

ARBITRATION IN FAMILY PROPERTY PROCEEDINGS: EXPLORING THE POTENTIAL

By Prof Patrick Parkinson AM



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Arbitration has been possible in property cases under the *Family Law Act 1975* for 25 years. It can only be undertaken on a voluntary basis. Legal Aid Queensland has operated a property arbitration scheme since 2001 with considerable success.

However, arbitration has otherwise not been much utilised, despite efforts being made by the Bar at least in Melbourne and Brisbane, and despite the widespread acceptance of arbitration as a means of resolving commercial disputes.

With the Family Court of Australia and the Federal Circuit Court under enormous pressure due to the cumulative effect of the government's 'efficiency dividends', and delays in replacing judges, there is no longer, in Australia, a quick, simple and cheap option for resolving family law disputes by means of adjudication.

That had been the mission of the Federal Magistrates Court, but in many parts of the country, the time taken in getting from filing to trial in the Federal Circuit Court in cases which lack urgency (such as property cases) may well be over two years.

Properly, the courts prioritise children's cases, particularly those involving safety issues. Federal Circuit Court judges now have an unrelenting diet of very difficult children's matters, and even when a property matter reaches the door of the court, there is some likelihood that the lawyers will be urged to sort it out in the corridor.

It can be extraordinarily expensive for legally represented parties to get through the various steps and procedural hearings that are required before a judge will give them their day in court. There has to be another option for middle Australia.

Snapshot

- **New arbitration rules commence at the beginning of April, creating a comprehensive framework for the resolution of property disputes under the *Family Law Act*.**
- **Once registered, an arbitration award takes effect as if it were a decree of the Court.**
- **Review of an arbitral award is only on a question of law, but the scope for review is not as narrow as this might suggest.**
- **There are currently no CGT or stamp duty exemptions for arbitral awards but this problem can be dealt with through the arbitration agreement and the terms of the award.**

One of the reasons why arbitration has been little utilised in the past has been because of gaps in the regulatory framework for arbitration.

Although the *Family Law Regulations* filled in a lot of the detail, they left to Rules of Court some significant matters such as the processes surrounding the issue of subpoenas.

New rules, the *Family Law Amendment (Arbitration and Other Measures) Rules 2015*, came into effect on April 1st 2016. These amend the *Family Law Rules 2004* to insert a new chapter 26B on arbitration. They address the lacunae in the regulatory framework.

What is arbitration under the *Family Law Act*?

There are two kinds of arbitration under the Act:

- court-referred arbitration under s 13E in relation to disputes between married and de facto couples; and

- party-initiated arbitration. This is arbitration agreed between the parties without court referral. In the Act it is known by the rather bureaucratic term 'relevant property or financial arbitration matters'.

Party-initiated arbitration has a broader scope than court-referred arbitration. It is not possible to arbitrate arguments about binding financial agreements under s 13E, but it is using party-initiated arbitration. The distinction, which has a historical rationale, has no practical utility today.

Once registered, the award takes effect as if it were a decree of the court (s 13H).

An arbitration need not be of all aspects of the proceedings.

The court could refer one part of the proceedings to arbitration, for example, determining the value of an asset, or determining certain issues of fact which need to be resolved before settlement can be reached.

Arbitration therefore has the potential to be very useful as part of the litigation process to help narrow the issues which a judge may need to determine, as well as being an alternative to litigation.

Whether or not the arbitration is court-referred, the Court can make orders to facilitate the arbitration (s 13E(2), 13F).

Who can be an arbitrator?

According to the *Family Law Regulations* (reg 67B) the arbitrator must be a legal practitioner who satisfies the minimum requirements (specialist accreditation or five years in practice, including at least 25% in family law) and who has done an arbitration course.

In the *Legal Profession Uniform Law*, (s 6) 'Australian legal practitioner' means an Australian lawyer who holds a current Australian practising certificate.

The Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) maintains a list of trained arbitrators on behalf of the Law Council of Australia, and that list can be searched by location.

The conduct of the arbitration

There is a limited amount of prescription in the legislation. Reg 67F specifies that an arbitration agreement must be in writing, and give details about what the agreement must contain.

Reg 67I provides that an arbitrator must determine the issues in accordance with the Act and must conduct an arbitration with procedural fairness. Arbitrators must also take an oath to preserve confidentiality (reg 67J). If the parties consent to this, an arbitrator is not bound by the rules of evidence but may inform himself or herself on any matter in any way that he or she considers appropriate (reg 67O).

