

# Arbitration of Family Law Property Disputes

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Presentation to Resolution Institute

Justice Robert McClelland

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## Outline

1. In this presentation I will discuss recent reforms in the area of arbitration and how those provisions might be applied having regard to developments in other jurisdictions. I will focus, in particular, on several areas that should be of interest to arbitrators and practitioners; the requirements of natural justice, the ability to refer a point of law to the Court, the requirement to give reasons and, finally, a brief outline of the right of a party to review an award.

## Overview

2. The Act defines arbitration as being a process “in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute”<sup>1</sup>. Arbitration can be Court referred or privately arranged by the parties.
3. The court may only refer the parties to arbitration in respect to property matters under Part VIII and Part VIIIAB of the Act and only with the consent of the parties<sup>2</sup>.
4. The court is empowered to adjourn the proceedings to facilitate the arbitration occurring and also to make such “additional orders as it thinks appropriate to

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<sup>1</sup> *Family Law Act* 1975 (Cth) s 10L (*'Family Law Act'*).

<sup>2</sup> *Ibid* s 13E.

facilitate the effective conduct of the arbitration”<sup>3</sup>. This might include, for instance, orders to preserve the subject matter of the litigation pending determination of the arbitration.

5. In addition to the power of referral, the court can make orders to facilitate the effective conduct of party arranged arbitration<sup>4</sup>, which is defined as “relevant property or financial arbitration.”<sup>5</sup> Party agreed arbitration is not restricted to property matters under Pt VIII and VIIIAB proceedings and can include spousal maintenance and maintenance agreements, financial agreements made before, during, or after marriage, superannuation agreements, and proceedings as to the execution of instruments by order of court.
6. An application for a matter to be referred to arbitration pursuant to s 13E of the Act must be made jointly by all parties to the proceedings,<sup>6</sup> whereas an application for orders to facilitate party agreed mediation can be made by a party to the arbitration or jointly by all parties.<sup>7</sup>
7. Pursuant to the *Family Law Regulations 1984* (Cth) (“the Regulations”) an arbitrator must be a legal practitioner who is either
  - accredited as a family law specialist; or
  - who has practised for 5 years and at least 25 per cent of that person’s work was in relation to family law.<sup>8</sup>
8. In addition, the person must have completed a specialist arbitration training course conducted by a tertiary institution or a professional association of arbitrators. Finally, that person’s name must be kept on a register retained by the Law Council of Australia or a body nominated by the Law Council of Australia.<sup>9</sup>
9. Under section 10P of the Act an Arbitrator has the same protection and immunity as a Judge.

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid s 13F.

<sup>5</sup> Ibid s 10L(2)(b).

<sup>6</sup> Family Law Regulations 1984 (Cth) reg 67D(b) (*‘the Regulations’*).

<sup>7</sup> Ibid reg 67E.

<sup>8</sup> Ibid reg 67B(b)(i)(ii).

<sup>9</sup> Ibid reg 67B(d).

10. Parties are permitted to enter into an arbitration agreement which must be in writing and must include a commitment by the parties to the payment of the arbitrator's costs which must be estimated in the agreement.<sup>10</sup>
11. The agreement must also include the names of the parties and the arbitrator as well as the time date and place of the arbitration. It must also include:
- the issues to be dealt with
  - the estimated time
  - information about how the arbitration will be conducted (for example, information about the exchange of documents and witness statements, scheduling and receiving expert evidence); and
  - the circumstances in which the arbitration may be suspended or terminated.
12. In circumstances where the parties have not entered into an arbitration agreement the regulations prescribe obligations in respect to notice and also the costs of the arbitration<sup>11</sup>.
13. The *Family Law Amendment (Arbitration and Other Measures) Rules 2015* ("the Family Law Amendment Rules") recently added a new chapter 26B to the Rules. The Rules set out detailed obligations in respect to the general duty of disclosure, the nature of documents that must be disclosed, and the use of documents that are so disclosed during the course of an arbitration<sup>12</sup>. Those rules mirror rules which prescribe similar obligations of disclosure in respect to matters that are before the Court<sup>13</sup>.
14. The Rules enable a party to require another party to the arbitration to produce documents for the purpose of the arbitration<sup>14</sup>. That rule mirrors rule 13.08 of the Rules which applies in respect to proceedings before the court.

