FAMILY LAW COUNCIL

DISCUSSION PAPER

THE ANSWER FROM AN ORACLE: ARBITRATING FAMILY LAW PROPERTY AND FINANCIAL MATTERS

MAY 2007

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CONSULTATION

The Family Law Council is seeking comment on:

- the particular questions posed in this paper
- the issues raised throughout this paper on which the reader would like to comment, and
- any other issues related to matters in the paper.

Persons and organisations wishing to make submissions or provide comments on all or any part of this paper are invited to do so in writing.

All written submissions made to Council will be publicly available unless there are reasons for confidentiality and those reasons are drawn to Council's notice. Persons making submissions are asked to keep this in mind. It is particularly important that the privacy of personal material, such as information about individual cases, be protected and Council asks that such material be clearly identified as confidential.

If you do not want your name used, or you want your submission or part of it treated as confidential, please advise Council accordingly and state your reasons for seeking confidentiality. You should be aware that confidential material must sometimes be released if requested under the *Freedom of Information Act 1982* (Cth).

The closing date for submissions and comments is **13 August 2007.**

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TERMS OF REFERENCE

Terms of reference were received from the Attorney-General 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:
>
> 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?
> 2. What, if any, legislative changes need to be made to support compulsory arbitration?
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1 INTRODUCTION

Purpose of the discussion paper

1.1 The main purpose of this paper is to generate discussion about whether courts exercising jurisdiction under the Family Law Act should have the discretion to order parties to attend arbitration. On 25 May 2006 the Family Law Council received terms of reference to examine arbitration as an alternative dispute resolution method in family law property and financial matters. The precise terms of reference are set out on p 5 of this paper. This referral is made in the context of continuing delays in matters being heard by the courts and the government's view that parties should resolve disputes in less adversarial and more cost effective ways wherever possible.

1.2 The current terms of reference are limited to property and financial matters and consequently this discussion paper will not look at the possibility of using arbitration to resolve children's matters. The way children's matters are dealt with by the courts has altered significantly since the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (SPR Act) on 1 July 2006 and those changes should be allowed a proper opportunity to have their full effect.

Continuing delays in the court system

1.3 One of the major advantages offered by arbitration is that it avoids the delays which have been endemic to the court system.

1.4 In its 2005–2006 Annual Report, the Family Court of Australia states that it aims to resolve 90% of interim applications within three months and 90% of final applications within 12 months of filing.[1] The Annual Report shows that in that year 66% of interim applications were finalised within three months and 90% were finalised within 8 months.[2] The Court's performance has improved in this regard, however 10% of interim applications have taken longer than 8 months to finalise.

1.5 With regard to final orders in the Family Court, 90% were finalised within 26.9 months of filing. This figure is up from 24.6 months in 2004–2005 and 22 months in 2003–2004.

1.6 In its 2005–2006 Annual Report, the Family Court states:

> A number of factors have affected the Court's ability to meet its targets for disposing [of] cases in the determination phase. These include delays in the replacement of retired judges during 2004 and 2005, and the increasing proportion of complex cases handled by the Family Court. It is also important to consider that at any one time there is a large number of cases pending (active) in the determination phase. This is referred to as the Pending Cases Inventory (PCI). The Court must continue to reduce the backlog of older cases in its PCI before there is improved performance against the targets.[3]

1.7 The delays in the Federal Magistrates Court (FMC) are less than in the Family Court. The FMC hears the simpler and shorter cases, which it aims to finalise within six months. 71% of

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1 Family Court of Australia, *Family Court Annual Report 2005–2006*, 2006, p 39 and p 41.
2 ibid, p 39.
3 ibid, p 42.

applications for final orders (excluding divorces) were finalised within six months of filing.[4] 29% of cases took longer than six months to finalise and for those cases the option of a speedier and cheaper arbitrated decision may have much to recommend it.

