# Arbitrations in Family Law

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25 November 2016

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The legislative framework in the *Family Law Act*

The possibility of arbitration under the *Family Law Act* has existed since 1991. It was introduced at the same time as the provisions for mediation. Whilst mediation has enjoyed wide success, arbitration was and still today has been hardly used at all.

The 1991 amendments established a system of both compulsory and voluntary arbitration "for cases about property settlement and spousal maintenance". However, the Government did not, at that time, make the necessary regulations to enable arbitrators to be approved so that the Family Court could order matters out to arbitration.

In addition, the 1991 amendments relied upon the Family Court, by a majority of judges, introduced rules to provide a basic framework to enable arbitration to be undertaken. Until April 2016 no such rules had been made.

In 2000 the *Family Law Act* was amended to remove the ability of the court to order out a case for compulsory arbitration. The reasons for removing the provision for compulsory arbitration from the legislation, as originally introduced in 1991, were concerns arising from the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. Consequently s 19D(2) of the Act was amended so that a court could no longer impose arbitration on an unwilling party.

*Brandy's* case involved the consideration of the determination of discrimination complaints by the Human Rights and Equal Opportunity Commission. The legislation provided that the Commission could make an inquiry and then a determination into a matter. That determination was not of itself immediately binding but if registered in the Federal Court, it had effect as if it were an order. The relevant legislation provided provisions for a review of the determination, however, it was not a review by a hearing de novo and parties could only adduce fresh evidence with leave. In *Brandy*, the limited nature of the way the determination of the Commission could be received, was the lynchpin as to why the High Court found the legislation constitutionally invalid. It is clear from *Brandy* that in order for a non-consensual arbitration scheme to be constitutionally valid, there needs to be provision for a full re-hearing de novo as a matter of right. Secondly, enforceability should be a matter of judicial discretion and not something that arises simply from a process of registration.

It could be argued, based on subsequent authorities that have considered *Brandy's* case, that the Government did not need to change the *Family Law Act* in 2000 as the 1991 provisions for non-consensual arbitration contained the two essential elements highlighted by the High Court in *Brandy's* case. That is, in court ordered arbitration under the 1991 provisions, there had been firstly a full right of review by way of hearing de novo and secondly, the need for the exercise of judicial discretion in respect of the enforcement of any award which is made.

So the sad history of compulsory arbitration in family law has been that it was not used by the court at all between 1991 and 2000 when it was on the statute book partly because the Government did not introduce regulations to approve arbitrators and partly because the

court did not introduce rules of court to create a structure for it to happen. Then in 2000 it was removed from the statute.

What we have left in the *Family Law Act* is a process of consensual arbitration. It requires two parties to consent to a binding process of arbitration (and probably from a practical point of view, their lawyers, to encourage their clients to do so).

There is no issue in relation to the constitutional validity of consensual arbitration. The constitutional basis for consensual arbitration does not rely upon the exercise of judicial power. The heart of the constitutional validity of consensual arbitration arises from the consent of the parties themselves (see *The Minister for Home and Territories v Teesdale Smith & Ors (*1924) 35 CLR 120; *Attorney-General of Australia v Breckler* (1999) HCA 28). The consent needs to be informed and real but once given, it means that the arbitral award to which a party is signing up, is binding subject to the right of review on an error of law. In order to be constitutionally valid there is no need for a consent arbitral award to have attached to it a right of review by way of a hearing de novo as there can be no suggestion that the arbitrator is exercising judicial power.

Legislation in 2006 made a number of minor changes and moved the location of the provision for arbitration in the *Family Law Act*. The current provisions are now in Part II Division 4 and Part IIIB Division 4 *Family Law Act*.

<u>The current legislative framework of the *Family Law Act*</u>

Section 10L of the Act defines arbitration as a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute.

Section 10M provides that an arbitrator is a person who meets the requirements prescribed by the Family Law Regulations (see below).

Section 10N provides that arbitrators may charge for fees for their services and must give written information about those fees to the parties before the arbitration starts. Section 123(1)(s)(e) and s 125(1)(b) and (c) of the Act provides that there may be rules of court or regulations relating to the costs of arbitration and how they are assessed or taxed.

Section 10P of the Act provides immunity to arbitrators. It is the same immunity as a judge of the Family Court has when performing the functions as a judge. However, communications with arbitrators are not confidential and may be admissible in court.

