Family Law Council

07/20103

24 September 2008

The Hon Robert McClelland
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

Family Law Council Advice on Arbitration of Family Law Property and Financial Matters

Overview

The Family Law Council has completed its consideration of arbitration of family law property and financial matters. In accordance with its terms of reference, the Council focused on the desirability of compulsory arbitration and the means by which a compulsory model could be incorporated into the *Family Law Act 1975* (Cth). Council also considered ways of promoting voluntary arbitration.

Council's discussion paper, *The Answer from an Oracle*, set out a number of possible models for the introduction of a model of compulsory arbitration that involves giving the court discretion to order parties to attend arbitration (discretionary court-ordered arbitration). In response to the discussion paper, there was a clear indication that some key stakeholders do not support the introduction of discretionary court-ordered arbitration at this time. Council considers that a system of discretionary court-ordered arbitration is unlikely to succeed without the support of the courts and the profession. Council is of the view that the ideas set out in detail in the discussion paper have merit but acknowledges that implementation of those ideas is not appropriate at the present time.

Council considers that there may be a time when it is appropriate to give the Court the ability to send certain cases to arbitration. For that reason Council has developed a suggested model that might form the basis for future discussion (see Appendix A).

Although there is insufficient current support for compulsory arbitration, there continues to be support for arbitration as an option for consensual dispute resolution in appropriate cases. Council notes that after the issue of the Discussion Paper there was a resurgence of the promotion (but not the use of) consensual arbitration for property and financial matters by the Family Law Section of the Law Council.

The Family Law Council recommends below a number of cost-effective measures that can be taken to enhance support for voluntary arbitration processes.

Background and terms of reference

Council received terms of reference from the former Attorney-General, the Hon Philip Ruddock MP, on 26 May 2006. The terms of reference are:

> I request that the Family Law Council investigate arbitration of family law property and financial matters, taking into consideration the following:
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> 1. Is it possible, and if so is it desirable, for a court exercising jurisdiction under the *Family Law Act 1975* to have the ability to compulsorily require parties to proceedings to participate in arbitration of property and financial matters?
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> 2. What, if any, legislative changes need to be made to support compulsory arbitration?
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> 3. What, if any, changes to court processes need to be made to assist compulsory arbitration?
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> 4. What, if any, funding might be required to support voluntary and compulsory arbitration?
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> 5. What, if any, changes to court processes or other changes could be made to promote voluntary arbitration?

Discussion Paper

Council released a discussion paper in response to the terms of reference in May 2007. The paper, entitled *The Answer from an Oracle: arbitrating family law property and financial matters*, focussed on the desirability of compulsory arbitration, particularly as a means of promoting voluntary arbitration.

The first part of the discussion paper provided a background to arbitration, both in the family law systems and elsewhere. The discussion included a number of major domestic and international models for arbitration, including the very successful NSW Workers Compensation Commission model and Legal Aid Queensland family law arbitration model. The paper then provided a legal history of family law arbitration in Australia and discussed models of arbitration in other countries. Arbitration was first

introduced into the *Family Law Act* in 1991. It was hoped that it would provide another avenue for diverting appropriate cases away from the court system. The discussion paper argued that this hope has not been realised, and identified lack of confidence in the system as a crucial cause, engendered by the lack of a clear framework for arbitration.

Council highlighted the benefits of arbitration as a system which can be activated and deactivated at short notice with limited costs once a structure is in place, making it an ideal system to assist courts in addressing registry specific factors such as backlogs and delays in the replacement of retiring judges.

Paragraph 1 of the Terms of Reference requests that Council consider whether it is desirable to introduce a system of compulsory arbitration. The discussion paper responded to this by proposing the grant to judicial officers of a discretion to order appropriate cases to court-ordered, non-consensual arbitration ('court-ordered arbitration'). Council argued that establishment of such a system might help to encourage voluntary arbitration by raising general confidence in the concept of arbitration, and by providing a framework in which it could be conducted.

It should be emphasised that Courts would not order arbitration in every or even most cases. The Courts would retain a discretion to pick in which cases arbitration is ordered.

Council suggested four possible models for court-ordered arbitration. They were:

1. **Early neutral evaluation**, in which a neutral lawyer provides a non-binding judgment to the parties at an early stage, which may then be registered as a consent order with the consent of both the parties.

2. **Registration of award without judicial review**, in which the arbitrator's award becomes binding upon registration with the court, without judicial review upon registration, but with a right to a rehearing *de novo.*

3. **Due process award** in which the order becomes binding upon registration if a judicial officer finds that due process was followed in the production of the arbitral decision, and the parties have a right to a rehearing *de novo.*

4. **Just and equitable award**, in which the order becomes binding upon registration if a judicial officer, on reviewing the award, finds that the order was just and equitable in terms similar to those already used in the Family Law Act with respect to property adjudication. The parties would continue to have a right to a rehearing *de novo*.

The discussion paper acknowledged that any model adopted would need to meet the constitutional limitations on delegation of judicial power elaborated in cases such as *Brandy v HREOC*[1] and suggested consideration of either model 3 or 4. It was considered that Model 4 ('just and equitable award') was the safest, albeit the most expensive, model. The discussion paper also raised a number of other issues about how a discretionary court-ordered model would operate, including costs of a new arbitration scheme, referrals to arbitration, the selection of the arbitrator and the conduct of arbitral proceedings.

The discussion paper also asked what can be done to improve implementation of consensual arbitration.

Council sought feedback on these suggestions for possible reform of the arbitration provisions, and posed 24 questions on various aspects of arbitration. Submissions closed on 13 August 2007. Twelve submissions were received, including submissions from the Family Court of Australia and the Federal Magistrates Court, legal practitioner representative bodies, including the Family Law Section of the Law Council of Australia, National Legal Aid, and a number of NGOs.[2]

Should the courts be given discretion to order appropriate cases to arbitration?

