

public institutions such as courts. Similarly, it is the appropriate role of courts to ensure protection of parties under a legal disability (including children and parties where there has been the appointment of a case guardian or litigation guardian). Finally, courts are the appropriate forum for a dispute about whether or not an earlier court order should be set aside under ss 79A or 90SN of the Act. However, it should be permissible to arbitrate where the parties agree that an order should be set aside (for example, circumstances have arisen since the making of the order which make it impracticable) but the parties remain in dispute about what new orders should be made.

9.22 One submission suggested that arbitral awards should include injunctions.²⁷ Injunctions are provided for primarily in s 114 in Pt XIV of the *Family Law Act*. Part XIV of the Act is not included in the list of matters which may be arbitrated. The Family Law Council recommended against injunctive powers for arbitrators.²⁸ Injunctive powers are appropriately exercised by courts, and the ALRC does not recommend that such powers be bestowed upon arbitrators. Should such orders be necessary in the course of an arbitration, an application could be made to a court.

Stamp duty

9.23 Several submissions sought greater clarity regarding the application of state and territory stamp duty exemptions to arbitral awards.²⁹ This has also been identified as an issue in commentaries.³⁰ Consultations with the AIFLAM indicated this is a key issue affecting arbitration. Although there are various provisions in the *Family Law Act* which purport to exempt various instruments executed for family law purposes from stamp duty,³¹ there are concerns about the constitutional validity of those provisions. In practice, state and territory offices rely on state and territory legislation in determining whether or not a particular instrument is exempt from duty. Consequently, different approaches are taken in each state and territory and there is often uncertainty about whether the purported exemptions are intended to apply specifically to arbitral awards as distinct from court orders and binding financial agreements. A nationally consistent approach to the application of stamp duty exemptions to asset transfers pursuant to arbitral awards is likely to increase confidence in, and use of, arbitration processes. The ALRC recommends that the Australian Government work together with state and territory governments to apply clear and nationally consistent exemptions for instruments executed pursuant to family law arbitral awards.

27 Victorian Association of Collaborative Professionals, *Submission 91*.

28 Family Law Council, *The Answer from an Oracle*, above n 21.

29 NSW Young Lawyers Family Law Committee, Law Society of NSW, *Submission 108*; Queensland Law Society, *Submission 66*; Law Council of Australia, *Submission 43*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

30 Justice Gary Watts, 'Arbitrations in Family Law' (Paper, University of New South Wales, Sydney, 25 November 2016); Wolters Kluwer, *Australian Family Law & Practice Premium Commentary* (2019) 44–750; Parkinson, above n 5.

31 *Family Law Act 1975* (Cth) ss 90, 90L, 90WA.

Awards by consent

9.24 In arbitration, as in court litigation, it is not uncommon for matters to settle by consent before the arbitrator determines an award. It is currently not clear whether arbitrators are empowered to make an arbitral award based on the consent of the parties, nor whether courts should register such awards like any other. The situation is not explicitly addressed in primary or subordinate legislation. Consultations with the courts and the AIFLAM in particular indicated that there is confusion and inconsistency regarding the procedure in such circumstances. The benefits to parties of settling matters by consent apply equally to arbitration as they do to litigation. Parties should be encouraged to settle matters by consent including at all stages of arbitration, and any disincentives to settlement should be removed wherever possible.

9.25 Currently, some Registrars are reluctant to register an arbitral award made by consent which does not contain reasons demonstrating that there has been some consideration that the award is just and equitable. Parties have sometimes been required to complete an Application for Consent Orders at further expense, incorporating details of their financial position and the effect of the proposed orders. This process reduces the level of privacy and confidentiality in arbitration, and additionally entails the risk that one party may withdraw their consent before the orders are made by the court.

