Speech By

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MEMBER FOR INALA

COMMERCIAL ARBITRATION BILL

Ms PALASZCZUK (Inala—ALP) (Leader of the Opposition) (5.25 pm): I rise to contribute to the debate on the Commercial Arbitration Bill 2012. From the outset I advise that the opposition will be supporting the bill. However, I will raise a couple of issues that I would like the Attorney-General to comment on during his address in reply. The bill is the reintroduction of the Commercial Arbitration Bill 2011. It is virtually unchanged, apart from two very minor alterations of a rather technical nature. The effect of the bill is to repeal the former uniform Commercial Arbitration Act 1990 and to establish a more up-to-date method for resolving domestic commercial disputes. Providing a cost-effective and efficient alternative to litigation in Australia is imperative for the business community and that method must reflect changes in international best practice.

The old act, whilst important and innovative at the time, still reflected the old English arbitration acts of 1950, 1975 and 1979. In May 2010, the Standing Committee of Attorneys-General agreed to update the uniform legislation. The model law was introduced by the then Attorney-General and minister for justice, Paul Lucas, on 15 November 2011, but lapsed when parliament was prorogued. It largely reflected the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. The model law reflects the accepted world standard for arbitrating commercial disputes. This means that the jurisdictions with which we compete for international arbitration work do not have different national and international arbitration laws. This is important in the growing move towards the internationalisation of business and commerce.

I also note that the Commonwealth government passed the International Arbitration Amendment Act 2010 to increase effectiveness, efficiency and affordability in international commercial arbitration. The two differences between the 2011 bill and this bill are: the schedule has been renamed as schedule 1 and, secondly, a new clause 2(5) has been added, which states—

Notes (other than the Model Law note to section 1) ... do not form part of this bill.

Clause 1AC outlines the paramount object of the bill, which is to 'facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'. So far, all other jurisdictions in Australia except for the Australian Capital Territory have passed legislation adopting the model law. The passage of this bill will bring Queensland into line with those jurisdictions. The bill makes five important changes to the current regime that applies to domestic commercial arbitration in Queensland. Under the current legislation, where parties have agreed to arbitration and one of the parties institutes legal proceedings, the court has a discretion to stay the proceedings pending finalisation of the arbitration process. This means that the proceedings may be continued even though the parties have agreed to arbitration at the discretion of the court.

Under this bill, provided there is a valid arbitration agreement and the subject matter of the dispute is capable of settlement via arbitration, the court is required to stay proceedings while the matter is arbitrated. The explanatory notes to the bill raise the issue of the exclusion of the courts under the heading 'Consistency with fundamental legislative principles'. However, as the notes point out—

In nominating arbitration as a dispute resolution method, parties are making a conscious decision to exclude court jurisdiction and resolve their dispute by alternate means. Parties consent to the use of this legislative framework to avoid litigating their dispute before the courts, which is more costly and time consuming.

There are protections built into the system because the courts can still oversee the arbitral process and intervene if the process does not comply with the agreement or with principles of procedural fairness, relevant public policy and the law. This will avoid the scenario where parties, having previously agreed to arbitration as a dispute resolution mechanism, seek to disrupt and delay proceedings by using the courts to avoid the arbitral process altogether. This clause forms part of the model law and it has been adopted unamended by other jurisdictions that have enacted the bill. It is important that there be certainty for parties who sign up to an arbitration agreement and this clause provides that certainty.

As clause 1AC provides, the functions of an arbitral tribunal must be exercised so that, as far as practicable, the paramount object of the act is achieved. This clause therefore informs the tribunal in how arbitration matters are to be conducted. Subject to the subclause and to safeguards which protect the public interest, parties are able to agree about how their commercial dispute is to be resolved.

While the bill ensures that, while parties have a fair degree of latitude to determine what arbitral procedure will apply to them, this is limited by being subject to the provisions of this act. This means that if a situation arises in which the parties' choice of procedure would result in unnecessary delay and expense, which would breach the paramount object of the act, the tribunal will be required to override the parties' choice to better serve the paramount object of the act.