All but one of the submissions were favourable to arbitration conducted with the consent of the parties.[3] However, a number of submissions, and in particular submissions from key stakeholders that would be involved in implementing a new model, did not support the introduction of court-ordered arbitration.

The Federal Magistrates Court and the Family Law Section of the Law Council of Australia (FLS) rejected the introduction of court-ordered arbitration.[4] The Family Court of Australia did not wish to express a view about whether it should be implemented, but considered that it was likely to be of limited utility in the Family Court setting. The National Alternative Dispute Resolution Council (NADRAC), the Queensland Law Society and the Lone Fathers Association of the Northern Territory also indicated a lack of support for the proposal.

Other submissions were supportive of the proposals in the Discussion Paper.[5]

A number of reasons were put forward for opposing the introduction of court-ordered arbitration. A number of stakeholders disputed the need for additional court-ordered dispute resolution mechanisms due to:

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1 (1995) 183 CLR 245.

2 See Appendix B for a full list of submissions.

3 The Lone Fathers Association of the Northern Territory argued that other measures are required to reduce family acrimony and bring better resolutions: Lone Fathers Association of the Northern Territory, *Submission*, 5 August 2007.

4 The Law Society of South Australia supported the submission of the Family Law Section of the Law Council of Australia.

5 The NSW Bar Association, The ACT Bar Association, Law Society of NSW, Family Law Reform Association, National Legal Aid.

- the establishment of the Federal Magistrates Court to deal with less complex matters has reduced the number of matters that might be suitable for court-ordered arbitration;[6]

- in the Family Court, changes to case management processes that have significantly reduced delays, including 'single expert' procedures, the Less Adversarial Trial process, and the impending introduction of an individual hearing docket and streamlined documentation;[7]

- in the Family Court, part issues that might have been suitable for arbitration can now be dealt with efficiently by the single expert procedures;[8] and

- the introduction of pre-action procedures that require parties to make a genuine effort to resolve a dispute before making an application to court.[9]

Furthermore, the Family Court strongly submitted that court delays are not an appropriate reason for referring matters to arbitration. The Court took the view that it cannot choose to opt out of its judicial workload. The Court pointed to levels of judicial resources, case management issues, the failure of parties to comply with filing directions and mutual adjournments as the cause of most delays in the Family Court.[10]

Even if it was proven there is a need for another court-ordered dispute resolution mechanism, it was disputed that arbitration would be the most effective option because of:

- a lack of evidence that arbitration would be cheaper, faster and less adversarial than court resolution, particularly in the Federal Magistrates Court;[11]

- the fact that arbitration does not provide substantially greater party control over proceedings, as arbitrations are subject to the requirements of due process and thus likely to emulate court procedure;[12] and

- the possibility of significant additional legal and court costs for the parties in the event of a de novo rehearing. That is, court ordered arbitration lacks sufficient finality to be attractive.[13]

The FLS argued that any arbitration process ordered by the court will inevitably involve a heavy burden of rules and regulations in order to overcome any constitutional issues. It was concerned that this would have an undesirable flow on impact on private arbitration processes which are intended to provide greater flexibility to meet the needs of the users. The FLS was concerned that a rule-driven

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6 Family Court of Australia, *Submission*, 31 August 2007, p 2.
7 Family Court of Australia, *Submission*, 31 August 2007, pp 3f. NADRAC also indicated there is a lack of evidence of widespread court delays: NADRAC, *Submission*, 31 August 2007, p 1–2.
8 Family Court of Australia, *Submission*, 31 August 2007, p 5.
9 Family Court of Australia, *Submission*, 31 August 2007, p 3.
10 Family Court of Australia, *Submission*, 31 August 2007, p 14.
11 Federal Magistrates Court, *Submission*, 20 September 2007, p 2; NADRAC, *Submission*, 31 August 2007, p 1.
12 NADRAC, *Submission*, 31 August 2007, p 1–2.
13 NADRAC, *Submission*, 31 August 2007, p 1–2.

arbitration model would effectively be as adversarial and costly as court proceedings, thus have a significant deleterious effect on the attractiveness of arbitration as a whole.[14]

The FLS agreed with the Council's assertion that some form of compulsion is necessary to ensure the development of arbitration, but considered that the compulsion should be focused on forcing all litigants to undertake a dispute resolution option, which may involve arbitration, prior to court proceedings.[15] Since publication of Council's discussion paper, the FLS has been involved in a major effort to encourage consensual arbitration as an option in Melbourne.[16]

A number of stakeholders gave support for court-ordered arbitration.[17] National Legal Aid's support was contingent on certain elements of the model being in place, including the requirement that a referral be made only where at least one party gives consent and the other party has the opportunity to express their objection.[18]

How can consensual arbitration be promoted?

As indicated above, all but one submission expressed support for consensual arbitration as an option available to the parties. Consensual arbitration can be utilised as a pre-action procedure and is also supported in the *Family Law Act* as an optional dispute resolution method. Since 2000, a list of qualified arbitrators has been kept in compliance with the Family Law Regulations.[19] As noted in Council's discussion paper, however, arbitration has hardly been used at all in the family law context and the qualified arbitrators have had little work to do for the last 15 years. Notwithstanding the efforts made to promote the "Melbourne project" (see below), this still seems to be the case.

Council has been made aware of a successful arbitration scheme being operated by Legal Aid Queensland (LAQ). These schemes target different market segments, and provide different models.