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<sup>10</sup> Ibid reg 67F(2).

<sup>11</sup> Ibid regs 67G, 67H.

<sup>12</sup> *Family Law Rules* rr 26B.01(1), 26B.02, 26B.03).

<sup>13</sup> Ibid rr 13.04, 13.07, 13.07A.

<sup>14</sup> Ibid r 26B.04.

15. Rules 26B.05 and 26B.06 of the Rules deal with claims of privilege and objections to the production of documents. They also mirror those rules which address similar matters in respect to proceedings before the court.
16. Rule 26B.09 of the Rules is significant in that it enables a party to an arbitration to seek the assistance of the court to enforce the obligations of disclosure of the parties to the arbitration.

### **The conduct of the arbitration**

17. Regulation 67J imposes an obligation of confidentiality on the Arbitrator which must be confirmed by oath or affirmation.
18. Regulation 67I requires the arbitrator to ensure procedural fairness.
19. Regulation 67M permits the parties to be legally represented if they so choose and Regulation 67O enables the parties to agree to dispense with the rules of evidence and to permit the arbitrator to “inform himself or herself on any matter in any way that he or she considers appropriate”.

### **Powers of the arbitrator**

20. Regulation 67K enables the arbitrator to suspend an arbitration if a party does not comply with a procedural direction. If the arbitration has been referred by the court the arbitrator must refer the matter back to the court if the failure to comply exceeds 28 days.
21. Regulation 67L requires the arbitrator to terminate the arbitration if the arbitrator considers that a party does not have the capacity to take part in the arbitration. Incapacity is defined in terms of the person’s inability to understand the nature and possible consequences of the arbitration and where the person is not capable of giving adequate instruction to his representatives or satisfactorily appearing in person in the arbitration. Again, if the arbitration is terminated for one of those grounds, in the case of court referred arbitration, the matter must be referred back to the court.

22. Regulation 67N empowers an arbitrator to compel the attendance of a person to give evidence or to produce documents. There are now provisions in the new Part 26B of the Rules, to which I have referred, that facilitate the issuing of subpoenas for that purpose.

23. Regulation 67P requires the arbitrator to provide reasons for his or her decision.

24. After an award is made the applicant has an obligation to serve a copy of the award on each party. Each party then has a period of 28 days in which they can file an objection to the registration of the award<sup>15</sup>.

25. Once registered, an award is enforceable as if it is an order of the court<sup>16</sup>.

### **Involvement of the court**

26. In addition to the court's powers to issue a subpoena to produce documents or attend and give evidence, or both, the court has the following powers.

27. In the case of both a court referred arbitration and a party arranged arbitration, the arbitrator may at any time "before making an award" refer a question of law arising in relation to the arbitration" for determination by the court<sup>17</sup>.

28. A party to an award can apply for a review of an award pursuant to Section 13J of the Act on a question of law and pursuant to section 13K of the Act, more generally. I will shortly discuss these provisions in a little more detail.

### **Approach**

29. While there is very little case law concerning these legislative provisions some guidance can be obtained from other jurisdictions where comparable provisions of the *International Arbitration Act* (1974) (Cth) and state and territory commercial arbitration Acts including, most specifically, the *Commercial Arbitration Act* (2010) (NSW). It would be a mistake, however, to assume that

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<sup>15</sup> *The Regulations reg 67Q.*

<sup>16</sup> *Ibid reg 67S; Family Law Act s 13H.*

<sup>17</sup> *Family Law Act s13G.*

the liberal approach that has been adopted in respect to commercial arbitration will necessarily be applied in the area of family law.