The benefits of arbitration

1.8 The advantages of an active system of arbitration in the family law context were canvassed extensively in the Family Law Council's 1988 report *Arbitration in Family Law* (the 1988 report).[5] The advantages set out in that report can be summarised under two broad headings:

- Arbitration provides a cheaper faster alternative to the court system and consequently can save money and time both for the litigants and for the court system.
- Arbitration provides a more flexible system of decision making. For example, an arbitrator may be selected or assigned to a case on the basis that they have particular expertise and arbitration may take place at a time and place to suit the litigants.

1.9 Arbitration as a system which can be activated and deactivated at short notice and with limited costs, once the structure is in place, would be of great assistance to the courts in addressing registry specific factors such as backlogs and delays in the replacement of retiring judges.

1.10 The benefits of avoiding delay are important in many ways. There is less need for interim proceedings so that parties are not constantly engaged in litigation and court lists are not clogged with extra cases. A speedy resolution allows the parties to maximise their assets and financial resources by getting access to them sooner and avoids the extra costs of updating valuations of particular assets and financial resources.

1.11 As well as benefits for the parties, there are important benefits for the government in providing a good, reliable and acceptable system of arbitration. The most obvious benefit is the saving in judicial and court costs if those matters which are suitable can be resolved by arbitration.

1.12 Whether arbitrations are conducted by suitably qualified and accredited members of the private legal profession, other professional groups or by suitably trained registrars of the court, a properly functioning scheme of arbitration provides a flexible model which can accommodate increases and decreases in the rate of arbitration. It is essentially a part time work force which can be called upon as the need arises. This will have particular benefits in reducing delays in particular registries and in dealing with temporary increases in case loads as they arise from time to time.

1.13 Arbitration avoids the unnecessary formality of court processes which parties sometimes find alienating. It allows the level of formality to be tailored to the particular disputants and the particular circumstances.

1.14 Because arbitration is a process which takes place at a time and place and in a manner agreed by the parties, even court-ordered arbitration allows parties to retain some control of the process. Parties' self esteem and sense of control is preserved and the relationship between the parties may not be damaged in the same way that it might be by a final hearing before a judge. If the parties have children, hostility which arises as a result of property proceedings often spills over into the arrangements for the children. Arbitration, at an early stage, might assist in minimising any hostility.

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4 Federal Magistrates Court of Australia, *Annual Report 2005–2006*, 2006, p 43.

5 Family Law Council, *Arbitration in Family Law*, 1988, chapter 4, pp 12–19.

Disadvantages of arbitration

1.15 Arbitration potentially adds another layer to the litigation process for particular litigants. At worst, it will be treated by some litigants as a 'dry run' for the case that they will eventually run before the court. The extent of this disadvantage will depend upon the rehearing rate. For those matters requiring a rehearing, parties may be put to further expense and potentially some greater delay. This disadvantage may be ameliorated in cases where, although there might be a rehearing, issues are narrowed by the arbitration process.

1.16 There is also the potential of a constitutional challenge although the models proposed by the Council in this discussion paper attempt to minimise any constitutional risk.

Historical perspective

1.17 A number of the recommendations made in Council's 1988 report on arbitration were accepted by the government and as a result the *Family Law Act 1975* (Cth) (Family Law Act) was amended in 1991 and a scheme for arbitration was introduced. However, it should be noted that not all of Council's recommendations were implemented, and a number of those will be reconsidered by Council as part of its present examination of arbitration.

1.18 The 1991 scheme provided for court-annexed, non-consensual arbitration as well as voluntary arbitration. That scheme never became a practical reality. Following the decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (*Brandy*), further amendments were made in 2000 by the *Family Law Amendment Act 2000* (Cth) and the *Family Law Amendment Regulations 2001* (Cth). The 2000 scheme, which is effectively the one still in operation today, provides only for voluntary non-court-annexed arbitration. The Family Law Act was further amended in 2006 by the SPR Act, providing a definition of arbitration, but retaining the consensual nature of the scheme. The 1991, 2000 and 2006 legislative provisions are discussed in more detail in chapter 4.