The LAQ scheme has been in operation since 2001 and is focused on rapid and inexpensive resolution of property disputes for low value cases. The scheme is aimed at those cases where the limited value of the property pool makes the legal expense of a full court hearing a particularly heavy burden for the litigants, but where there are genuine issues in dispute which are not resolved by other forms of alternative dispute resolution. Arbitral hearings are usually conducted on the papers, although there is a right to be heard by telephone. The scheme is designed with a strong emphasis on simplicity, speed, and on low costs. A grant of aid is made to legally aided parties, and a separate grant is made to the arbitrator. The scheme is part of the core dispute resolution services offered by the LAQ, and there has been a steady increase in the

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14 Family Law Section of the Law Council of Australia, *Submission*, 4 September 2007, p 6.
15 Family Law Section of the Law Council of Australia, *Submission*, 4 September 2007, p 7.
16 See discussion below on the 'Melbourne Project'.
17 NSW Bar Association; ACT Bar Association; NSW Law Society; Family Law Reform Association; National Legal Aid.
18 National Legal Aid, *Submission*, 23 August 2007.
19 As at 27 March 2008, there were 137 family law arbitrators included on the list (an increase from 116 in March 2007).

number of matters referred to arbitration each year. It operates at fairly minimal cost as most participants pay their legal aid costs at the completion of the matter. This has involved a remarkable total of 1,373 referrals for property arbitration, via LAQ, in 4 years, compared to probably less than ten in the rest of Australia. This pioneering arbitration project by Queensland Legal Aid (replicating LAQ mediation pilots in the early 1990's) requires further study especially as all other efforts to introduce family property arbitration have been such dismal failures.[20]

The Family Law Section of the Law Council of Australia (FLS) in conjunction with the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) promoted another scheme for arbitration of family law property matters, the 'Melbourne Project'. Launched in November 2007, the aim of the project is both to promote consensual arbitration, and to help the Family Court deal with delays in the hearing of property matters in the Melbourne registry.[21]

The Melbourne Project operates under the existing provisions of the Family Law Act and the Family Law Regulations. The proposal is that arbitrations conducted under the Project have set fees, set out in three bands. Each band has an initial 'composite' fee which provides for a comprehensive package of services, including preparation for the hearing, an initial allocation of one day's hearing time, and preparation of the award. If more than one day is required for hearing, the fee schedule provides for a flat rate daily fee in addition to the composite fee.[22] Arbitrators willing to act as part of the project have registered with the FLS, and indicated which band of fees they will charge.[23]

The Melbourne Project has attracted considerable support from senior members of the legal profession across Australia, and there are talks of expanding the operation of the project to other cities.[24] As at August 2008, virtually no arbitrations had been conducted under the Project. It is still too early to predict whether or not this initiative will be successful.

Council considers that one of the key factors underlying the lack of take up of arbitration as an option is a lack of confidence in an established process of arbitration. The success of the LAQ scheme shows that where an appropriately resourced model can be applied to meet the needs of certain stakeholders, arbitration can be an effective and useful process for resolving disputes. Whilst the promotion of the Melbourne project has attracted additional members of the legal profession to pay to

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[20] Legal Aid Queensland provided statistics to Council, indicating the following numberrs of referrals in a financial year: 2003–04, 230; 2004–05, 212; 2005–06, 367; 2006–07, 360; and from July 2007 to December 2007, 194.

[21] Law Council of Australia, 'Law Council Project to Encourage Family Law Dispute Resolution' (Press Release, 14 November 2007).

[22] The fees are: Fee Band 1, $10,000 (composite) and $5,000 (daily fee); Fee Band 2, $7,500 (composite) and $3,750 (daily fee); Fee Band 3, $5,000 (composite) and $2,500 (daily fee).

[23] The list, including 79 arbitrators, is available at <http://www.familylawsection.org.au/resource/List@8Nov07withfulldetailsALLSTATES.pdf>, last viewed 27 March 2008.

[24] In a meeting with Peter Murphy SC on 27 April 2007, Council was told of proposals for a consortium of senior lawyers in Brisbane to offer arbitration services and to promote voluntary arbitration particularly in high wealth cases.

be trained as arbitrators the consensual take up of arbitration has been minimal, or zero.

Consensual arbitration

Council's discussion paper asked what could be done to improve the implementation of consensual arbitration.[25] A number of issues were raised by stakeholders for consideration.

Information and education

Submissions emphasised the need for appropriate education of practitioners and the public for the success of any arbitration scheme.

Council considers that the profession must play a significant role in promoting the benefits of arbitration and establishing trust in the process. This is likely to be the most effective way to spread interest throughout the profession. Notwithstanding the results of the Melbourne project, it appears to have been at least partly successful in generating interest within the profession about arbitration and establishing an available panel of trained arbitrators. It remains to be seen if this will result in enticing practitioners to undertake arbitration.

As advice about family dispute resolution rests not only with the profession, it is necessary to ensure that information about arbitration processes can be obtained from a variety of sources. Council is not suggesting that government fund an expensive education and training campaign to promote arbitration. It may be possible, however, for government to support the growth in interest in arbitration through some simple and cost-effective measures. These include:

- the development of fact sheets and brochures explaining the arbitration process, examples of the types of cases appropriate for arbitration, and how to find arbitration services. These fact sheets and brochures can be made available through Australian Law Online and other online information websites, and distributed to Family Relationship Centres;

- encouraging Family Relationship Centres to promote arbitration as a possible option in appropriate cases where ongoing disputes are in relation to property, and to develop good relationships with those in the local profession that are familiar with arbitration processes; and

- providing public support for initiatives that promote arbitration, such as the arbitration kit produced by the FLS of the Law Council.