30. As the High court noted in *Westport Insurance Corporation v Gordian Runoff Limited*<sup>18</sup>,

...it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power, and is wholly divorced from the exercise of public authority. (Reference omitted)

31. In that respect, it is significant that Regulation 67I(1) provides that “an arbitrator must determine the issues in dispute between the parties to the arbitration in accordance with the Act.” In *Stanford and Stanford*,<sup>19</sup> the High Court emphasised that a precondition to any order adjusting the parties’ property interests was that it is just and equitable.

## Natural Justice

32. As noted, Regulation 67I requires the arbitrator to ensure procedural fairness.

This includes:

- ... (for example, giving each party to the arbitration a reasonable opportunity to be heard and to respond to anything raised by another party), and
- informing each party, in writing, if during the arbitration, the arbitrator becomes aware of anything that could lead to direct or indirect bias in favour of or against any party.

33. Section 13K(2) of the Act provides that lack of procedural fairness is a ground for setting aside an award.

34. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*<sup>20</sup> the Full Court (Allsop CJ, Middleton and Foster JJ) relevantly said:

The required content of fairness in any particular case will depend on context...

The common element is that, generally speaking, the exercise of power should

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<sup>18</sup> [2011] HCA 37; (2011) 244 CLR 239 at [20]

<sup>19</sup> [2012] HCA 52 (15 November 2012).

<sup>20</sup> [2014] FCAFC 83 at [86].

be fair. That exercise will always have a human context. That is why, as Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*<sup>21</sup>, fairness is not an abstract concept, but essentially practical. The concern of the law is to avoid practical injustice. Fairness is normative, evaluative, context-specific and relative.

35. A useful practical analysis of the application of the principles of procedural fairness in the context of an arbitration is set out in a New Zealand decision of Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General*<sup>22</sup>. By way of summary, his Honour relevantly identified the following principles:

- (a) each party must be treated equally.
- (b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate including, for instance, whether the parties require an oral hearing or are content for the arbitrator to determine the matter on the papers.
- (c) As a minimum each party must be given full opportunity to present its case.
- (d) each party should be given the opportunity to present evidence and argument in support of its own case and to understand, test and rebut its opponent's case, including by cross-examination if oral evidence is to be given.
- (e) The arbitrator should not take into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.
- (f) Similarly the arbitrator should not base his decision on his own opinion and ideas if they were not expressly traversed during the hearing.
- (g) However, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing

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<sup>21</sup> [2003] HCA 6; 214 CLR 1 at 14.

<sup>22</sup> [1999] 2 NZLR 452.

their own conclusions from the material presented.

(h) Further, an arbitrator is not under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.<sup>23</sup>

64. Finally, it is worth noting that the Full Court of the Federal Court of Australia has expressed caution about permitting a situation where the factual findings of an arbitrator are “re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly.” And specifically will reject an application which is “a disguised attack on the factual findings of arbitrators dressed up as a complaint about natural Justice.”<sup>24</sup>

## **Referral of a point of Law**

65. As noted s 13G enables an arbitrator to refer a question of law to the Court. Authorities confirm that no hard and fast rule exists as to when that may be appropriate. Some assistance as to when that may be appropriate is found in the decision of *Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corpn*<sup>25</sup>. In that case, Lord Denning MR suggested that a threefold test should be applied;

1. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law.
2. The point of law should be clear cut and capable of being accurately stated as a point of law — as distinct from the dressing up of a matter of fact as if it were a point of law.
3. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case as distinct from a side issue of little importance<sup>26</sup>.

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<sup>23</sup> [1999] 2 NZLR 452 at 463.

<sup>24</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 (16 July 2014) at [54] – [55].

<sup>25</sup> [1973] QB 843 at 862.

<sup>26</sup> *Ibid.*

66. The opinion of the court is consultative only<sup>27</sup> and the Full Court may disagree with the court that was originally asked for the opinion.<sup>28</sup>

### **Obligation to give reasons**

67. As noted, Regulation 67P requires the arbitrator to provide reasons for his or her decision. That must include “a concise statement setting out:

- a) the arbitrator’s reasons for making the award; and
- b) the arbitrator’s findings of fact in the matter, referring to the evidence on which the findings are based.