Section 13E provides a court may make an order with the consent of all the parties referring Part VIII proceedings and Part VIIIAB proceedings (for de facto matters) to an arbitrator for arbitration. This would probably only ever happen in the context of proceedings that had already commenced a journey upon the litigious pathway in the court. If a court makes a consensual order out to arbitration then s 13E(2) allows the court to adjourn the proceedings and make additional orders to facilitate the effective conduct of the arbitration.

The terms “Part VIII proceedings” and “Part VIIIAB proceedings” are defined in s 4 of the Act as proceedings with respect to the maintenance of a party or the property of a party. It

is questionable as to whether a court could order out a determination of jurisdictional issues such as whether a de facto relationship existed because of an anomaly in the way the sections are drafted although if the arbitration is not court ordered such an issue could be determined by an award (compare s 10L(2)(a) and s 10L(2)(b)(iv)).

Section 13F allows an application in a case to be made by a party to any arbitration for any order to facility the effective conduct of the arbitration.

Section 13G creates the opportunity for an arbitrator at any time before making his or her award to refer a question of law arising in relation to the arbitration for determination by a Justice of the Family Court or a Judge of the Federal Circuit Court and the arbitrator must await the outcome of that determination prior to making an award.

Section 13H importantly allows an arbitrator's award to be registered in court and once an award is registered, it has effect as if it were a decree made by that court.

Section 13J provides that a party to a registered award may apply for a review of the award. The review of the award is on a question of law only (as indicated above there is no need for there to be review by way of a hearing de novo for a consensual arbitration to be constitutionally valid). On a review on a question of law, the court which reviews the award may make whatever order the court thinks is appropriate, including an order affirming, reversing or varying the award.

Section 13K sets out the following further grounds upon which an award can be challenged in a court:

> (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
>
> (b) the award or agreement is void, voidable or unenforceable; or
>
> (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or
>
> (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

If successfully challenged on any of these grounds, the court has the ability of affirming, reversing or varying the award.

<u>The Family Law Regulations</u>

The arbitration regulations are contained in Part V Division 2 of the Family Law Regulations.

Regulation 67B prescribes the requirements for an arbitrator. An arbitrator needs to be a legal practitioner and either a person who is accredited as a family law specialist by a State or Territory legal professional body or a person who has practised as a legal practitioner for at least five years and at least 25 percent of the work done by that person in that time

was in relation to family law matters. Further, the person has to have completed a specialist arbitration training conducted by a tertiary institution or professional association of arbitrators and their name needs to be included in the list kept by the Law Council of Australia.

Regulation 67D prescribes the form (a Form 6) of an application to be made to a court to order proceedings or part of proceedings to arbitration. I note in passing the Regulations have not been changed since the introduction of de facto relationship property settlement orders into the *Family Law Act* and this regulation currently only applies to married couples. A similar application, in relation to de facto couples, would be made by using an ordinary application in a case.

Regulation 67E provides a prescribed form (a Form 7) for making an application under s 13F for an order to facilitate the effective conduct of an arbitration.

Regulation 67F prescribes what is required in an arbitration agreement.

The agreement must be:

- In writing
- Set out prescribed information, including the date, time and place at which the arbitration is to be conducted, the issues to be dealt with, the estimated time needed, the method by which the arbitration will be conducted (for example, information about the exchange of documents and witness statements, scheduling and receiving expert evidence; the circumstances in which the arbitration may be suspended or terminated and the estimated costs of the arbitration including disbursements such as venue hire)
- Provide details as to the agreement in relation to the payment of the costs of the arbitration and the timing of the payment
- The agreement has to be signed by each party to the arbitration.

Regulation 67G provides that in court ordered arbitration an arbitrator by way of notice to the parties needs to provide them with information similar to that which is required to be contained in an arbitration agreement relating, amongst other things, to the issues to be dealt with, the manner in which the arbitration is to be conducted and an estimate of costs.

Regulation 67H deals with the costs of arbitration and provides that each party would share the costs of conducting the arbitration equally unless they agree otherwise in writing. For court ordered arbitration the regulation requires the parties to confirm with the arbitrator in writing before the arbitration starts that they agree to pay the arbitrator within 28 days after an award has been made.

Regulation 67I imposes the following duties on an arbitrator:

- To determine issues in dispute between the parties in accordance with the *Family Law Act*
- Conduct the arbitration with procedural fairness

- Inform the parties immediately if the arbitrator becomes aware of anything that could lead to direct or indirect bias in favour of or against any party.