Council also considers that the courts can play a role in promoting the integrity of the arbitration process by encouraging parties in appropriate cases to consider it as an option.[26] This would require the courts to ensure that its judicial officers and registrars

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[25] Family Law Council, *The Answer from an Oracle*, p 65.

[26] It is noted that legislative permission to advertise arbitration and other dispute resolution services in Family Court registries was removed from the *Family Law Regulations 1984* by the *Family Law Amendment Regulations 2006(No 1)*. The Explanatory Statement indicated that this is an administrative matter for the courts and does not require legislative dictation.

were equipped with information about the kinds of cases most suitable for arbitration, and the availability of arbitration services in the area.

Council notes that, to assist with Council's investigation of the need for compulsory arbitration, the Family Court of Australia implemented a one month period where registrars from a number of registries asked parties if they would consider arbitration as an option.[27] While the rate of positive responses was low during the survey period, Council considers that raising arbitration as a possible option in appropriate cases will, over time, help to promote more constant consideration by the profession of the idea of arbitration. It is possible that if courts, by consent, were able to order a few pilot arbitrations, and most importantly, if these were "successful" on a variety of measures, for both parties and lawyers, then gossip in the legal profession would lead to increased use of arbitration, at least for a time. Before the profession more readily suggests the option of arbitration to clients who have already engaged in court processes, however, there are a few legislative changes that could be implemented to make arbitration a more attractive option.

Rights of rehearing

At present, where a matter is referred to consensual arbitration under s 13E, a review of the arbitral award can only be made on questions of law.[28] Many of the submissions emphasised that appeal rights from the arbitration were an important consideration for practitioners considering whether to recommend consensual arbitration to their clients. In particular, there was general support for the proposition that parties should be able to go to consensual arbitration and agree that review should be by way of a rehearing *de novo* rather than limited to appeal on a question of law.

For example, National Legal Aid submitted that in consensual arbitration, 'parties should be at liberty to agree on the terms of the arbitration.'[29] The NSW Bar Association argued that 'a rehearing *de novo* is essential to make any arbitration process attractive'. In the Association's view, limited appeal rights have deterred many parties from trying arbitration.[30] Introduction of *de novo* review of voluntary arbitral awards was also supported by the Family Court of Australia, the Federal Magistrates Court and the NSW Law Society. While the ACT Bar Association felt that the limitation of rights of appeal to questions of law only was attractive to litigants, because it does not 'require regurgitation and delving into greater depth of factual details,' they still felt that litigants should be able to contract for such rights of review as were attractive to them, including *de novo* rehearing.[31]

Council considers it would be valuable to amend the *Family Law Act* to provide the option for parties who choose consensual arbitration under s 13E to agree that review may be by way of a rehearing *de novo*. Of course this option would not be chosen by some parties who are looking for the most final arbitral order as possible.

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27 The results of the survey are set out in Family Law Council, *The Answer from an Oracle*, p 41.

28 *Family Law Act 1975* (Cth) s 13J(1).

29 National Legal Aid, *Submission*, 23 August 2007, pp 6f. The ACT Bar Association agreed: *Submission*, 13 August 2007, p 3.

30 NSW Bar Association, *Submission*, 13 August 2007, p 4.

31 ACT Bar Association, *Submission*, 13 August 2007, p 3.

Registration of arbitral awards

One of the benefits of undertaking arbitration referred under s 13E is the ability to have the award registered and have the effect of a decree of the court. Registration of arbitral awards is not currently an automatic process. Regulation 67Q of the *Family Law Regulations 2004* provides that a party may 'bring to the attention of the court any reason why the award should not be registered' within 28 days of being served with the other party's application to have the award registered. The FLS submitted that this may allow parties to make objections to findings of fact, and provide parties with an opportunity for review of the award additional to the powers of the court to review awards on questions of law under s 13J or set them aside under s 13K. The FLS suggested that reg 67Q should be amended to remove the right to object to registration and to impose a duty on the Court to register the award.

Council supports the proposed amendment to reg 67Q Family Law Regulations.

Appeal rights

With respect to appeal rights, the FLS identified a 'perception by some members of the judiciary that arbitrators are by virtue of the review on a question of law provisions less susceptible to appeal than judges or federal magistrates'.[32] The FLS proposed that s 13J should be amended to make it clearer that appeal rights are the same from arbitration as they are from the decision of a judge or federal magistrate.[33]

Council is of the view that an amendment to s 13J of the FLA will not improve the chances of a consensual arbitration scheme becoming more popular. .

Costs orders

There was some support for the proposition that s 117(2A) of the *Family Law Act* be amended to allow the courts to take into account whether the party had achieved a better result on the rehearing when ordering costs for a rehearing of a court-ordered arbitration..[34] The FLS argued that 'failure to participate or *bona fide* participate in an ADR process' could be added as a relevant factor to consider in making costs orders. The FLS also suggested that failure to participate in specified forms of alternative dispute resolution could be made an exception to s 117(1), which provides that parties should bear their own costs.[35] The Family Court considered that a number of factors in s 117(2A) are already relevant to situations where one party has refused to engage in alternative dispute resolution, and any other relevant factors could be made the subject of submissions and considered under s 117(2A)(g).[36]

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32 Family Law Section of the Law Council of Australia, *Submission*, 4 September 2007, p 10.

33 Ibid.

34 Family Law Reform Association of NSW, *Submission*, 20 August 2007, p 3; ACT Bar Association, *Submission*, 13 August 2007, p 3; Law Society of NSW Family Issues Committee, *Submission*, 9 August 2007, p 2; National Legal Aid, *Submission*, 23 August 2007, p 5.

35 Family Law Section of the Law Council of Australia, *Submission*, 4 September 2007, p 8.

36 Family Court of Australia, *Submission*, 31 August 2007, p 8. The NSW Bar Association also took this view: *Submission*, 13 August 2007, p 4.