1.19 In a recent paper examining the 2006 changes to the arbitration framework, a senior barrister practising in family law has described the introduction of the definition and the rearrangement of the sections as a positive development, particularly in view of the procedural changes introducing a less adversarial approach in relation to children's cases.[7]

> Unless parties agree to apply the same principles to their spousal maintenance and property case, the likelihood is that there will need to be two hearings using differing jurisprudential approaches. Arbitration for financial matters is a very real alternative to economically separate the different processes involved in the two types of cases.[8]

1.20 The changes introduced to the handling of children's cases may well stimulate greater use of arbitration in family law property proceedings. There is, however, little evidence to date that arbitration is an option which many litigants will consider. Data from a small sample case taken by Family Court Registrars in 2006 indicates that parties currently have little interest in voluntary

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7 This was effected by the introduction of the new Division 12A Part VII, *Family Law Act 1975* (Cth).

8 Bartfeld, M, *Family Law Arbitration,* paper delivered at the 12th National Family Law Conference, Perth, 22–26 October 2006, p 2.

arbitration as a way of resolving their property disputes.[9] The legal profession and the courts have similarly not embraced arbitration as a mainstream dispute resolution mechanism.[10]

1.21 It is clear that simply to offer consensual arbitration, as is currently the case under the Family Law Act, has not been sufficient to establish it as a viable option. Therefore, the view which this paper will take is that compulsory arbitration, ordered by the court in appropriate cases, supported by a clear structure and by measures designed to give the profession, the courts and the litigants confidence in the system, is a necessary first step to creating a climate in which voluntary arbitration can develop. The expectation of Council is that once discretionary court-ordered arbitration demonstrates the benefits of arbitration generally, it will become an option to which people resort voluntarily and even prior to filing an application in a court. Council would particularly value comments which go to the issue of what matters should or should not be referred to court-ordered arbitration.

Voluntary and compulsory arbitration

1.22 The terms of reference given to the Family Law Council which are set out at p 5 request that Council consider both voluntary and compulsory arbitration. The option of compulsory arbitration set out in the terms of reference must be understood in the context of the apparent failure to take-up voluntary arbitration by the profession and the courts. It is clear from the *Brandy* decision that compulsory arbitration requires consideration of whether a particular model is constitutionally valid. The constitutional issue is discussed at chapter 6 and the two preferred possible models proposed at chapter 7 have been crafted to minimise the risk of constitutional challenge. However the need to take into account the constitutional issue makes all of the compulsory models more complex than they might otherwise be and more complex than similar state schemes where no constitutional issue arises.

1.23 Arbitration can be non-compulsory or compulsory. Encouragement and compulsion can come at different points spread along what can be described as 'a continuum of compulsion' (see figure below).[11] The current scheme in the Family Law Act is at the extreme left of the continuum of compulsion. There is scope for moving further to the right without running the risk of constitutional problems.