Regulation 67J contains the form of oath or affirmation to be sworn by an arbitrator prior to taking that position.

Regulation 67K gives the arbitrator power to suspend an arbitration if a party fails to comply with a procedural direction.

Regulation 67L allows the arbitrator to terminate an arbitration if the arbitrator forms the view that one of the parties does not have the capacity to take part in the arbitration. This would arise if a party did not understand the nature and possible consequences of the arbitration or is not capable of giving adequate instruction to his or her representation at the arbitration or satisfactorily appear in person in the arbitration.

Regulation 67M confirms that a party may appear in an arbitration either in person or be represented by a legal practitioner.

Regulation 67N gives an arbitrator power to require any person (whether a party to the arbitration or not) to attend the arbitration to give evidence, to produce documents or to attend the arbitration to give evidence and produce documents.

Regulation 67N(2) allows a party to an arbitration to apply to the court for the issue of a subpoena requiring a person, whether a party to the arbitration or not, to require a party's attendance to give evidence at an arbitration and/or to produce documents. That regulation was amended in 2006 so that there was a requirement that the application for the issue of a subpoena be in accordance with applicable rules of court. Specific rules of court for issuing subpoenas for arbitrations were not introduced until April 2016.

Regulation 67O provides that, if all parties to the arbitration consent, when conducting the arbitration, an arbitrator is not bound by the rules of evidence but may inform himself or herself on any matter in any way that she or she considers appropriate.

Regulation 67P requires an arbitrator, at the end of an arbitration, to make an award. The award must include a concise statement setting out the arbitrator's reasons for making the award and the arbitrator's findings of fact in the matter, referring to the evidence to which the findings are based. A copy of the award has to be given to each party and in a court ordered arbitration, the arbitrator must inform the court that the arbitration has ended and that an award has been made.

Regulation 67Q provides a form (Form 8) for a party to apply to register an award. That application needs to be served on the other parties who then have 28 days to bring to the attention to the court any reason why the award should not be registered. A note to regulation 67Q(3) suggests that a way of bringing some matter to the court's attention would be by filing an affidavit. If nothing is filed by the other parties "the court must register the award". If a party has raised a reason why the order should not be registered with the court, then the court must, after giving all the parties a reasonable opportunity to determine whether to register the award.

Regulation 67R requires the court to give notice of the registration of the award to each of the parties stating the date when and the place where it was registered.

Regulation 67S allows a party to a registered award to apply for enforcement of the award as if the award were an order made under Part VIII of the Act. When the de facto property amendments were made to the *Family Law Act*, regulation 67S was not amended to include a reference to Part VIIIAB of the Act. As earlier noted, s 13H(2) of the Act provides that the effect of registration is that a registered award is to be treated as if it were a decree made by that court. Arguably regulation 67S is superfluous and a de facto party has a right to make an application for enforcement of an award not withstanding the lacuna in regulation 67S.

Regulation 67T places an onus on a party who has registered an award to register any decree of a court that might affect that award that is made under either s 13J or s 13K of the Act (reviewing awards on the basis of an error of law or seeking to set aside awards on the basis of fraud/non-disclosure; the award or agreement being void, voidable or unenforceable; impracticability; bias or lack of procedural fairness).

Family Law Rules

The new rules introduced commencing 1 April 2016 are contained in Chapter 26B of the Family Law Rules.

Part 26B.1 provides rules about disclosure in the context of an arbitration which are similar to disclosure rules introduced into the rules in 2004 for cases proceeding before the court.

Rule 26B.03 makes clear that the *Harman* obligation applies in relation to documents that are made available in relation to an arbitration. Apart from the general duty to disclose all relevant documents and a requirement to provide specific documents to the other party, that party may require the production of documents which that party nominates.

Rule 26B.05 maintains the ability of a party to claim privilege and requires a party to give notice if a redacted version of a document is provided to the other side.

The rules provide for a process of objection to production.

Rule 26B.07 allows a party to an arbitration to require the other party, rather than producing documents, to provide a list of documents. This is a process akin to formal discovery. The rules go on to set out a process by which a party or an arbitrator can seek orders from the court in relation to disclosure. There is provision for disclosure of documents by electronic communication and the ability of a party to apply to the court if the costs of complying with the duty of disclosure would be oppressive.

Part 26B.2 of the rules set out the process for issuing subpoenas in an arbitration, the requirements of service of a subpoena and the obligations to pay conduct money and witness fees.