Conclusion

At this time, there is little support in Australia for the introduction of court-ordered arbitration for financial disputes under the *Family Law Act.* This is unlikely to change unless and until funding bodies and lawyers have repeated and successful experiences in using various models of family arbitration. In the event that, in the future, key stakeholders believe the time has come to attempt to construct a system of court ordered arbitration, then Appendix A provides a suggested model. Use may breed confidence, and confidence breeds use. Only in Queensland is there a bank of repeated, use and confidence in an abbreviated model of arbitration among a small group of lawyers, and in Legal Aid Queensland. This success story is worth further study in order to understand its features, strengths and weaknesses, and possible application around Australia.

Council is particularly influenced by the fact that the courts and the peak professional body representing family law practitioners are not supportive of discretionary court-ordered arbitration, with the Federal Magistrates Court considering it undesirable and the Family Court of Australia giving the opinion that it would not be widely used if implemented. As a court-ordered arbitration model relies on court orders, it is necessary to have court support for the successful introduction of such a model. Council therefore considers that it is not timely to introduce provisions for court-ordered arbitration to the *Family Law Act*.

As outlined in detail above, Council suggests the following measures that could be taken to enhance the reputation of consensual arbitration:

- one or more detailed studies of the unique and apparently successful LAQ property arbitration scheme. This provides a pioneering model of low-cost and unorthodox dispute resolution which may also inform areas of family law reform.

- amend the *Family Law Act* to provide the option for parties referred to consensual arbitration under s 13E to agree that review may be by way of a rehearing *de novo*;

- amend reg 67Q Family Law Regulations to eliminate the ability, in consensual arbitration, to seek to interfere with the registration of the award.

Based on results thus far, Council also notes that the Melbourne Project and multiple other individual entrepreneurial projects around Australia have made minimal impact on promoting arbitration as an option for lawyers and litigants to consider. As the family dispute resolution landscape continues to develop, various forms of arbitration will undoubtedly be discussed again.

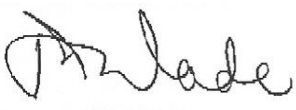
Council notes with thanks that many of the stakeholders who opposed the introduction of discretionary court-ordered arbitration answered questions posed by Council in detail.

In Appendix A, Council sets out its currently preferred option for court-ordered arbitration should circumstances change in the future and implementation be considered again. The model has been developed after taking into consideration the

views of stakeholders who made submissions to the discussion paper. Of course, other models could be reconsidered in any future discussion.

We also enclose, for possible future consideration the New South Wales Workers Compensation Commissioner's Code of Conduct (Appendix C).

Yours sincerely,



Professor John Wade
Chairperson, Family Law Council

APPENDIX A: MODEL FOR DISCRETIONARY COURT-ORDERED ARBITRATION

Constitutional basis: key elements of model
The following model could be considered for a court-ordered arbitration process:

Just and equitable award model

1. A court exercising jurisdiction under the Family Law Act orders parties to arbitration, in a case that the court in its discretion considers is appropriate for arbitration.
2. The arbitration is conducted in accordance with a process directed by the arbitrator.
3. The award that the arbitrator makes has no binding effect.
4. The award is sent by the arbitrator to the court for an order to be made in terms of the award.
5. Each party has a right to a hearing de novo.
6. Subject to either party's right for a hearing de novo, the court makes an order in similar terms to the arbitrator's award if the court considers it to be:
    a. just and equitable to do so (*Family Law Act* s 79(2) and the proposed s 90SM);
    b. proper (*Family Law Act* s 74(1) and the proposed s 90SE); or
    c. just (*Family Law Act* s 117(2)).

The model is based on the notion that the arbitrators are exercising non-judicial power when deciding the substance of the dispute and that the judicial power remains with the judges and federal magistrates in their supervisory role. Effect is given to the arbitral award by judicial order. The court order in step 6 requires the court to look at the reasons given by the arbitrator for the award, not the process undertaken in making the award, and determining whether the order should be made.

It is not envisaged that a transcript of the arbitral proceedings would be taken. The court's decision as to whether the award is just and equitable would be made on the basis of what is recorded in the arbitral award.

This model, which was Model 4 in Council's Discussion Paper, was considered by Council and most stakeholders to best balance the constitutional concerns surrounding judicial supervision of the exercise of non-judicial power, as raised in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, with considerations of costs to the courts and parties.[37]

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[37] For a full discussion of the constitutional concerns on these issues, see Family Law Council, *The Answer from the Oracle: Arbitrating Family Law Property and Financial Matters—Discussion Paper* (2007), Ch 6.

An alternate model is for the court to assess the award only to ensure that due process has been followed and the award validly made.[38] This model would have fewer cost implications for the Family Courts by making the process by which the order is made simpler. While there was some support for the 'due process' model, there were ongoing concerns about its constitutional validity.

Determining matters that can be ordered to arbitration

It is recommended that the court have the discretion to order any property or financial matter to arbitration, with the exception of matters relating to:

(a) enforcement;

(b) applications under s 79A and the proposed s 90SN;

(c) determination of the validity of, or termination of, a Binding Financial Agreement (ss 90K, 90KA and the proposed s 90UM and s 90UN);

(d) the revocation of approval of a maintenance agreement (s 87(8));

(e) a case where a case guardian has been appointed under Pt 6.3 of the *Family Law Rules*.

