

# Commercial Arbitration Bill 1984

No.

## EXPLANATORY MEMORANDUM

### PART I.—PRELIMINARY

*Clause 1* cites the short title of the Act.

*Clause 2* provides for commencement on a date to be proclaimed.

*Clause 3* contains repeal, transitional and application provisions.

*Sub-clause 1* provides for the repeal of the legislative provisions contained in Schedule 1.

*Sub-clause 2* provides that subject to sub-clause 3 the Act shall apply to an arbitration agreement whether made before or after the commencement of the Act and provides further that a reference in an arbitration agreement to the *Arbitration Act 1958* shall be construed as a reference to this Act.

*Sub-clause 3* provides that where an arbitration has been commenced before the commencement of the Act the previous law in force shall apply to that arbitration.

*Sub-clause 4* provides that the Act shall apply to arbitrations provided for in any other Act.

*Sub-clause 5* states the circumstances in which an arbitration shall be deemed to have been commenced.

*Sub-clause 6* removes from the operation of the Act arbitrations under Division 6 of Part II. of the *County Court Act 1958* and arbitrations or any class of arbitrations that may be prescribed by regulation.

*Sub-clause 7* removes from the effect of the Act section 28 of the *Instruments Act 1958* and section 22 of the *Hire-Purchase Act 1959*.

*Clause 4* contains definitions of “Arbitration agreement”, “award”, “misconduct”, “party”, “Power of appointment”, “Supreme Court” and “The Court”.

*Sub-clause 2* provides that an arbitration agreement may specifically confer jurisdiction on the County Court.

*Clause 5* provides that where the Crown is a party to an arbitration agreement it shall be bound by the Act.

### PART II.—APPOINTMENT OF ARBITRATORS AND UMPIRES

*Clause 6* provides that, unless the parties agree to the contrary, where an agreement is silent as to the number of arbitrators to be appointed, then it shall be deemed to provide for appointment of a single arbitrator.

*Clause 7* provides that an arbitrator shall be jointly appointed by the parties unless otherwise agreed in writing.

*Clause 8* sets forth a procedure to be adopted where a person who has a power to appoint an arbitrator defaults in the exercise of that power.

*Clause 9* provides that a power to appoint an arbitrator or umpire extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or ceases to hold office.

*Clause 10* empowers the Court to fill a vacancy in the office of arbitrator or umpire.

*Clause 11* provides that where an arbitrator or umpire is removed by the Court the Court may appoint a replacement therefor, or order that the arbitration agreement will cease to have effect in relation to the relevant dispute.

*Sub-clause 2* provides that the Court shall not order that the arbitration agreement shall cease to have effect unless all parties to the agreement were domiciled or ordinarily resident in Australia when the agreement was made.

*Sub-clause 3* provides that the residency restriction contained in sub-clause 2 does not apply to an arbitration agreement treated as such because the Act applies to arbitrations provided for in any other Act.

*Clause 12* provides that, where an arbitration agreement provides for appointment of an even number of arbitrators, the arbitrators may appoint an umpire who is not required to sit while the arbitration is being conducted.

*Clause 13* deems an arbitrator or umpire appointed pursuant to Part II. of the Act to have been appointed pursuant to the provisions of the arbitration agreement.

### **PART III.—CONDUCT OF ARBITRATION PROCEEDINGS**

*Clause 14* provides that subject to the Act and to the agreement the arbitrator or umpire may conduct proceedings as thought fit.

*Clause 15* provides that a majority decision may be made where three or more arbitrators are appointed, unless a contrary intention is expressed in the agreement.

*Clause 16* establishes the circumstances in which an umpire may enter on the arbitration in place of the arbitrators as if the umpire were the sole arbitrator.

*Clause 17* permits any party to an arbitration agreement to obtain a writ or summons, as appropriate, requiring a person to attend the arbitration for examination or to produce documents.

*Sub-clause 2* provides that a person shall not be compelled to answer or produce any document which that person could not be compelled to answer or produce on the trial of an action.

*Clause 18* provides that, unless the agreement expresses a contrary intention, on application to the Court by a party or the arbitrator or umpire the Court may order a person in default to comply with a writ or summons to attend or with a requirement of the arbitrator or umpire and may make consequential orders as to the transmission of evidence or documents to the arbitrator or umpire.

*Sub-clause 3* provides that an arbitration may proceed in default of appearance or compliance with a requirement of the arbitrator or umpire if in similar proceedings before the Supreme Court the Court could also proceed.

*Clause 19* prescribes the manner in which evidence may be given in arbitration proceedings.