Tribunals can issue interim measures in order to protect the process and ensure that arbitration remains an effective method of dispute resolution. The scope of these orders may be very wide and can include security for costs; discovery of documents; the giving of evidence by affidavit; the inspection of any property which is or forms part of the subject matter of the dispute; the taking of photographs of any property which is or forms part of the subject matter of a dispute; samples to be taken from or any observation to be made of or experiment conducted on any property which is or forms part of the subject matter of the dispute; and dividing, recording and strictly enforcing the time allocated for a hearing between the parties.

The courts also have similar powers and a party may apply to a tribunal for an interim order and have that order enforced by the courts. Courts also have the power to issue interim orders such as Mareva injunctions and Anton Piller orders. Ex parte orders may only be issued by the courts.

Whilst it has long been accepted internationally that confidentiality is an integral feature of commercial arbitration—and this was thought to be the case under the act as it stands—the decision of the High Court in Esso v Plowman meant that confidentiality only applied to parties to an arbitration agreement where it was expressly provided for in the agreement. This bill reverses this presumption so that extensive confidential obligations apply to the parties to an agreement unless they expressly provide to the contrary. These provisions are designed to be helpful in protecting the commercial interests of the parties by the disclosure of commercially sensitive information or from harm to any party's commercial representation stemming from public knowledge of the dispute.

Under the current act, judicial review is available on the grounds that the award contained a manifest error of law or that there had been some procedural unfairness to one or both parties because of misconduct on the part of the arbitrator or the arbitration or award has been improperly procured. This bill provides specific grounds upon which an arbitral award may be set aside by a court. An application must be made within three months from the date of receipt of the award.

An appeal can also be made to a court only if the parties have agreed before the end of the appeal period—again, three months and with the leave of the court. The court must not grant leave unless it is satisfied that the decision of the tribunal is obviously wrong, if the question is one of general public importance or that the decision is at least open to serious doubt. This means that where parties have agreed to an arbitral agreement the decision of the tribunal will have greater determinative effect. Hopefully this will eliminate circumstances such as occurred in Cole v Gebauer. When the last in a long line of decisions had been made in relation to the arbitration in that case, proceedings had been on foot for some 10 years and 21 days.

Part 8 of the bill provides for greater recognition and enforcement awards than is currently available under the act. Courts are required to enforce awards except in limited circumstances where refusal of enforcement is permitted—the grounds for which are set out in the bill. The process for enforcement of awards is much simpler and more efficient and orders of the tribunal may, by leave of the court, be enforced in the same way as a court order. Once such leave has been granted, judgement may be entered into the terms of the order.

Consultation on the bill has been conducted with a number professional organisations including the Australian Centre for International Commercial Arbitration, the Queensland Law Society, the Bar

Association of Queensland, the Institute of Arbitrators and Mediators, the heads of jurisdiction and the Chartered Institute of Arbitrators. Again, as a member of this House, I am indebted to them for their thoughtful observations that they have submitted to the committee. They have been of enormous assistance yet again, and I particularly would like to mention the Law Society and Bar Association who are so often called on to make submissions on legislation and without exception make thoughtful and considered suggestions on the proposed bills, often in very tight time frames.

The Bar Association and the Chartered Institute of Arbitrators have made some suggestions on the proposed amendments to the bill. However, both have recognised the importance of uniform legislation and the fact that amendments to the bill would bring it out of kilter with other jurisdictions. It has been suggested that perhaps dialogue could be commenced with the Attorneys-General and the other jurisdictions to perhaps give consideration to some of the suggestions they have made. I ask the Attorney-General, through the Deputy Premier, whether he would be prepared to undertake to consider whether the issues that are of concern to the Bar Association and the Chartered Institute of Arbitrators should be raised at an interjurisdictional level when the next review of the act is being undertaken.

This is an important piece of legislation. A number of previous Attorneys-General have played a very large part in the development of this legislation. I would like to echo the words of the former Attorney-General when he introduced the bill and said—

The updated commercial arbitration framework contained in this bill will ensure Queensland is in keeping with national and international standards for facilitating fair and final resolution of commercial disputes in a timely and cost effective manner.

It will promote Queensland as a jurisdiction in which parties conducting business both in Australia and in Asia Pacific region can access commercial arbitration services which accord with international norms.

I commend the bill to the House.