Rule 26B.19 sets out when compliance with the subpoena is not required.

Rule 26B.20 provides that a subpoena remains in force until:

- The subpoena is complied with
- The issuing party releases the person on whom the subpoena is served
- The arbitration ends.

The rules also provide for a process to object to subpoenas and in relation to a subpoena for production, the rules specify the process for production, inspection and copying of documents; the process for objection to production and inspection and copying of documents.

Rule 26B.27(1) deals with what should happen if a party to an arbitration seeks production of documents from the court or another court. This involves giving notice to the Registry Manager who, in so far as that notice may relate to documents held by another court, may ask the other court for production of the documents.

The rules provide for what is to happen to documents after an arbitration is over (either returning them to the person who produced them or if that person has already indicated their wish, destroying them).

Party 26B.3 deals with other rules relating to arbitration. This part expands upon provisions of the Family Law Regulations, particularly in relation to the interaction between the arbitrator and the court in circumstances including:

- Where an arbitrator refers a question of law to the court
- Where an arbitrator refers a court ordered arbitration back to the court because of non-payment of the arbitrator's costs
- Where an arbitrator suspends an arbitration for failure to comply with directions
- Where an arbitrator terminates an arbitration for lack of capacity
- Where court ordered arbitration has ended and an award has been made

Rule 26B.33 requires that an application to register an award must be served on the other party within 14 days of the date on which the application is filed.

Rule 26B.34 sets out that the respondent must file and serve a response and affidavit within 7 days if they seek to oppose the registration of the award

Rule 26B.35 requires the arbitrator to inform the court if an arbitration is suspended, terminated or has ended in arbitrations where subpoenas have been issued.

The April 2016 rules also delegated to deputy registrars the general powers in the rules in relation to subpoenas and production of documents and access by parties to documents in an arbitration.

A provision was inserted into the rules that allowed an arbitrator to search and copy the court record relating to the case where an arbitration had been referred by the court.

Super splitting in an arbitral award

The super splitting provisions in the *Family Law Act* were introduced in Part VIIIB in 2002.

Section 90MC provides that a superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in s 4 and for the purposes of paragraph (c) of the definition of de facto financial cause in s 4.

Section 90MS(1) provides:

> "in proceedings under s 79 or 90SM with respect to the property of spouses, a court may, in accordance with this Division (Division 3 of Part VIIIB), also make orders in relation to superannuation interests of the spouses."

Section 90MS(2) provides:

> "a court cannot make an order under s 79 or 90SM in relation to a superannuation interest except in accordance with this Part."

Section 10L(2)(b)(i) specifically refers to "Part VIIIB proceedings" as being the permissible subject of a property or financial arbitration. Part VIIIB proceedings is defined in s 4 to include proceedings in relation to a payment splitting order. It is consequently beyond doubt that where parties privately agree on a arbitration, an award splitting superannuation can be made.

Whilst s 10L(2)(a) does not refer to "Part VIII proceedings", in relation to court ordered arbitration, as the above sections make clear, the order for splitting superannuation is in fact not made under Part VIIIB but rather made in accordance with that Part under either s 79 or s 90SM, and consequently it is likely a super splitting award may be made in a court ordered arbitration.

Stamp duty and CGT

The *Income Tax Assessment Act* 1997 s.126.5(1)(e) provides that CGT rollover applies to arbitral awards in the same way as court orders or binding financial agreements.

Currently s 90 and s 90WA of the *Family Law Act* constitute a Federal law providing exemption from any duty or charge under any Commonwealth law or State or Territory law in relation to any deed or instrument executed for the purposes of or in accordance with an order that is being made under s 79 or s 90SM or a financial agreement made under Part VIIIA (married spouses) or VIIIAB (de facto spouses).

An argument could be made that if an award has the effect as if it were an order made under Part VIII or Part VIIIAB, then the provisions of s 90 are attracted.

That argument from a practicable point of view in the short term however is not of great consequence because State Stamp Duty Commissions do not recognise the constitutional validity of s 90 and s 90WA because of the High Court's decision in *Gazzo v Comptroller of Stamps; Ex parte Attorney General for the State of Victoria* (1981) FLC 91-101. The

current s 90 and s 90WA were introduced into the Act after *Gazzo's* case. There has not been a retesting of the constitutional validity of the current s 90 nor s 90WA.