9.26 The ALRC recommends that in property and financial matters, arbitrators should be specifically empowered to make an arbitral award based on the consent of the parties. The arbitrator should be required to provide short written reasons as to why the arbitrator considers the consent arrangement to be just and equitable on the basis of material available to the arbitrator. Parties should be explicitly entitled to then seek registration of such an award in a court on the same basis as any other arbitral award in property and financial matters. The existing provisions in the *Family Law Act* appear sufficient to allow for such a process. These recommended provisions could therefore be included in subordinate legislation, rather than primary legislation.

Registration of awards

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.

9.27 The *Family Law Act* provides that a party may register an arbitral award with a court and that a registered award ‘has effect as if it were a decree made by that court.’³² Regulations provide that an application for registration of an award must be served on each other party, and that a party may ‘bring to the attention of the court any reason

why the award should not be registered.³³ No guidance is provided as to what may be a proper reason for a court to decline to register an award, which has led to uncertainty about the status and finality of an arbitral award.

9.28 Some possible valid grounds for objection to registration have been canvassed in case law³⁴ and commentary.³⁵ They note that many situations which might lead a court to decline registration of an award are likely in any event to enable a party to have the award set aside under s 13K of the *Family Law Act*, primarily on grounds of lack of due process or procedural fairness. Alternatively, the same circumstances may enable a party to have the award reviewed on a question of law under s 13J of the Act. It is not likely that there would be occasion to decline registration of an award for reasons which would not fall within the set aside or review provisions, noting also the qualifications required for arbitrators.³⁶ It has also been noted that there is a lack of guidance as to the status of an unregistered award, and the appropriate course of action in the event that registration of an award is declined.

9.29 In order to increase certainty around the status of an arbitral award, and clarify the circumstances in which an award may not be enforced by a court, the ALRC recommends that the opportunity to object to registration be removed. Concerns regarding the award should instead be the subject of an application to set aside (s 13K) or review (s 13J) the award. Implementation and enforcement of a contested award could be stayed pending the outcome of the application to set aside or review the award. Consultations with the AIFLAM and the Family Law Section of the Law Council of Australia indicated strong support for this Recommendation.

9.30 The requirement to give notice to all other parties before applying to register an award should be maintained. For arbitrations referred by a court order, the party seeking to register the award should be required to attest that the document submitted is the final version of the arbitral award made in accordance with the court's referral. For other arbitrations, the party seeking to register the award should be required to attest to the material facts demonstrating why the award is registrable under the Act. In both scenarios, the party seeking to register the award should be required to submit a copy of the relevant arbitration agreement.

Review of an award

9.31 The *Family Law Act* provides that a party to a registered award may apply for 'review of the award, on questions of law'.³⁷ There is some uncertainty as to the precise meaning of this phrase, and some have suggested that the grounds for review of an

33 *Family Law Regulations 1984* (Cth) reg 67Q.

34 *Braddon & Braddon* [2018] FCCA 1845; *Pavic & Pavic* [2018] FCCA 3386.

35 Patrick Parkinson, 'Family Property Arbitration: Exploring the New Potential' (Paper, ESFLPG Weekend, Katoomba, June 2016).

36 *Family Law Act 1975* (Cth) s 10M; *Family Law Regulations 1984* (Cth) reg 67B.

37 *Family Law Act 1975* (Cth) s 13J.

arbitral award are arguably narrower than the grounds of appeal against a trial judgment, which has made some lawyers reluctant to recommend arbitration to their clients.³⁸

9.32 For example, in appeals from orders made by judges of either court under Pt X of the Act, the appellate court ‘shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact’.³⁹ Arguably this power to have regard to factual issues is broader than a power to review on questions of law alone. However, commentators have also noted that the lines between questions of law and fact are frequently blurred,⁴⁰ and have questioned whether there is in reality any difference between the power to review an arbitral award and the power to appeal against a first instance judgment.⁴¹ Case law has established that an appellate court must be satisfied that an appellable error has occurred before the appellate court interferes with a discretionary trial judgment.⁴²