*Clause 20* provides that, unless the parties agree to the contrary, a party shall appear personally or, where the party is a body of persons, by an officer, employee or agent but may, with the leave of the arbitrator or umpire, be legally represented.

*Clause 21* provides that, unless the parties agree to the contrary, there shall be continuity of proceedings when an umpire enters on the arbitration or when a new arbitrator or umpire is appointed.

*Clause 22* provides that, unless the parties agree to the contrary, any question arising for determination in the course of proceedings shall be determined according to law.

*Clause 23* provides that an arbitrator or umpire may make an interim award, unless the agreement expresses a contrary intention.

*Clause 24* provides that an arbitrator or umpire may order specific performance of any contract if the Supreme Court would have power to do so, unless the agreement expresses a contrary intention.

*Clause 25* provides that arbitration proceedings may be extended to include a further dispute between the same parties arising under the same agreement.

*Clause 26* empowers the Court to order the consolidation of two or more arbitration proceedings.

*Clause 27* provides that, unless the parties agree to the contrary, the arbitrator or umpire shall have power to order the parties to take steps to settle the dispute.

*Sub-clause 2* provides that, where an arbitrator or umpire conducts a conference for the purposes of an attempt at settlement, and the conference fails to produce a settlement, then no objection shall be taken to that arbitrator or umpire conducting subsequent arbitration proceedings solely on the ground that he or she had previously conducted the conference.

#### **PART IV.—AWARDS AND COSTS**

*Clause 28* provides that the award of the arbitrator or umpire shall be final and binding on the parties to the agreement, unless the agreement expresses a contrary intention.

*Clause 29* provides that, unless the parties agree to the contrary, the arbitrator shall make the award in writing and shall include therein a statement of the reasons for making the award.

*Sub-clause 2* provides that where an award is made otherwise than in writing the arbitrator or umpire shall give a written statement of the terms of the award and the reasons for making the award to a party requesting same.

*Clause 30* provides for corrections of an error in an award.

*Clause 31* provides that an interest component may be included in an award, unless the agreement expresses a contrary intention.

*Clause 32* empowers the arbitrator or umpire to direct that interest at the rate payable on a judgment debt in the Supreme Court be paid on any sum ordered to be paid unless the agreement expresses a contrary intention.

*Clause 33* provides for enforcement of the award, by leave of the Court, in the same manner as a judgment or order of the Court.

*Clause 34* provides that the costs of the arbitration shall be in the discretion of the arbitrator or umpire, unless the agreement expresses a contrary intention and may be taxed or settled by the arbitrator or umpire, or be taxable in the Court.

*Sub-clause 3* declares certain provisions in relation to costs in an agreement to be void.

*Sub-clause 4* provides that, where an award is silent as to costs, a party may apply to the arbitrator for a direction as to payment of costs.

*Sub-clause 5* directs that an arbitrator or umpire shall take into account in exercising the discretion as to costs the fact that any money was paid into Court and the amount of that payment.

*Clause 35* provides for taxation of the arbitrator's or umpire's fees and expenses.

*Clause 36* provides that, unless the parties agree to the contrary, where an arbitration fails the Court may on the application of a party to the agreement or the arbitrator or umpire make such order as it thinks just.

*Clause 37* imposes a duty on the parties not to act in such a manner as to delay or prevent an award being made.

## **PART V.—POWERS OF THE COURT**

*Clause 38* provides that an appeal shall lie to the Supreme Court on any question of law arising out of an award but that the Court shall not otherwise have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

*Sub-clause 4* provides that an appeal may be brought with the consent of all the parties, or by leave of the Court.

*Sub-clause 5* provides guidelines to the Court as to whether to grant leave to appeal, and enables the Court to grant leave upon conditions.

*Sub-clauses 6 and 7* limit appeals to the Full Court of the Supreme Court.

*Sub-clause 8* provides that an award varied on appeal shall have effect as if it were the award of the arbitrator or umpire.

*Clause 39* empowers the Court, in certain circumstances, to determine any question of law arising in the course of the arbitration.

*Clause 40* restricts the right of appeal where the parties have entered into an agreement in writing excluding the right of appeal (an "exclusion agreement").

*Clause 41* provides that an exclusion agreement shall only in certain circumstances apply to a question or claim falling within the admiralty jurisdiction of the Supreme Court or a dispute arising out of a contract of insurance or a commodity contract.

*Sub-clause 2* defines a commodity contract.

*Sub-clause 3* provides that the Governor in Council may make regulations in relation to the application of exclusion agreements.