Section 68 of the *Duties Act 1997* (NSW) and other State's stamp duty laws provides for exemptions in relation to court orders and binding financial agreements but does not specifically provide for exemptions in relation to awards made as a result of an arbitration.

Absent further legislative intervention and given that parties need to consent to the process of arbitration, the problem of stamp duty might be dealt with in the agreement itself. A clause could require the parties to agree that the arbitrator when making the award could order that the parties sign consent orders in accordance with the terms of the arbitral award or alternatively enter into a binding financial agreement to give effect to the arbitral award. The award itself would provide that if a person failed to execute the instrument that would create the exemption under State legislation, then that party would be responsible for the payment of the tax or the duty that was incurred as a result. That award in itself would be enforceable against that party as if it were an order of the court.

How final are arbitral awards?

There are as yet untested questions about the finality of a registered arbitral award. Does a registered award exclude the application of Part VIII or Part VIIIAB of the Act to financial matters and financial resources to which the arbitral award applies or, to put it another way, is a registered award in substitution for any right of a party to the award under Part VIII or Part VIIIAB of the Act?

The answer to those questions will depend upon the interpretation of s 13H(2) of the Act which is in the following terms:

Awards made in arbitration may be registered in court

> (1) A party to an award made in section 13E arbitration or in relevant property or financial arbitration may register the award:
>
> ….
>
> (2) An award registered under subsection (1) has effect as if it were a decree made by that court.

There are no provisions in the Part IIIB Division 4 of the Act similar to either s 71A(1) and s 90SA(1) of the Act which specifically give finality to binding financial agreements or s 87(1) which, in former times, gave finality to approved maintenance agreements.

A provision related to s 13H(2) of the Act is Regulation 67S which is in the following terms (referring to only Part VIII because of when it was enacted):

> Enforcement of registered awards
>
> A party to a registered award may apply for enforcement of the award as if the award were an order made under Part VIII of the Act.

Reg 67S is in similar terms to s 88 of the Act which still applies to old (unapproved) s 86 Agreements and is as follows:

> Enforcement of maintenance agreements
>
> (1) A maintenance agreement that has been registered, or is deemed to have been registered, in a court may be enforced as if it were an order of that court.

Early in the court's history the words "enforced as if it were an order of that court" were interpreted not to exclude the Court's jurisdiction to hear proceedings in respect of financial matters (see by Pawley J *In the marriage of Sykes and Sykes, Dotch and Others* (1979) FLC ¶90-652).

In *Sykes*, counsel argued that the combined effect of registration of an agreement under s 86 and the principles enunciated in Taylor's case made the terms of that agreement unsusceptible of variation.

Pawley S.J. said:

> This argument could succeed only if by registration under sec. 86 the terms of an agreement acquired the essential characteristics of an order of the court. This is not the effect of such registration. All that registration does in appropriate cases is to attract the operation of sec. 83 [modification of spousal maintenance orders] and 88 [enforcement of the agreement]. Certainly the terms of the agreement were they properly made are able then to be enforced as if they were orders of the court. But, even though those terms deal with matters of property it would be a mistake to regard them as orders under sec. 79 or orders in any sense except in the very limited way I have outlined. They lack the very important ingredient which orders made under sec. 79 and indeed agreements approved under sec. 87 possess. They have not been arrived at by an exercise of the court's discretion. Indeed they have been arrived at without any exercise of the judicial process. They lack then a very significant characteristic possessed by orders of the court relating to property settlement and in my view without having been set aside under sec. 86(3) can have their effect varied or altogether extinguished by a subsequent order made in the same field by a Judge in the exercise of his discretion.

So registration of a s 86 agreement did not give finality. The question arises as to whether the registration of an arbitral award does and the answer to that question turns upon whether there is a difference in the meaning of the words "has effect as if it were an order" in s 13H(2) of the Act and the words " may be enforced as if it were an order" in s 88 of the Act and regulation 67S?

<u>Some arguments for finality</u>

Firstly, as a matter of statutory interpretation, the use of different words should be taken to indicate a different intention in meaning.

As mentioned, there is constitutional power to legislate for resolution of disputes about matters by consensual arbitration (see the High Court decision in *The Minister for Home*

*& Territories v Teesdale Smith and Others (*1924) 35 CLR 120) and that is what the Act (Part II Division 4 and Part IIIB Division 4) and the Regulations do.

