ARBITRATION
ALRC REPORT RECOMMENDATIONS

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The ALRC received submissions "broadly supportive of a greater use of arbitration, and of an enhanced legislative framework to support it." It made four recommendations to increase the use of arbitration, plus made suggestions which were not elevated to the status of formal recommendations.

Recommendation 26

The *Family Law Act 1975* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) should be amended to increase the scope of matters which may be arbitrated, whether or not upon referral from a court. Those matters should include all financial issues, including child maintenance and child support, subject to limitations.

Appropriate occasions for arbitration would not include disputes:

- relating to enforcement;
- under sections 79A or 90SN of the *Family Law Act 1975* (Cth) (subject to limitations); and
- in which a litigation guardian has been appointed.

Expansion of arbitral disputes

Arbitration of family law property disputes has been possible for many decades but has only been an option meaningfully taken up by parties since the 2016 amendments which essentially enabled greater powers to compel production of information by way of subpoena. To understand Recommendation 26 it is necessary to consider the two situations in which parties can commit to arbitration being:

1. Where proceedings are underway and the court, by consent, orders arbitration pursuant to section 13E which only allows arbitration of proceedings under Pt VIII (Property/Spousal Maintenance) or

Pt VIIIAB (De facto Property/Maintenance) of the *Act* (excluding proceedings relating to Pt VIIIAB financial agreements); and

2. Without any court orders or even proceedings, parties agree to binding arbitration in respect of 'relevant property or financial arbitration' ("private arbitration") which may relate to matters under Pt VIII (Property/Spousal Maintenance), Pt VIIIA (Financial Agreements), Pt VIIIAB (De Facto Property/Maintenance), Pt VIIIB (Superannuation Interests) or section 106A of the *Act*.[1]

Private arbitration therefore can determine a wider range of disputes than court ordered arbitration, particularly so far as financial agreements and section 106A applications are concerned.

The Report recommend that a wider range of disputes should be arbitrable whether the arbitration was court ordered or private. It also recommended that the range of disputes should be expanded further to include:

- adult child maintenance;
- child support. Child support legislation and reviews of administrative assessments are complex and the Report does not examine these issues in any detail. It suggests that parties should be able to agree that the child support formula does not apply and choose to have child support issues determined by an arbitrator with the award to become a child support agreement; and
- property matters involving third parties. Where a third party is formally a party to court proceedings and consents to arbitration, there is unlikely to be doubt that the arbitral award binds the third party. The Report recommends that where the conditions set out in section 90AE of the *Act* are satisfied (such as according the third party procedural fairness), it is appropriate that an arbitral award be able to bind a third party not part of the arbitration, and the legislation should be amended to make this clear.

Superannuation splitting

Submissions to the ALRC suggested there is currently uncertainty for lawyers, parties and super funds as to whether court ordered arbitration arbitral awards can split superannuation interests as section 13E does not expressly refer to Part VIIIB. A contrary view is that section 13E arbitration arbitral awards can split super because the *Act* provides that in property division proceedings a court can also make orders splitting superannuation interests.

***Editor:** For example section 90XS would appear to support the assertion that arbitration pursuant to section 13E can, like private arbitration, also deal with Superannuation Interests in light of section 90XS which requires Parts VIII and VIIIB to be read together. Section 90XS provides:*

Section 90XS (1) in proceedings under sections 79 [contained in Part VIII] or 90SM [contained in Part VIIIAB] with respect to the property of the spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.

***Note 1:** Although the orders are made in accordance with this Division, they will be made under either sections 79 or 90SM. Therefore they will be generally subject to all the same provisions as other orders made under that section.*

***Note 2:** Sections 79A and 90XO limit the scope of section 79.*

***Note 3:** Sub-sections 44(5) and (6) and sections 90SB, 90SK and 90XO limit the scope of section 90SM.*

(2) A court cannot make an order under sections 79 or 90SM in relation to a superannuation interest except in accordance with this Part.

The Report recommends that any uncertainty should be removed by the *Act* specifying that arbitral awards can split superannuation.

1 Section 10L(2)(b)(i).

Stamp Duty

The Report also sensibly recommends that the Commonwealth should work with the states to provide for relief from stamp duty on transfers of property pursuant to arbitral awards just as with transfers pursuant to court orders or financial agreements.

This has already occurred in NSW.[2]

Arbitral awards by consent

The Report notes that in arbitration, as in litigation, it is common for matters to settle before the arbitrator determines an award. It recommends amendments allowing arbitrators to make an award based on the consent of the parties. The arbitrator would provide short written reasons as to why the arbitrator considers the consent arrangement to be just and equitable on the basis of the material available to them. The consent award should then be registrable in the same way as any other arbitral award.

Recommendation 27

The *Family Law Act 1975* (Cth) should be amended to remove the opportunity for a party to object to registration of an arbitral award, while maintaining appropriate safeguards for the integrity of registered awards.