*Clause 42* empowers the Court to set aside an award where there has been misconduct on the part of an arbitrator or umpire or the award has been improperly procured.

*Clause 43* enables the Court to remit matters to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, for consideration.

*Clause 44* enables the Court to remove the arbitrator or umpire where it is satisfied that there has been misconduct or undue influence or where the arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.

*Clause 45* provides that a party is not prevented from challenging the impartiality, suitability or competence of an arbitrator where that party appointed the arbitrator.

*Clause 46* provides that, unless the agreement expresses a contrary intention, a duty shall be placed on the claimant to prosecute the claim, and that where there has been undue delay on the part of a claimant the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further proceedings.

*Sub-clause 3* provides that the Court shall not make such an order except in specified circumstances.

*Clause 47* empowers the Court to make interlocutory orders in relation to arbitration proceedings as it may in relation to proceedings in the Court.

*Clause 48* enables the Court to grant an extension of time for doing any act or taking any proceeding in or in relation to an arbitration.

*Clause 49* empowers the Court, subject to the Act, to make an order, direction or decision on such terms and conditions as the Court thinks just.

## **PART VI.—GENERAL PROVISIONS AS TO ARBITRATION**

*Clause 50* provides that, subject to the Act, the authority of an arbitrator or umpire is irrevocable unless the agreement expresses a contrary intention, or unless the parties agree to the contrary.

*Clause 51* provides that an arbitrator or umpire will not be liable for negligence in respect of the performance of his duties but will be liable for fraud.

*Clause 52* provides that after the death of a party the agreement shall be enforced by or against the personal representative of the deceased, unless the agreement expresses a contrary intention.

*Sub-clause 2* excludes from the operation of the section a right of action which by law is extinguished by the death of a person.

*Clause 53* empowers a Court to stay proceedings commenced in that Court involving parties to an arbitration agreement in respect of a matter agreed to be referred to arbitration and enables that Court to make consequential orders or to give directions on the future conduct of the arbitration.

*Clause 54* empowers a Court to refer a matter to arbitration where relief is sought by way of interpleader and it appears to the Court that the claims in question are matters to which an arbitration agreement applies.

*Clause 55* overrides a provision in an agreement requiring arbitration or the happening of some other event as a condition precedent to the bringing or defending of legal proceedings.

## **PART VII.—RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS AND AGREEMENTS**

*Clause 56* is an interpretation section containing definitions applicable to this Part and includes a definition of "Convention" as meaning the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the English text of which is set out in Schedule 2 to the Act.

*Clause 57* provides for the enforcement of foreign arbitration agreements.

*Sub-clause 1* provides that the section shall apply to an agreement:

- (a) governed by the arbitration law of a convention country;
- (b) governed by the arbitration law of a country other than Australia or a convention country, where a party to the agreement is Australia, a State or Territory or a person domiciled or ordinarily resident in Australia when the agreement was made;
- (c) a party to which is the government of a convention country or a part thereof to which the convention extends; or
- (d) a party to which is a person who was domiciled or ordinarily resident in a convention country when the agreement was made.

*Sub-clause 2* provides that, where proceedings are pending in the Court between parties to an arbitration agreement to which the section applies, and the matter in dispute is capable of settlement by arbitration then, on application by a party to the

agreement, the Court shall refer the parties to arbitration upon such conditions as it thinks fit.

*Clause 58* provides that a foreign award is binding upon the parties to the arbitration agreement, and may be enforced in the Court as if the award had been made in Victoria in accordance with Victorian law.

*Sub-clause 4* provides guidelines to the Court in determining whether the award should be enforced.

*Clause 59* specifies the documentation that must be produced to the Court before an award may be enforced, and the methods of authenticating such documentation.

*Sub-clause 3* provides that any document which is not in the English language shall be produced together with an English translation, certified to be correct.

#### **PART VIII.—MISCELLANEOUS**

*Clause 60* specifies the acceptable methods for service of notices under the Act.

*Clause 61* empowers the Judges of the Supreme Court to make rules in relation to applications to the Court under the Act, costs, payments into and out of Court and other matters as required.

*Clause 62* empowers the Judges of the County Court to make rules in relation to applications to the Court under the Act, costs, payments into and out of Court and other matters as required.

*Clause 63* vests in the Governor in Council a power to make regulations under the Act.

*Clause 64* makes a consequential amendment to the *Legal Profession Practice Act 1958*.

*Clause 65* makes a consequential amendment to the *Supreme Court Act 1958*.