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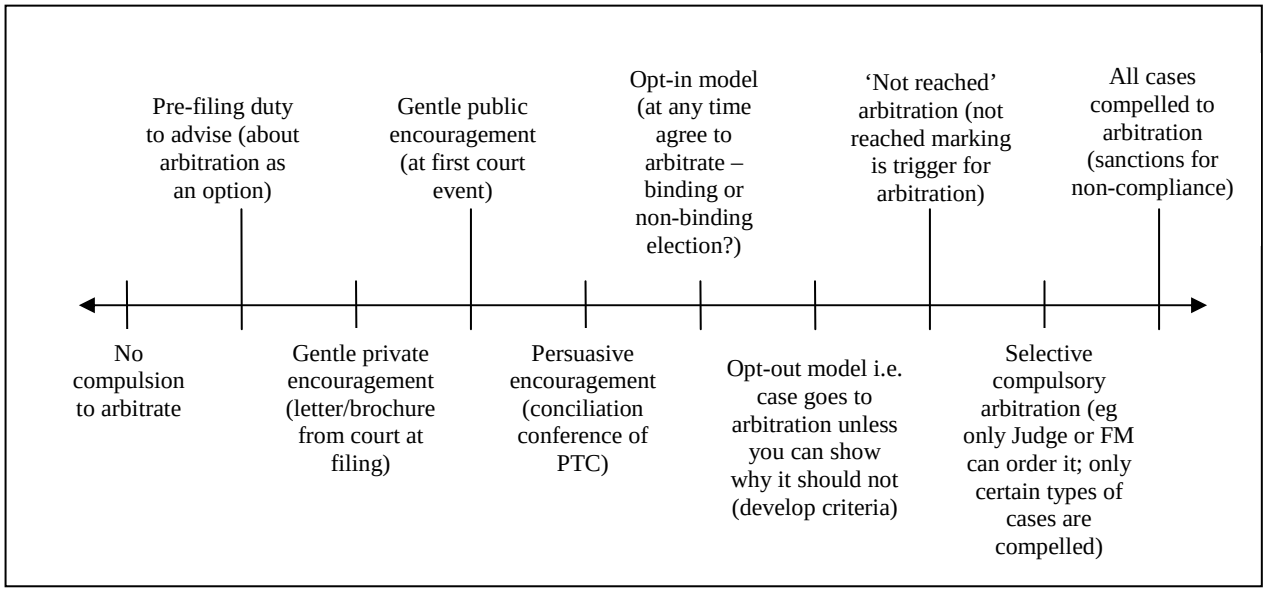
9 This survey sample is discussed in more detail in Chapter 4.

10 There may currently be some shift in this situation on the eastern seaboard. A presentation made to the Family Law Council by Peter Murphy SC on 27 April 2007 detailed preliminary proposals for a consortium of senior lawyers to offer arbitration services and to promote voluntary arbitration particularly in high wealth cases. He suggested that market forces in Queensland at the current time, including length of time to get to trial in Brisbane, had created a new environment that made it appropriate for the new proposed service to be tried.

11 Figure provided by Dr Tom Altobelli (as he then was), personal communication to the Family Law Council meeting at Parramatta, 3/4 August 2006.

Figure 1: The Continuum of Compulsion



Establishing an attractive arbitration scheme

1.24 The terms of reference ask that Council look at changes to court processes or other changes that could be made to promote voluntary arbitration. Council's preliminary view is that creating an appropriate structure in which the litigants, the lawyers and the judiciary all have confidence is the cornerstone of any arbitration scheme, whether it be voluntary or compulsory. In the case of a voluntary scheme if there is no confidence in the scheme it will not be used. In the case of a compulsory scheme, if there is no confidence there will be dissatisfaction and resentment and the number of appeals and rehearings will increase so that the benefits of speed and low cost will be obviated.

1.25 Three issues which have been brought to Council's attention as possible factors in contributing to the lack of confidence and poor uptake of arbitration as a dispute resolution model in family law are the lack of:

- a clearly defined structure for arbitration
- knowledge amongst litigants and the profession about the availability of arbitration, and
- confidence in the arbitrator and the arbitration process.[12]

1.26 One way of addressing the issue of the lack of a framework for arbitration is to tie the delivery of arbitration services to the family courts' structure, which is well understood by the profession and the judiciary. In some state legal systems, such as in the NSW Workers Compensation Commission scheme, that arrangement prevails. This is the approach advocated in this paper. The aim of this approach is in part to promote the acceptance of arbitration by establishing clear guidelines and frameworks for its conduct, and by encouraging the growth of a group of arbitrators and practitioners with experience of, and interest in, the system. Council seeks input into what structure should be provided for arbitration in family law matters. These matters are discussed in Chapters 7 to 10.

[12] Family Law Council meeting at Parramatta, 3/4 August 2006.