Secondly the original purpose of the legislation was to allow for private ordering. The argument in favour of finality is assisted by reference to the relevant Explanatory Memorandum. The current s 13H(2), introduced in 2006, is an re-enactment of ss 19D(5) and 19E(2) which were introduced into the Act in 1991. The EM for s 13H says

> 251. An award that is registered with a court subsection 13H(1) has the same effect as a decree made by the court in which it is registered.
>
> 252. Section 13H reproduces current subsections 19D(5) and 19E(2) of the Act (with relevant changes to terminology).
>
> 253. No substantive changes have been made to the arbitration provisions

The EM for the 1991 amendments, which introduced ss 19D(5) and 19 E(2) said:

> The Bill will amend the Family Law Act so as to enable -
>
> ….
>
> (c) private arbitration, to be conducted outside the court system by suitably qualified arbitrators and subject to review, on questions of law only, by the Full Court of the Family Court.
>
> New subsection 19D(5) provides that an arbitral award may be registered. On registration, in the court that made the order referring a matter to arbitration, the award has the same effect as if it were decree made by that court and all provisions of the Family Law Act and common law for the variation, recision *(sic)* or enforcement of a decree of that court apply to the arbitration award. Review of the award can only be made in accordance with new section 19G. *(the current version of which is 13K)* ….
>
> New subsection 19E(2) provides that the court may make Rules of Court for the registration of arbitral awards. When registered the award has the same effect as a decree made by the court.

Consequently the 1991 EM supports the notion that an award is to be treated as if a court had made an order in the same terms as the award.

Thirdly the provisions of s13J which provide for review of an arbitral award on a point of law only would be otiose if a party was free to institute financial proceeding after an award was made and registered. The review is not a hearing de novo. Whether the review is the same as an appeal in a strict sense or by way of rehearing without further evidence is an interesting question. There is certainly no provision of a discretion to receive further evidence (compare s 93A(2) of the Act) but s 13J(2) does give the court reviewing the award the power to make such orders as it thinks appropriate including an order varying the award. Either way the provision for review in s 13J is arguable more restrictive than an appeal to the Full Court from an order made by a Justice or a Judge which is an appeal by

way of rehearing (see ss 93A(2), s 94(2) s 94AA(2) and *Allesch v Maunz* 203 CLR172 at [20] to[24].

Fourthly, the provisions of s 13K which allow a court to reverse or vary the award or agreement if particular matters are established (including fraud, impracticability and lack of procedural fairness) would be otiose if a party was free to institute financial proceeding after an award was made and registered. The provisions of s 13K(2) are more restrictive than analogous provisions allowing a court to vary or set aside a court order (s 79A; s 90SN) or to set aside a binding financial agreement (s 90K; s 90UM)

Fifthly, arbitration is a process which provides the parties with more protections than binding financial agreements because of the qualifications, duties and role of an independent arbitrator (see s 10M; Regs 67B;67I and 67J to L )

Sixthly, an arbitrator is given the same immunity as a Justice (see s 10P)

Seventhly, the dicta by Pawley SJ in *Sykes* can be distinguished because the role of the qualified Arbitrator, chosen by the parties is, to exercise the same discretion as the court (Regulation 67I(1)), albeit by a process which may, but does not have to be, less adversarial and more inquisitorial (See Regulation 67O; 67P (2))

<u>Some arguments against finality</u>

Firstly, there are no provisions in the Part IIIB Division 4 of the Act similar to either s 71A(1) and s90SA(1) of the Act which specifically give finality to binding financial agreements or s 87(1) which, in former times, gave finality to approved maintenance agreements.

Secondly, there is no difference between "has effect" and "maybe enforced". As Pawley SJ said it would be a mistake to regard awards as orders under s 79 or orders in any sense except awards, once registered, have effect as if they are orders in that they are enforceable as if they are orders. Awards lack the very important ingredient which orders made under s 79 or 90SM and indeed agreements which were once approved under s 87 possess. They have not been arrived at by an exercise of the court's discretion. Indeed they have been arrived at without any exercise of the judicial process. They lack then a very significant characteristic possessed by orders of the court relating to property settlement.

Thirdly, s 13K(1) gives the court power to affirm an award or agreement and it might be argued that, given the existence of that power, an award is not final until it is affirmed by the court. This is obviously a weak argument as the power to affirm in s 13K(2) is only to be exercised in favour of a party who successfully resists an application to reverse or vary the award or agreement).

Fourthly, s 86(3) also allowed an old s 86 agreement to be set aside because of fraud or undue influence, so provisions such as s 13K are not determinative of questions about the finality of an award.