9.33 Equivalent provisions applicable in the Federal Court of Australia refer to ‘a review, on a question of law’.⁴³ Arbitration legislation in the United Kingdom similarly provides for ‘an appeal to the court on a question of law’.⁴⁴ Case law in the international commercial context has held that an award may not be reviewable even on a question of law, primarily based on the consent of the parties to submit themselves to the decision of the arbitrator.⁴⁵ In addition, it has also been noted that litigants may in fact prefer the finality of limited review rights.⁴⁶

9.34 Consultations with the AIFLAM and the Family Law Section of the Law Council of Australia indicated strong support for the provisions in the *Family Law Act* to be amended to provide for the same rights of appeal as from a trial judgment. In particular, it seems that the different expression as to the basis of the appeal has caused confusion and added to the reticence to arbitrate. The wider remedies available on a successful appeal against a trial judgment are more suited to family law arbitration than might be the case for commercial arbitration.⁴⁷

9.35 On balance, the ALRC recommends amending s 13J of the *Family Law Act* to provide for the same grounds of appeal from an arbitral award as for an appeal from a

38 Family Law Council, *Letter of Advice to the Attorney-General*, above n 26; Parkinson, above n 35; Law Council of Australia, *Submission 43*; Australian Institute of Family Law Arbitrators and Mediators, *Submission 41*.

39 *Family Law Act 1975* (Cth) s 93A.

40 Jennifer Batrouney, *The Distinction between Questions of Fact and Questions of Law in Section 44 Appeals to the Federal Court* (20 May 2014) <<http://www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney>>.

41 Wolters Kluwer, above n 30, 58–830.

42 *House v The King* (1936) 55 CLR 499; *Allesch v Maunz* (2000) 203 CLR 172.

43 *Federal Court of Australia Act 1976* (Cth) s 53AB(2).

44 *Arbitration Act 1996* (UK) s 69(1).

45 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533.

46 Parkinson, above n 35.

47 Compare the powers contained in ss 13J and 94(2) of the *Family Law Act 1975* (Cth).

trial judgment. A court should also have the same powers and remedies available when reviewing an arbitral award as it does when hearing an appeal from a trial judgment.

Children's matters

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 ss 102NA(1)(b) and (c) of the *Family Law Act 1975* (Cth).

9.36 A number of submissions suggested that legislation should provide for arbitration of appropriate children's matters as well as financial matters.⁴⁸ Several agreed that cases involving, for example, alleged child abuse or family violence would not be appropriate, and that a number of additional processes may be required to enable arbitration in children's matters to proceed safely, to incorporate the views of children, and to appropriately screen for risk of violence or harm. In addition, there may be limitations on the types of children's matters which can permissibly be arbitrated, given the traditional *parens patriae* jurisdiction of courts, which parents may not be able to 'contract out of' by way of an arbitration agreement. Consultations with the AIFLAM indicated that some members supported arbitration of children's matters, while others held some concerns.

9.37 There is no doubt that arbitration involving children's issues would necessarily be consensual. However, it is also clear for reasons set out below that children's issues would need to be referred by a court for arbitration, and then supervised by the court.

9.38 The ALRC recommends that legislation explicitly provide for arbitration of children's matters in limited circumstances. The method for an arbitral award taking effect as a decree of the court should be different from financial cases. Courts should retain a supervisory role in children's cases so that the award would need to be placed before the court by the parties in terms of a consent order with sufficient supporting material to satisfy the court that such orders are in the children's best interests. For

48 See, eg, Family Law Reform Coalition, *Submission 355*; Dr D Thorp, *Submission 305*; CatholicCare Diocese of Broken Bay, *Submission 197*; D Cooper, *Submission 165*; Springvale Monash Legal Service, *Submission 161*; Anglicare WA, *Submission 152*; Grandparents Victoria, *Submission 138*; CPSU, *Submission 136*; Interrelate, *Submission 126*; Women's Legal Service Victoria, *Submission 100*; Victorian Association of Collaborative Professionals, *Submission 91*; NSW Young Lawyers, *Submission 68*; Australian Psychological Society, *Submission 55*; Relationships Australia, *Submission 11*; P Theobald, *Submission 6*.