Current provisions for objecting to registration of arbitral awards

Section 13H currently provides that a party may register an arbitral award with a court and that the registered award has the same effect as if it were a decree made by the court. Regulation 67Q provides that an application for registration of an award must be served on each party who may "bring to the attention of the court any reason why the award should not be registered." No guidance is given as to what might be a proper reason for a court to decline to register an award. In two 2018 decisions Judge Harman found that the grounds for opposing registration are the same as the grounds for reviewing or setting aside a registered Award pursuant to sections 13J and 13K.[3]

2 https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn006.

3 *Braddon & Braddon* [2018] FCCA 1845. *Pavic* [2018] FCCA 3386.

The ALRC has observed that the situations which might cause a court to decline registration are likely to also allow a party to seek the award be set aside under section 13K or reviewed on a question of law under section 13J. The Report sensibly recommends that the opportunity to object to registration pursuant to Regulation 67Q be removed to increase certainty.

Review of arbitral awards

A party to a registered award may, pursuant to section 13J, apply for "review of the award, on questions of law." The ALRC described this phrase as "uncertain". It described the grounds for review of arbitral awards on questions of law only (and not issues of fact) as narrower than the grounds of appeal from a trial judgement causing some lawyers to be reluctant to recommend arbitration to clients. The Report recommends that section 13J be amended to provide for the same grounds of appeal from an arbitral award as for an appeal from a trial judgement.

Recommendation 28

The *Family Law Act 1975* (Cth) should be amended to allow some children's matters to be arbitrated. Appropriate occasions for arbitration in children's matters would not include disputes:

- relating to international relocation;
- relating to medical procedures of a nature requiring court approval;
- relating to contravention matters;
- in which an Independent Children's Lawyer has been appointed; and
- involving family violence which satisfy sections 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

The ALRC received submissions suggesting an expansion of arbitration to include appropriate children's matters, and noted the UK Family Law Arbitration Children Scheme. The ALRC also recognised Australia's international obligations under the UN Convention on the Rights of the Child to ensure that decisions about children are made in accordance with the Convention. It acknowledged that an arbitration scheme should not

undermined the parens patriae jurisdiction of the courts which includes powers beyond what a child's parent may be entitled to authorise.

The Report recommends arbitration of children's matters subject to:

1. the consent of all parties;
2. children's matters being referred by a court to arbitration, with the referring Judge taking into account the best interests of the child, including how the child's views are to be communicated to the arbitrator; and the allegations made by each party;
3. the arbitral award would need to be placed before the court by the parties as a consent order with sufficient supporting material to satisfy the court that the orders are in the children's best interests;
4. a party would be entitled to appeal the Order; and
5. requirements for registration as an arbitrator of children's matters should be amended – although the Report does not specify exactly how. It referred to child arbitrators satisfying existing requirements[4] plus having competencies relating to cases involving family violence including assessment of risk.

Recommendation 29

The *Family Law Act 1975* (Cth) should be amended to provide that upon application by an arbitrator, or by a party to an arbitration, a court has power to make directions at any time regarding the further conduct of the arbitration, including power to make a direction terminating the arbitration (whether or not the arbitration was referred from a court).

Orders for the conduct of arbitration

Sections 13E(2) and 13F, and Regulation 67E provide that a party may seek orders from the court "appropriate to facilitate the effective conduct of the arbitration." The Report recommends legislative amendments to also allow an arbitrator to seek such orders at any stage of the arbitration process.

4 Regulation 67B provides that an arbitrator under the *Family Law Act 1975* (Cth) be a legal practitioner; be either a family law accredited specialist or have practiced as a legal practitioner for 5 years and at least 25% of their work in that time relate to family law; have completed specialist arbitration training.

The Report does not specify how this might be done, or at whose cost. An arbitrator might be reluctant to make such orders at their own cost — although payment of such costs by the parties could be incorporated into the Agreement to Arbitrate.

Orders terminating arbitration

There is currently no explicit power for a Court to terminate an arbitration process once commenced. Arguably, one party can require the arbitration to proceed to an arbitration hearing notwithstanding a change of mind of the other party. If a party ceases to engage in the arbitration process, the other party could request the arbitrator proceed to an undefended hearing.

The Report suggests that courts should be able to terminate an arbitration after its commencement to protect parties against being compelled to proceed with a flawed or unfair arbitration process. It did not however specify the circumstances in which this might occur in any detail.

Compulsory arbitration rejected

The Report rejects submissions that courts should have power to order parties to arbitrate a dispute without their consent. This was due to the constitutional invalidity of mandatory arbitration[5] and due to "principled reasons" which it did not explain. The ALRC also referred to "practical difficulties in ensuring the productive engagement of parties in an arbitration process to which they had not consented".

It is difficult to quantify the uptake of property arbitration. The Family Law Courts have no centralised records of matters referred to arbitration or registration of arbitral awards and, obviously some arbitrations occur without court proceedings. My research indicates that at least 109 property arbitrations were conducted since the 2016 legislation to the end of 2018.[6] The ALRC recommendations, if implemented, have the potential to further increase the use of arbitration. As the Report notes, this would both relieve the workload of the courts and provide parties with immediate access to quickly delivered adjudication.

5 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

6 Shepherd, M. *Family Law Property Arbitration* Australian Family Lawyer Vol 28/2019.