1.27 The question of confidence in the arbitrator is one which Council has addressed by looking at training, accreditation and regulation of arbitrators in chapter 10. Confidence in the process will be more difficult. The legal profession has shown a willingness to embrace positive change but it has not to date voluntarily recommended to clients a process which does not have a track record in resolving family law disputes. This issue is discussed in chapter 4.

1.28 With respect to lack of knowledge about arbitration, in its 1988 report Council recommended an 'intensive program of education' within the Family Court, the profession and the public.[13] This recommendation was not acted upon by the government. Council would welcome views on whether it is appropriate to renew this recommendation. Naturally in view of the creation of the Federal Magistrates Court in the intervening period the recommendation would include a reference to that court. The need for education programs connected with the implementation of a new arbitration scheme is discussed in Chapter 5.

Consultation and recommendations

1.29 Although there have been several attempts to establish arbitration as a viable method of dispute resolution, a properly resourced and well structured system of court-ordered compulsory arbitration for appropriate cases has not been tried in the family courts.

1.30 The Family Law Council is seeking to enliven the discussion about arbitration and to gather information about why litigants and practitioners have not taken up the option of arbitration. The Council would value the opinions of all stakeholders in the family law system including practitioners, the judiciary, arbitrators and the public generally. Specific questions on which Council is seeking input are set out throughout the body of this discussion paper and collated at the front of the paper. Council welcomes your contributions to these questions and any other matters relevant to the terms of reference. Instructions on how to make a submission to the Council are set out on p 1.

1.31 After consideration of all input from stakeholders and the public, Council intends to complete a final report.

[13] Family Law Council, *Arbitration*, Recommendation 4, p 53.

2 WHAT IS ARBITRATION?

Definitions of arbitration

2.1 Arbitration pre-dates the birth of Christ by many hundreds of years. When Greeks or Romans had a dispute they would agree upon a Judge to settle it. Richard Bloch described an arbitrator as the Oracle who gave people 'The Answer'.[14]

2.2 Section 10L (1) of the Family Law Act defines arbitration:

> **Arbitration** is 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.

2.3 The essential elements of the definition in the Family Law Act are:

- a process
- before an arbitrator (not a judge)
- the presentation of arguments and evidence, and
- the making of a determination.

2.4 Earlier definitions of arbitration included a reference to the binding nature of the award. In their materials *Arbitration in Family Disputes Materials*, the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) defines arbitration as

> … a process of private adjudication in which an impartial third party or parties makes a binding award on the basis of some objective standards and measures.

2.5 The concepts of evidence and argument are rolled into the concept of adjudication in the AIFLAM definition.

2.6 In Council's 1988 report a more discursive definition distinguished arbitration from mediation and conciliation 'in that it results in a determination (usually called an award) which is legally binding on the parties'[16] and distinguished arbitration from adjudication on the basis of the authority of the arbitrator which arises from the consent of the parties. Council also noted the lower level of formality of the process, and the potential that an arbitrator will have specialist knowledge.[17]

2.7 The Australian Centre for International Commercial Arbitration (ACICA) defines arbitration as set out below.

> Arbitration involves dispute resolution by a third party, the arbitrator. The arbitrator's determination is called an award. The difference between court proceedings and arbitration

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[14] Bloch, R, 'Arbitration as a career', in Max Zimny, Ann Harmon Miller, Christopher A. Barreca (eds), *Labor Arbitration Development – a Handbook*, 1983.

[16] Family Law Council, *Arbitration*, paragraph 2.4.

[17] Family Law Council, *Arbitration*, paragraph 2.4.

> rests on the flexibility of arbitral procedure and, more importantly, the fact the arbitrator derives authority from the agreement of the parties.[18]

2.8 In all the definitions referred to above, arbitration is placed somewhere between mediation/conciliation and adjudication in that the parties retain control over the process but not the outcome. This contrasts to mediation/conciliation where parties retain control over both process and outcome, and adjudication where they have no control over either the process or the outcome. Whether an award is binding or not will depend on the framework within which arbitration takes place. Under the current legislative scheme in the Family Law Act awards are binding and may only be set aside upon appeal on a point of law.

