Terms of Reference

In November 1969, the Committee was given a reference to consider the law relating to the settlement of disputes by commercial arbitration with a view to preparing a revised Arbitration Act.[1]

Background of Reference

At the Law Society of Western Australia's Summer School in 1969, Mr HE Zelling QC drew attention to aspects of the existing arbitration system that he regarded as unsatisfactory. From the discussion that followed, it was apparent that many members of the legal and business communities shared Mr Zelling's views. The matter was subsequently referred to the Committee for consideration.A sub-committee, constituted by the Hon Justice Burt, Mr JL To appointed to investigate the existing arbitration system. The sub-committee met with representatives of legal, business and commercial groups to ascertain their views on the subject and formulate proposals for reform. Further impetus for reform came in 1970 when the law reform agencies of South Australia and Queensland produced reports recommending that the arbitration legislation of their states should be brought up to date. The Committee issued a working paper containing proposals for reform in October 1971.

Nature and Extent of Consultation

In response to the working paper, the Committee received submissions from commercial arbitrators, government departments, legal practitioners, underwriters' associations and the State Electricity Commission. When the Committee was reconstituted as a Commission in January 1973, it inherited the project. The Commission published its final report containing recommendations for reform in January 1974.[2]

Recommendations

The Commission recommended that the *Arbitration Act 1895* (WA) be repealed and a revised Arbitration Act be enacted. The two principal recommendations[3] of the Commission were:

- A court should not be able to stay a legal action that had been commenced by a party on the basis that the party was bound by an arbitration agreement, unless the court was satisfied that justice would be better served by the dispute being determined by arbitration because of factors such as expense, delay, and the nature of the questions in issue.
- The court would be expressly empowered to stay arbitration proceedings commenced against a party so that the party who commenced them would be obliged to take court proceedings instead.[4]

The Commission also made a series of recommendations pertaining to arbitration procedures, including:

- The arbitrator should be required to make his award in writing and to give reasons for his decision in writing, unless the parties to the dispute waive those requirements.[5]

1 The Commission found that it was not necessary to investigate Part B of the reference, which required an examination of the relevant Supreme Court Procedures, because the

- A provision should be enacted that any agreement that parties in arbitration should bear their own costs of arbitration proceedings is void unless the parties have agreed after the dispute has arisen, to bear their own costs.
- The new Arbitration Act should bind the Crown.

Finally, the Commission recommended that the Supreme Court be given a number of express powers,[6] including the power to:
- Order security for costs and discovery of documents.
- Remove a dilatory arbitrator and appoint a fresh arbitrator.
- Authorise an application for an amendment to an award to provide for costs.
- Resolve disputes about an arbitrator's fees.
- Set aside an award for jurisdictional error and misconduct, including mistakes both of jurisdiction and within jurisdiction.

Legislative or Other Action Undertaken

After a minor amendment to the Commission's draft Bill, the recommendations were passed into law by the *Commercial Arbitration Act 1985* (WA).[7]

6 Ibid 32–38.
7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 1985, 3831–3838 (Mr Parker, Minister for Mines and Energy).