68. In *Westport Insurance Corporation v Gordian Runoff Ltd*<sup>29</sup>, the High Court held that the obligation of an arbitrator to give reasons will depend upon the nature of the decision and on the particular circumstances of the case. It will, at least, include an obligation to give an indication of factual findings and the reasons for making the award. In circumstances where the case involves the construction and application of legislation the arbitrator is “obliged to explain succinctly why the various integers in [the] statutory provision were satisfied.”<sup>30</sup> In the case of family law property proceedings this would clearly include addressing the criteria and factors set out in ss 79 and 75(2) of the Act.

### **Grounds for setting aside an award**

69. Section 13 J of the Act enables a party to a registered award to apply for a review of the award “on a question of law”. Section 13J (2) provides that on review of an award, for that reason, the court may:

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

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<sup>27</sup> *In re Knight and Tabernacle Permanent Building Society* [1892] 2 Q.B. 613; *Carr v. Wodonga Shire* (1924) 34 C.L.R. 234; *In re Pridham Holdings Limited v. Smorgon Consolidated Industries Pty Ltd* [1974] V.R. 231.

<sup>28</sup> *In re Pridham Holdings Ltd* *ibid* and *Halfdan Grieg & Co. AIS v. Sterling Coal & Navigation Corporation* (*supra*, n. 34).

<sup>29</sup> [2011] HCA 37; (2011) 244 CLR 239.

<sup>30</sup> *Ibid* at [55].

70. Those matters that potentially constitute an error of law include but are not limited to:

- a) Absence of procedural fairness (which is itself a ground for setting aside and award (section 13K(2)).<sup>31</sup>
- b) Failure to provide reasons.<sup>32</sup>
- c) Acting with no or no probative evidence.<sup>33</sup>
- d) Taking into account irrelevant matters, or excluding from consideration relevant matters.<sup>34</sup>
- e) Manifest unreasonableness.<sup>35</sup>

71. As further noted, section 13K of the Act empowers the court to affirm, reverse or vary an award in the following circumstances;

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

72. I have discussed the issue of procedural fairness. A useful approach to an allegation of bias is to apply the three step test outlined by Gageler J in *Isbester v Knox City Council*<sup>36</sup>, which was as follows:

Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as a result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of

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<sup>31</sup> *Weiss v R* [2005] HCA 81; 224 CLR 300; 80 ALJR 444; 158 A Crim R 133; 223 ALR 662 (15 December 2005) at [45].

<sup>32</sup> *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.

<sup>33</sup> *Haider v JP Morgan Holdings Aust Ltd* [2007] NSWCA 158 at [33].

<sup>34</sup> *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177].

<sup>35</sup> *TX Australia Pty Limited v Broadcast Australia Pty Limited* [2012] NSWSC 4 (16 January 2012) at [107]

<sup>36</sup> [2015] HCA 20; (2015) 89 ALJR 609 at 619 [59].

the reasonableness of the apprehension of that deviation being caused by that factor in that way.

73. Time does not permit a detailed examination of the remaining provisions of section 13K of the Act. The topic is substantial in itself. However, to assist further research I note the provisions have some similarity to other provisions in the Act, for instance;

- S13K(2)(a) has some similarity to section 79A (1)(a);
- S13K(2)(b) has some similarity to section 90UM (1)(e); and
- S13K(2)(c) has some similarity to section 79A (1)(b).

## **Conclusion**

74. Recent amendments to the Family Law Rules are intended to give greater efficacy to arbitration of family law disputes. It is early days but there are some encouraging signs that the legal profession is now prepared to reconsider the possibility of arbitration. Experience in Australia and other common law jurisdictions suggests that, for many matters, arbitration may be an appropriate means of obtaining an objective final determination of family law disputes.