Consensual, compulsory and court-annexed arbitration schemes

2.9 Distinctions may be drawn between consensual and compulsory, and court-annexed and non-court-annexed arbitration. Consensual arbitration is based on an agreement between the parties to refer a dispute to an arbitrator, either at the time a dispute arises or as part of a dispute-resolution mechanism in a pre-existing contract. Consensual arbitration will usually include an agreement to be bound by the outcome of the arbitration process. The form and manner of the arbitration may be regulated by legislation. The arbitrator has power to determine facts, and consequently arbitration requires its own rules of procedure and evidence, although these may be less formal than those found in judicial proceedings. Arbitration is consensual even where one party regrets their decision to contractually agree to arbitration — consent stems from the initial agreement to be bound. Consensual arbitration is commonly used in international maritime agreements.

2.10 By contrast, compulsory arbitration arises independently of the agreement of the disputing parties. It may arise directly from the operation of legislation or some rule of law. Alternatively, the law may give judicial authorities a discretionary power to order arbitration in particular cases. Compulsory arbitration sits uncomfortably with the definitions of arbitration set out in Council's 1988 report and the ACICA definition in that it does not by its nature derive its authority "from the agreement of the parties"[19] nor do the parties consent to the process. The concept of compulsory arbitration is however one which has wide acceptance both within Australia and internationally.[20]

2.11 Court-annexed arbitration is arbitration which has a close connection with a particular court. It may be either consensual or compulsory. Court-annexed arbitration may be used by courts as a method of reducing case load, by diverting appropriate cases to arbitration. The court may have the power to determine which cases are sent to arbitration, and may be able to refer particular aspects of a case (such as the valuation of property) to arbitration. The court may also be given power to review arbitrators' awards, and there may be a provision that an award may be enforced as if it were an order of the court. By contrast, many private arbitrations have no particular connection with a court, except where interaction with a court is ancillary to the arbitration. For example, arbitrators may refer parties to the court to subpoena documents and witnesses, and parties may seek to have arbitral decisions enforced or challenged in court. However, these arbitrations occur largely independently of the court system, and are not court-annexed.

2.12 For reasons discussed in the introduction, the focus of this discussion paper is on court-annexed arbitration as an option able to assist in resolving disputes that have already been filed in court in an appropriate and more timely manner. However, Council considers that there is a place

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18 ACICA, *About ACICA*, viewed 29/11/2006, <http://www.acica.org.au/about.html>.

19 ibid.

20 ibid. See chapter 3 where mandatory state systems and internationally the Philadelphia system are discussed.

in family law for more use of pre-action consensual arbitration. This could be as part of pre-action dispute resolution methods, part of a collaborative law process, or as a requirement of a pre-nuptial agreement or de facto agreement. If a stronger court-annexed arbitration system is established, it is likely to lead to greater confidence in using arbitration in family law more generally.

3 ARBITRATION SCHEMES IN AUSTRALIA AND OVERSEAS

3.1 Arbitration has a long history in Australia and overseas, and many different dispute resolution frameworks have been developed with arbitration as a central element. This chapter describes the current scheme for arbitration under the Family Law Act, and then sets out a selection of the currently operating arbitration schemes within Australia, with a focus on those schemes which have enjoyed particular success. The chapter then notes a number of international arbitration systems covering compulsory, consensual and court-annexed schemes. Philadelphia has a sophisticated and compulsory scheme of arbitration which does not allow the parties to select their arbitrators. The international scheme established by the United Nations Commission on International Trade Law (UNCITRAL) is based on the consent of the parties and is used to resolve many international disputes. Another scheme, the China International Economic and Trade Arbitration Commission (CIETAC), has been one of the most active arbitration systems in the world and is similar to the UNCITRAL model. In contrast to these systems, which have minimal judicial involvement in the actual arbitration process, Saudi Arabia requires arbitration documents and the arbitrators to be approved by the judiciary.