The new arbitration rules

The new Rules cover two main issues. The first is the duty of disclosure. Each party has a duty to the arbitrator and each other party to give timely full and frank disclosure of relevant information (reg 26B.01(1)).

The requirements about what must be disclosed (26B.01(2)) mirror r 13.04 with respect to court proceedings. There are also similar rules concerning the disclosure of documents and the use to which they are put, provisions dealing with claims of privilege and objections and making provision for inspections. Either a party to the arbitration, or the arbitrator, may apply to the court to enforce disclosure requirements (r 26B.09).

The second area the rules cover is subpoenas. Regulation 67N gives to the arbitrator the power to compel witnesses or the production of evidence. Furthermore, a party to an arbitration may apply to the court for the issue of a subpoena in accordance with rules of court. Until now, there have been no such rules.

The Explanatory Statement observes that the amendments harmonise the approach to the production of documents under subpoenas with the approach of the *Federal Circuit Court Rules 2001*, to streamline the process and reduce the number of court appearances.

The approach is contingent upon service, compliance by the named person, the absence of any objection and the issuing party filing a notice of request to inspect.

When can an arbitral award be challenged?

One of the issues which has undoubtedly led to resistance to the use of arbitration is that there are limited rights of review. However, there may well be more avenues for review than practitioners realise.

- First, it is important to note that an arbitral award only takes effect once registered. That registration is on the application of a party. There could be circumstances where neither party is entirely happy with the outcome, and they come to some agreement of their own instead.

- Second, there is a right to review the arbitral decision on a question of law (s 13J). It is important to note the exact wording of the section because it does not say, in terms, that the award can only be overturned for an error of law. Section 13J provides that a party 'may apply for review of the award, on questions of law' by a judge.

On a review of an award, the judge may:

- (a) determine all questions of law arising in relation to the arbitration; and
- (b) make such decrees as the judge or Federal Circuit Court of Australia thinks appropriate, including a decree affirming, reversing or varying the award.

Read literally, if a review of an arbitral award is sought on a 'question' of law, then the judge may determine that legal question and has a broad discretion, having done so, to make a decree 'affirming, reversing or varying the award'. This might mean that even if the judge concludes that there is no error of law, the award could still be varied in some way.

For example, applying *House v the King* (1936) 55 CLR 499, the judge might conclude that on the facts the award 'is unreasonable or plainly unjust', and consequently it may be inferred that in some way there has been a failure properly to exercise the discretion which the law reposes in the arbitrator. That might lead the judge to vary the award even if he or she decides that the arbitrator correctly determined the specific 'question of law' about which a review was sought.

- Third, there are other grounds for setting aside the award. Section 13K provides that the court may make a decree affirming, reversing or varying the award or agreement if satisfied that it was

obtained by fraud (including non-disclosure of a material matter); or void, voidable or unenforceable; or if it is impracticable for some or all of it to be carried out; or the arbitration was affected by bias, or a lack of procedural fairness.

For middle Australia, the comparative finality of arbitration may be a great advantage. What many people need is a decision which allows them to move on with their lives. If the arbitral award is made by a respected and experienced decision-maker (and many arbitrators may have decades of experience in family law), then the constraints upon review may not be of great moment.

Both sides get a reasonably high degree of finality and avoid the difficulty and expense of the court process. If the lawyer wants to keep options open, the best way might be to have a senior lawyer conduct a neutral evaluation – with recommendations to both parties.

CGT and stamp duty relief

Finally, it is necessary to consider CGT and stamp duty. The exemptions from stamp duty and capital gains tax in relation to interspousal transfers do not apply to arbitration. Section 68 of the *Duties Act 1997* (NSW), for example, exempts transfers pursuant to binding financial agreements, court orders and other agreements between the parties following relationship breakdown. It is difficult to see how arbitration fits into the existing exemptions.

This can be dealt with either in the arbitration agreement, or the arbitral award, or both. The agreement or award could specify that in the event that issues of stamp duty or CGT relief arise, the parties will agree to enter into Consent Orders to give effect to the arbitral award, and if a person fails to do so, he or she would be liable to pay the relevant duty or tax payable. The award could be in similar terms.

Conclusion

There are good reasons to consider arbitration now. A hearing could take place within weeks and a decision be handed down shortly thereafter. The parties could agree on their own arbitrator. An arbitration could be conducted with a brief hearing for clarification of issues and submissions.

It remains to be seen whether now, finally, arbitration will find its place in the sun. **LSJ**