisdictions. I commend the Bill to the House.

The Hon. HADDON STOREY (East Yarra Province)—I move:

> That the debate be now adjourned.

I suggest that it be adjourned until the next day of meeting. In so doing, I recognize that it is intended that the Bill should lie over until the spring sessional period so that consideration can be given to it. As the former Attorney-General, I introduced the previous Bill and it has taken two years for this Bill to be introduced and now it must lie over. It is hoped that the Bill will be passed in the spring sessional period.

The motion for the adjournment of the debate was agreed to, and it was ordered that the debate be adjourned until the next day of meeting.