The current scheme for arbitration under the Family Law Act

3.2 The current provisions for arbitration are set out in Division 4 of the Family Law Act. The scheme provides for consensual arbitration by appropriately qualified legal practitioners. The decision of the arbitrator, once registered in the court, is binding and an appeal from the decision is only available on points of law. The details of the scheme are set out below.

Definition of an arbitrator

3.3 An arbitrator is defined by section 10M as 'a person who meets the requirements prescribed in the regulations to be an arbitrator'. Regulation 67B of the *Family Law Regulations 1984* (Cth) specifies that a person may be an arbitrator if the person is a legal practitioner and has either been accredited as a family law specialist by a State or Territory legal professional body or has practised as a legal practitioner for at least five years and, as a minimum, 25% of their practice has been in family law matters. Furthermore, the person must have completed a specialist arbitration training course either at a tertiary institution or a professional association of arbitrators. The person's name must also be included in a list maintained by the Law Council of Australia, or by a body nominated by the Law Council of Australia. This list is currently maintained by AIFLAM.

Arbitrator's rights, duties and obligations

3.4 Section 10N(1) allows an arbitrator to charge fees for their services, and subsection (2) requires that they provide the parties with written information regarding those fees prior to the commencement of the arbitration.

3.5 Under section 10P, whilst a person is acting as an arbitrator they have the same protection and immunity that a judge of the Family Court has in performing the functions of a judge.

3.6 Where the dispute involves a married person considering instituting proceedings for divorce, or financial proceedings, or proceedings with respect to children, the arbitrator must provide the

person with documents containing information prescribed by s 12C regarding reconciliation.[21] This requirement does not have to be met if the arbitrator has reasonable grounds to believe that the person has already been given documents containing the prescribed information or, considers that there is no reasonable possibility of reconciliation.[22]

3.7 Part 5 Division 2 of the Family Law Regulations sets out how the arbitration must be conducted. Regulation 67I states that an arbitrator must determine the dispute in accordance with the Family Law Act and ensure that the parties are afforded procedural fairness. Furthermore, if the arbitrator becomes aware of anything that could lead to direct or indirect bias they must inform both parties in writing.

3.8 If an arbitrator considers that one of the parties does not have the capacity to participate in the arbitration, the arbitrator must terminate the arbitration. If the arbitration is conducted under s 13E (which allows the court to refer Part VIII proceedings to arbitration), the arbitrator must refer the matter to the court which ordered the arbitration.[23] Regulation 67L states that a person lacks capacity if they do not understand the nature and possible consequences of the arbitration, or are not capable of giving adequate instructions to their representative for the conduct of the arbitration, or cannot satisfactorily appear in person at the arbitration.

3.9 During the arbitration, the arbitrator is not bound by the rules of evidence and may inform themselves of any matter which they consider to be appropriate.[24] An arbitrator may require a person to attend the arbitration to give evidence, or produce documents, or to do both.[25]

3.10 Regulation 67P requires that at the conclusion of the arbitration, the arbitrator must make an award which includes a statement outlining the reasons for the award, any findings of fact and the evidence on which those findings were based. The arbitrator must provide each of the parties with a copy of the award and inform the court that the arbitration has ended and an award has been made.

Matters which can be referred to arbitration

3.11 Section 10L(2) sets out what types of disputes can be arbitrated. These are:

(a) matters referred to arbitration under s 13E regarding proceedings arising under Part VIII or,

(b) relevant property or financial arbitration matters.

3.12 For the purposes of s 10L(2)(b), relevant property or financial arbitration is defined as:

(i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIB proceedings or section 106A proceedings; or

(ii) any part of such proceedings; or

(iii) any matter arising in such proceedings; or

(iv) a dispute about a matter with respect to which such proceedings could be instituted.

