Gordon Ramsay MLA

Member for Ginninderra

Attorney-General
Minister for Regulatory Services
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Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Jones

I write in response to comments made by the Standing Committee on Justice and Community Safety (the Standing Committee) in the Scrutiny of Bills Report No. 2 of 7 February 2017 in relation to the Commercial Arbitration Bill 2016 (the Bill).

Exclusion of the Supreme Court and s 48(1) of the *Australian Capital Territory (Self-Government) Act 1988*

The Standing Committee commented that the Bill limits the Supreme Court's power to decide contract disputes and that it attempts to limit the Supreme Court's power under s 48(1) of the *Australian Capital Territory (Self-Government) Act 1988*.

I do not agree that the Bill limits the Supreme Court's power to decide contract disputes. The Bill provides a legislative framework for arbitrations where parties to a commercial agreement have expressly agreed to submit disputes under their agreement to such arbitration. It is appropriate for statutes to create a framework for review of matters in the Courts.

This Bill will replace the existing *Commercial Arbitration Act 1986* with a uniform model law which has been adopted by all states and the Northern Territory for domestic commercial arbitrations. The uniform model law is based on the United Nations Commission on International Trade Law Model Law (the Model Law) on International Commercial Arbitration. The Model Law also forms the basis of the *International Arbitration Act 1974* (Cwlth) which provides for international commercial arbitrations.

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The current Commercial Arbitration Act includes a restriction on parties to commercial arbitrations unilaterally appealing arbitral awards to the Supreme Court. Under the Commercial Arbitration Act, a party to a commercial arbitration agreement can seek a stay of court proceedings initiated by the other party to the agreement.

For a legislative scheme for commercial arbitrations to be effective, a restriction on accessing the courts is required.

Permitting parties to unilaterally appeal their arbitral award to court or permitting them to litigate disputes which they had agreed to arbitrate from the outset would undermine the purpose of the commercial arbitration process. The purpose of arbitration is to provide a quicker, less costly and confidential alternative to the courts, in which the decision of the arbitral tribunal is final and enforceable.

If a party could avoid their commercial arbitration agreement altogether, or could unilaterally appeal an arbitration award which they were displeased with, the scheme would no longer reflect a binding arbitration process. It would more closely reflect a mediation process.

Where the arbitration fails, the Bill provides that the parties can jointly appeal the award to the Supreme Court.

The Bill provides that a party under the Bill is able to apply to the Supreme Court to set aside proceedings in certain circumstances, such as where there has been a denial of procedural fairness by the arbitral tribunal.

This is a model uniform scheme and as such, these limitations are included in each other Australian jurisdiction's legislation. If these reasonable limitations are not included in the ACT scheme, there is a risk that a party to a commercial arbitration dispute arising in another jurisdiction could seek to avoid their agreement and litigate their dispute in the ACT Law Courts and Tribunal.

To be clear, these provisions, including the limit on parties unilaterally appealing an arbitral award in s 34A of the Bill, are drafted consistently with provisions in the model uniform Acts which have been passed in each state and the Northern Territory except for differences in drafting and stylistic changes and references to ACT legislation.

The right to a fair trial and the opportunity of a party to present their case

The Standing Committee refers to clause 18 of the Bill, which provides that, '[T]he parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party's case.'

The Standing Committee also refers to the note in clause 18, which states that, "[T]his section differs from the Model Law to the extent that it requires the party to be given a 'reasonable' instead of 'full', opportunity of presenting the party's case."

The Standing Committee comments that the Explanatory Statement offers no reason for the departure from the Model Law, and the Standing Committee considers that an explanation is required.

The Model Law referred to in the Bill (including the notes to the Bill) is the Model Law on International Commercial Arbitration, not references to the model uniform Acts in each state and the Northern Territory. An explanation of the term 'Model Law' is provided in a note to part 1A (preliminary) of the Bill.

The Explanatory Statement is a model explanatory statement which has been used in most jurisdictions on presentation of the Bill.