Concerns were raised that there may be particular circumstances about a case that would make it inappropriate for referral to arbitration. It is recommended that the legislation include a list of non-exclusive, non-binding matters for the court to consider in exercising its discretion to refer a matter to arbitration, including:

(a) whether arbitration is likely to be able to deal with a matter at less cost to or with more convenience for the parties;[39]

(b) current court timeframes;

(c) the existence of allegations of violence;

(d) security issues for the parties;

(e) complexity of a matter;

(f) value of the asset pool;

(g) third party interests in the case;

(h) availability of a suitable arbitrator;

(i) special features of the matter and the parties which may make the risk of one or other of the parties seeking a rehearing of the arbitrator's award high; and

(j) whether the case involves questions of general importance, such that it would be desirable for the court to issue a decision on one or more points in issue.[40]

Timing of referrals to arbitration

It is recommended that the legislation provide the court discretion to order a matter to arbitration at any time after commencement of proceedings. Case management

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[38] See Model 3: Due Process Award Model, set out at [7.14]–[7.23] of Council's Discussion Paper.
[39] See *Family Law Rules 2004* Rule 11.18(b)(i)–(ii).
[40] See *Federal Magistrates Court Rules 2001* Rule 8.02(4)(a).

guidelines should state that there is an expectation that, if not already considered, consideration of referral to arbitration should be made at the conclusion of any usual primary dispute resolution processes undertaken in the court. At present, in the case of the Family Court of Australia, this will be at the conclusion of a conference required by s 79(9) of the *Family Law Act*; and in the Federal Magistrates Court at conclusion of the conciliation conference if one is ordered. Referral at an earlier stage must take into consideration the benefits of parties first completing the conciliation conference, and the availability of documentation for an arbitration hearing.

Procedural matters

Referral of part matters: Section 13E of the *Family Law Act* currently allows referral of proceedings, or any part of them, to arbitration. Concerns were raised that, because the arbitral award in relation to the part of the matter is not binding, the part of the matter would be re-litigated when the court considered the remaining issues. To provide full discretion to the court, it is recommended that the power to order a part of proceedings to arbitration be retained. It is not envisaged, however, that such a referral will often be made. Part referral would only be appropriate where the court is of the view that a conclusive dealing with the discrete issue would lead to a high likelihood of settlement of the remaining issues.

Arbitration on the papers: While there was some guarded support for allowing arbitration on the papers, there was no support for mandatory referral to hearings on the papers, as occurs in some other court-referred arbitration systems. Arbitration on the papers is an extremely cost-effective measure, and a necessary element of high volume arbitration processes, particularly where arbitration is a mandatory step in a dispute resolution process. It is most effective in less complex matters and where appropriate documentation is available to the arbitrator. In the family law system, there are a variety of processes that offer possible resolution of disputes for less complex matters before reaching the latter stages of a court process. It is not envisaged that this model for discretionary court-ordered arbitration will be used to process high volumes of cases, but rather those selected cases that are suitable for an arbitration hearing. There are also the practical considerations relating to preparing full documentation for an arbitration on the papers.

It is recommended that the parties be given a right to appear in a hearing before an arbitrator. Parties may, of course, agree to arbitration on the papers.

Referral to court on question of law: Section 13G of the *Family Law Act* allows an arbitrator in a s 13E arbitration to refer a question of law to the court on his or her own initiative or that of one of the parties, at any time prior to the making of the arbitral award. It is recommended that this ability to refer questions of law be retained for all court-ordered arbitration. Parties should not, however, have the power to require an arbitrator to refer a question of law to the court. The provisions should not need to be used on a regular basis if careful consideration is put into determining whether a particular matter is suitable for referral to arbitration. It is appropriate that the court have discretion to refuse to hear a question of law referred by an arbitrator if the court is not satisfied that it would be an effective use of court time.

Referral of entire matter back to court: A range of circumstances may arise where it would be appropriate to allow referral of an entire matter back to court prior to the making of an arbitral award. Such circumstances may include where:

- it has become apparent to the arbitrator that a party lacks capacity to participate in the arbitration;
- a party has died;
- a party has become bankrupt;
- a conflict of interest has arisen; or
- the safety of the arbitrator or a party has become an issue.

Rather than specify the situations where a referral would be appropriate, it is recommended that the Act provide that the court has the discretion to revoke an order for arbitration and bring the matter back before the court in special circumstances.

Who are the arbitrators?

A successful arbitration scheme can involve two formats that could work side-by-side, or be adopted independently: a court-annexed process, or arbitration delivered by private practitioners.

Court-annexed arbitration: The Chief Justice and Chief Federal Magistrate could nominate particular registrars of their courts to conduct discretionary court-ordered arbitration. This approach enjoys a number of advantages. The use of registrars as arbitrators gives the Court access to a pool of arbitrators who may be used according to operational imperatives. In addition, registrars are generally well respected and have substantial experience with family law matters.

Court-annexed arbitration would take place at a court venue, with the registrar arbitrator allocated by the court according to internal administrative processes. Where registrar arbitrators are not available (either because none have been nominated or none is available at the time of the referral), parties ordered to attend arbitration will be referred to a private arbitrator.

Private arbitration:

Private arbitrators should be legal practitioners with appropriate experience in family law. While the technical requirements of reg 67B of the *Family Law Regulations* are appropriate, a further step is required to create a pool of arbitrators that are available, and in which the courts, parties and their legal representatives can have confidence.

It is recommended that a panel of arbitrators for discretionary court-ordered arbitration be selected by the Chief Justice and Chief Federal Magistrate in consultation with the Law Council or state bar and law societies. An appointment as an arbitrator should be subject to review on a yearly basis. Use of experienced practitioners on an appointed panel will have a number of beneficial effects. Practitioners and clients will be able to be confident that arbitrators on the panel are suitably qualified to provide a definitive decision on a matter being arbitrated. Annual review of the membership of the panel would ensure that continuation on the panel will be subject to satisfactory continuing performance. Limitation of the field of arbitrators will ensure that sufficient work is provided to arbitrators to make membership of the panel an attractive option and that panel members will develop their arbitral skills.

