

Arbitration reform must continue

Opinion – John Hatzistergos

It has been 26 years since the present uniform domestic arbitration acts were introduced, and their reform has been on the Standing Committee of Attorneys-General (SCAG) agenda since 2002. This suggestion NSW is rushing this reform (“Arbitrators query rush of NSW bill”, Letters, June 11) is misplaced.

Doug Jones, president of the Australian Centre for International Commercial Arbitration wrote to me on June 7 saying: “ACICA regards it as critical that there be no delay in the implementation of legislation to reform commercial arbitration in Australia.”

I regard it as very important that we have uniform national laws on domestic arbitration. However, I also made it clear that if SCAG could not agree on reform at its April 2010 meeting, I would move to reform NSW law alone.

In April this year, I was pleased ministers agreed to a draft bill prepared after consultation by each jurisdiction. We are moving to ensure that modernisation of these laws does not lose momentum, because it is important to provide business with up-to-date domestic arbitration laws that provide a cost-effective and efficient alternative to litigation.

During consultation on the model law, we asked for input on what issues should be covered by domestic arbitration laws. One such issue was how combined mediation-arbitration processes should be handled. It has been reported in these pages that some stakeholders have identified clause 27D, the proposed mediation-arbitration provision, as “a critical flaw” in the bill because, it is claimed, the provision will make it less likely parties will use this combined process.

This is certainly not a position shared by all stakeholders. A number, including the alternative dispute resolution committee of the NSW Bar Association, strongly support the clause. It also has the strong support of a number of other jurisdictions, and I am advised a similar provision will be inserted by the commonwealth into the International Arbitration Act.

Clause 27D provides for a process that applies if the parties agree to a person appointed as an arbitrator attempting to resolve the matter using mediation. It allows parties the flexibility to attempt to solve their dispute by negotiation and agreement, but also provides certainty, should the mediation terminate, as the arbitration is still able to proceed to a binding award. It also contains procedural safeguards to ensure fairness and finality but protecting against the risk that an arbitrator will make a decision based on information gleaned through private sessions that the other party has not had a chance to answer.

It thereby seeks to ensure finality, too, by removing the possibility of bias tainting a decision.

The suggestion by Michael Sweeney (June 8) that the provision is “a world first” is not correct. Singapore and Hong Kong have provisions of similar effect, and a stated objective of our law is to harmonise domestic and international arbitration law. Based on the criticism, the opposition proposed an amendment in the Legislative Council to delete the disclosure provision in Clause 27D.

This would have been unfortunate had it passed and would have undermined the hard-won national agreement, which is something, the profession and business have made clear, that is a priority.

I do accept that differences of opinion exist in the profession as to how best to deal with mediation-arbitration. For that reason, the government indicated in Parliament on June 10 that I will be asking SCAG to have another look at the section.

This will allow all parties, in all jurisdictions, to consider this issue in light of the concerns raised, and ensure that we retain the important national consistency we have achieved through SCAG.