The overview in the Explanatory Statement states '[T]he Bill facilitates the use of arbitration agreements to manage domestic commercial disputes by adopting the provisions of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the Model Law).' The places where the Bill and the Model Law differ (in other than minor technical respects) are identified by notes in the Bill. The Bill reflects the numbering of the Model Law and, to ensure consistency, contains gaps in the numbering and use of alphabetical identifiers.

The requirement that each party must be given a reasonable opportunity of presenting the party's case is not only consistent with the uniform model law in each state and territory, it is also consistent with s 18C of the *International Arbitration Act 1974* (Cwlth). Section 18C of the *International Arbitration Act 1974* (Cwlth) provides that, for the purposes of article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

The requirement that each party must be given a 'reasonable opportunity' of presenting the party's case is consistent with common law principles of natural justice.

The right to a fair trial and the opportunity of a party to obtain information concerning the material to be relied upon in the matter

The Standing Committee notes that there is no statement in subclauses 24(4) and 24(5) of the time within which obligations must be met.

The Standing Committee recommends that consideration be given to inserting a note in clause 24 to point to subsection 151B(2) of the *Legislation Act 2001* (Doing things for which no time is fixed).

Clause 24 of the Bill has been drafted consistently with article 24 of the Model Law on International Commercial Arbitration. This clause has been drafted consistently in each jurisdiction's Commercial Arbitration Act.

The provision also needs to be read in light of other provisions in the Bill, including clause 19 (Determination of rules of procedure), clause 24B (General duties of parties), clause 25 (Default of a party) and clause 26 (Expert appointed by arbitral tribunal).

The arbitral tribunal itself and the parties are bound by rules of procedural fairness (clause 18).

The inclusion of a note in clause 24 may have the unintended effect of creating confusion for parties and the arbitral tribunal who will have decided, as they consider appropriate, the dates for the filing and service of facts, contentions and the evidence which they intend to rely on.

The privileges of persons required by subpoena to answer questions and/or to produce documents

The Standing Committee notes that subclauses 27A(3) and 27B(5) provide that a person required by subpoena to attend and/or produce documents must not be compelled to answer any question or produce any document which the person could not be compelled to answer or produce in a proceeding before the court.

The Standing Committee comments that these provisions add to the Model Law and commendably enhance rights but they would add better protection if a note was added drawing attention to the privileges of witnesses such as the privilege against self-incrimination.

The 'Model Law' in the Bill is a reference to the Model Law on International Commercial Arbitration, not to the model uniform law in each state and the Northern Territory.

Clauses 27A and 27B as with all other clauses in the Bill have been drafted consistently with the model uniform law in each state and the Northern Territory, subject to necessary amendments to refer to ACT provisions and drafting style.

These provisions make it clear that a witness giving evidence before the arbitral tribunal cannot be required to give evidence which the person cannot be required to adduce before a court. It is not clear how the addition of notes would make this intent clearer.

Does a clause of the Bill inappropriately delegate legislative powers? – Committee term of reference (3)(d)

The Standing Committee has commented that it considers certain transitional provisions in part 20 of the Bill to be inappropriately delegated legislative powers.

Transitional provisions have been included in the Bill to resolve any unforseen issues which may arise as a result of existing agreements and arbitrations provided for in other territory laws transitioning from the *Commercial Arbitration Act 1986* to the Bill.

The power to make transitional regulations does not extend to amending the primary legislation or amending other primary legislation by way of subordinate legislation. It only allows the Executive to respond in a temporary way to matters of a transitional nature which may come up within two years after commencement, particularly to assist the smooth transition of arbitration agreements, to the new legislative scheme. The 'amendments' in a transitional regulation do not actually amend the words of the law they 'amend', but rather operate to modify their effect temporarily. The regulation itself is disallowable.

As the power to make transitional regulations is limited in its scope to transitional matters, it does not represent an inappropriate delegation of Territory powers and the power is not beyond the law-making power of the Legislative Assembly.

I note the Standing Committee's concerns and will include a statement, such as the one suggested, in future explanatory statements.

Yours sincerely

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Attorney-General