The panel would be managed by the court through administrative processes, ensuring that a matter ordered to arbitration is allocated to an available practitioner from the panel. Alternatively, the parties may agree to seek the services of another practitioner who is a member on the panel. It is not, however, appropriate to allow the court officer making the referral to specify a particular arbitrator without the consent of the parties.

Arbitration conducted by a private arbitrator can be conducted in a court venue where facilities are available. Alternatively, parties can agree on a location and any associated cost for the venue. It is noted that private arbitrators should be more able to travel in order to conduct an arbitration in a location close to the parties than registrars, who are restricted to the court or confined to circuits.

Costs of arbitration process

For court-annexed arbitration, there would be no cost to the parties for the arbitration process, although parties would be required to cover the costs of their legal representation for the process.

For private arbitration, parties will be required to share the costs of the arbitration process, including the costs of the arbitrator (discussed below) and any venue costs.

A fee structure should be established for court-ordered private arbitration, ensuring certainty for parties and those seeking to be included on the arbitrators' panel. The rate should be equivalent to the high end of the daily fee scale provided for junior counsel by Item 205 of Sch 3 of the *Family Law Rules*, ensuring that suitably experienced practitioners are attracted to the role.

It is recommended that the fee structure for court-ordered arbitration should incorporate a composite rate, plus a flat daily rate.[41] The composite rate, the equivalent of the rate for two days work, would allow for preparation for the hearing, an initial allocation of one day's hearing time, and preparation of the award.[42] It is expected that most matters would be able to be completed within a day and attract the composite rate only. Additional hearing days would attract the flat daily rate. Under the present fee scales, this would be the equivalent of a composite rate of $6,602.50, and a daily rate of $3,301.25.

Consideration should be given to ensuring the legal aid funds can be made available to eligible parties to cover the costs of the arbitration process and the costs of legal representation throughout the process on the basis that any obligation upon the eligible party to make a contribution to those costs be a charge against the fruits of any award which that person receives.

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[41] This structure is based on the fee structure developed by the Family Law Section of the Law Council of Australia (FLS) in conjunction with the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) for the 'Melbourne Project' scheme for private arbitration of family law property matters. The rates envisaged in this document for court-ordered arbitration are similar to the lowest tier provided for in the Melbourne Project model.

[42] Note that this varies from Council's position in the Discussion Paper at [5.10]. After stakeholder feedback, it was considered that the estimate of 4 hours for each arbitration hearing was insufficient, and that a full day is a more appropriate estimate for the hearing.

Rights, duties and immunities of arbitrators

The duties of an arbitrator, as set out in reg 67I of the *Family Law Regulations*, are appropriate. There are, however, a broader list of rights and duties and ethical responsibilities that would be appropriate to document as applying to arbitrators.

There was general support for the NSW Workers Compensation Commission's Code of Conduct for arbitrators.[43] It is recommended that a similar code of conduct, to apply to arbitrators conducting arbitrations ordered under the *Family Law Act*, be developed. Making these rights and duties explicit is important in order to promote awareness of them amongst arbitrators, and confidence in the system amongst the general public and practitioners.

Under s 10P of the *Family Law Act*, arbitrators currently have the same immunity as a judge of the Family Court has whilst preforming their duties. It is recommended that this immunity for arbitrators be retained.

[43] A copy of the NSWWCC Code of Conduct is attached as Appendix C.

APPENDIX B: SUBMISSIONS TO THE FAMILY LAW COUNCIL IN RESPONSE TO THE DISCUSSION PAPER 'THE ANSWER FROM AN ORACLE: ARBITRATING FAMILY LAW PROPERTY AND FINANCIAL MATTERS'

Submissions were received from:

- Family Court of Australia
- Federal Magistrates Court
- Family Law Section of the Law Council of Australia
- New South Wales Bar Association
- Australian Capital Territory Bar Association
- Family Issues and Arbitration Liaison Committees of the Law Society of New South Wales
- Queensland Law Society
- Law Society of South Australia
- National Legal Aid
- National Alternative Dispute Resolution Advisory Council
- Family Law Reform Association NSW
- Lone Fathers Association NT

APPENDIX C: WORKERS COMPENSATION COMMISSION

ARBITRATORS' CODE OF CONDUCT
(Issued February 2007)

This Code governs the conduct of persons appointed by the President of the Workers Compensation Commission ('the Commission') as Arbitrators pursuant to section 368 of the *Workplace Injury Management and Workers Compensation Act* 1998 ('the 1998 Act'). It also provides guidance to Arbitrators in identifying and resolving ethical issues.

PURPOSE

This Code seeks to guide Arbitrators in carrying out their duties in a manner that is consistent with the objectives of the Commission, and to assist them:

- in ensuring the highest standards of conduct in their relationship with the
- parties undergoing arbitration,
- in maintaining appropriate standards of professional performance, and
- in identifying and resolving ethical dilemmas or disputes.

ARBITRATORS ROLE

The fundamental role of Arbitrators is to be impartial and independent in carrying out their statutory duties of (1) attempting to bring the parties involved in a dispute to a settlement of the issues appropriately referred for resolution, which is acceptable to all of them, and, where this is not achieved, (2) making a determination to conclude that dispute.

COMPLIANCE WITH COMMISSION OBJECTIVES

Arbitrators must act in accordance with the objectives of the Workers Compensation Commission as set out in section 367 of the 1998 Act. To this end, they must work with the staff and other Members of the Commission to provide:

- a fair and cost effective system for the resolution of disputes,
- a timely service, so as to ensure that workers' entitlements are determined promptly,
- a dispute resolution service that meets worker and employer expectations in relation to accessibility, approachability and professionalism, and
- an independent dispute resolution service that is effective in settling matters, and leads to durable agreements between the parties in accordance with the Workers Compensation Acts.

Complaints in relation to Arbitrators will be dealt with as outlined in the Commission's Access and Equity Service Charter

GENERAL RESPONSIBILITIES

Arbitrators have the following general responsibilities:

- to demonstrate a respect for the law, in both their professional and private lives, including awareness of and compliance with legislation dealing with such matters as privacy, discrimination, and corruption.
- to uphold the highest standards of integrity, truthfulness, and honesty, and act ethically in accordance with the law,
- to ensure fairness and timeliness in the performance of their duties in dealing with parties involved in Commission proceedings,
- to remain, at all times, independent of the parties in the matter before them and free from any influence external to those proceedings,

- to be scrupulous in the use of Commission resources,
- to respect the confidentiality of all matters raised in proceedings before them,
- to maintain the highest professional standards in their conduct, and in the performance of their duties and functions, in particular by continuing to improve and develop their professional knowledge and skills, and
- to uphold the integrity and reputation of the Commission at all times. To this end, Arbitrators must refrain from engaging in inappropriate activities, or expressing inappropriate opinions, that might diminish the standing of the Commission, or compromise their ability to deal with specific cases.

FAIRNESS

In exercising their powers, Arbitrators must:

- conduct proceedings according to the law, with due regard to equity, good conscience, and the substantial merits of the case,
- abide by the principles of procedural fairness,
- ensure that all parties are given adequate opportunity to participate in proceedings,
- ensure that decisions are based on relevant and logically probative information,
- treat the parties with respect and courtesy,
- take into consideration any special needs, such as language, cultural background, literacy or disability,
- ensure that any communication with the parties and witnesses occurs in an open and transparent way,
- consider any factors that may give rise to an unfair advantage to one party over another,
- act without bias, and in a way that does not give rise to an apprehension of bias, and
- have regard to the Commission's Access and Equity Service Charter at all times, particularly in considering the special needs of any party to Commission proceedings in areas such as language, cultural background, literacy or disability.

AVOIDANCE OF CONFLICT OF INTEREST

With respect to conflicts of interests, Arbitrators should, at the earliest opportunity, advise the Registrar of the Commission and the parties (where necessary) of any actual or perceived conflict of interest that may prevent them from carrying out their duties in accordance with this Code. This includes any factor that may give rise to a reasonable apprehension of bias by a party to the proceedings.

The case law on bias and apprehended bias would suggest that an arbitrator who regularly acts for a particular union, employer, or insurer/agent should ensure that the Commission does not allocate to him/her, and that he/she does not accept, matters involving those clients. Likewise a barrister arbitrator who is regularly briefed by a particular firm of solicitors should not deal with Commission matters conducted by that firm.

PROFESSIONAL STANDARDS

Arbitrators should:

- regularly review their performance to ensure that they are able to meet the objectives of the Commission,
- conscientiously and effectively complete the resolution of each dispute as

necessary and appropriate, and in the manner required, with a view to bringing finality to that dispute.
- co-operate fully with performance evaluations, and complaint investigations conducted by the Commission,
- undertake continuing training to develop and enhance knowledge and skills relevant to their role as Arbitrators,
- undertake continuing training, where necessary, in order to function in the electronic environment established by the Commission,
- participate in training programs provided by the Commission, and
- maintain up-to-date knowledge with respect to NSW workers compensation law.

MEDIA and PUBLIC COMMENT

The Commission recognises the important role Arbitrators can play in educating the public on the Commission's role in the Workers Compensation Scheme.

Although Arbitrators have a right to publicly comment on political and social issues, they should ensure that, when making comments on issues affecting the Commission, the audience is aware that their comments are made in their private capacity and in no way represent the official view of the Commission. Obviously an Arbitrator should never make any public comment on Commission matters he/she is dealing with, or has dealt with, in the exercise of his/her duties as an Arbitrator.

Also, personal views on the legislation or Government policy in regard to Commission operations should not appear in any decisions published by Arbitrators or Medical Appeal Panels.

When speaking at conferences an Arbitrator may make general reference to his/her experiences, but must make clear that his/her comments come from the individual and not the Commission. Where speaking invitations are extended to Arbitrators, in that capacity, Arbitrators must consult with the Registrar (who will, in turn, consult with the President) before accepting.

IDENTIFYING AND RESOLVING ETHICAL DISPUTES

Arbitrators are encouraged to access an appropriate and confidential ethical advisory service (such as the St James Ethics Centre's free and confidential telephone counseling service, Ethi-Call) whenever they feel the need for external assistance in identifying and resolving ethical disputes.

GIFTS, BENEFITS, AND HOSPITALITY

As a general rule, Arbitrators should never expose themselves to the possibility of their being accused of using their position or status as Commission appointees to obtain any benefits, preferential treatment, or other advantage.

Where gifts or benefits are offered, or social invitations extended, by parties or representatives in Commission proceedings, to Arbitrators in their capacity as such, they should, as a general rule, be declined.

If a gift is proffered in circumstances where it cannot be returned to the donor, it should be handed to the Registrar for inclusion in the Commission's gift register and appropriate disposition (e.g. for a charitable purpose).

CORRUPT CONDUCT

If an Arbitrator becomes aware of an instance or behaviour that could be corrupt conduct, maladministration, or criminal conduct, relating to the Commission, he/she should report it promptly to the Registrar or the President, and also, if appropriate, to the Independent Commission Against Corruption.

Hon Justice Terry Sheahan
President

Ms Helen Walker
Registrar