3.13 Matters which can be referred to arbitration therefore include property matters, spousal maintenance and maintenance agreements, financial agreements made before, during, or after

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[21] s 12G(1).
[22] s 12G(2).
[23] Regs 67L(1).
[24] Reg 67O.
[25] Reg 67N(1).

marriage, superannuation agreements, and proceedings as to the execution of instruments by order of court.

3.14 Part VIII of the Family Law Act deals with property, spousal maintenance and maintenance agreements. Section 13E(1) allows the court to refer matters arising under this part to arbitration, provided that all the parties consent to this course of action. Section 13E(2) allows the court to adjourn proceedings or to make additional orders to facilitate the arbitration. Section 13F allows the court to make orders which will facilitate the conduct of arbitration of relevant property or financial arbitration, which may include property, spousal maintenance and maintenance agreements,[26] financial agreements,[27] superannuation interests[28] and execution of instruments by order of the court.[29]

Effect of arbitrator's decision and judicial review

3.15 Section 13H(1) allows an arbitrator's decisions to be registered by one of the parties in (a) the court that ordered the arbitration under s 13E; or (b) a court that has jurisdiction under the Family Law Act. A registered award has effect as if it were a decree made by the court.[30]

Appeals

3.16 Under section 13J(1), a party may apply for review of the award, on questions of law, by: (a) a single judge of the Family Court; (b) a single judge of the Family Court of a State; or (c) the Federal Magistrates Court. Subsection (2) allows the judge to (a) determine all questions of law arising in relation to the arbitration; and (b) make such decrees that the judge thinks appropriate, including a decree affirming, reversing or varying the award.

3.17 Section 13K(1) stipulates that if an award is registered in the Family Court, the Federal Magistrates Court, or a Family Court of a State, the court in which the award is registered may make a decree affirming, reversing or varying the award or agreement. Subsection (2) specifies that the court can only make a decree if one of the following elements is present: (a) the award or agreement was obtained by fraud; 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 which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

Legal Aid Queensland scheme for family law property matters

3.18 Legal Aid Queensland (LAQ) first attempted to set up a scheme for arbitration in 1996. The attempt was unsuccessful. No matters were referred to the scheme.

3.19 In 2001 regulations governing the conduct of arbitration under the Family Law Act[31] were promulgated and as a result LAQ decided to revisit arbitration. LAQ made a successful submission

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[26] Part VIII.
[27] Part VIIIA.
[28] Part VIIIB.
[29] s106A.
[30] s 13H(2).
[31] *Family Law Regulations 1984* (Cth), Division 2, inserted by *Family Law Amendment Regulations 2001* (No 1).

to the federal government for funding to implement the program, which included a state-wide consultation process with stakeholders. The scheme which was adopted was based on this consultation.

3.20 Arbitration is only available in property matters. Applicants for legal aid will apply for a grant of aid in the usual manner. Matters may be referred directly from the grants officer, or from a LAQ family law conference chairperson (mediator) where there are outstanding property issues at conclusion of the conference. The conference may have involved both parenting and property matters, or property matters alone. Matters can also be referred directly from the courts although in practice this has not been a large referral source.

Eligibility

3.21 Applicants must meet guidelines for LAQ under the Means and Merits test.[32] For the purpose of arbitration, the assets aspect of the Means test is not considered because the property is the subject of the dispute.

3.22 Parties seeking arbitration must have been, or be, married and have separated. The separation must be final and parties must have been separated for at least six weeks.

3.23 The property in dispute must have a total net equity of between $20,000 and $400,000 including superannuation entitlements although there is discretion with the Grants Manager to allow matters into the program where the equity is either under or over these limits.

Main features of the scheme

Consensual

3.24 Both parties must consent to the arbitration. However, refusal to consent may have some implications for the grant of aid to any of the parties who are legally aided.

3.25 If one of the parties is not legally aided they must contribute to the costs of the arbitration.

Representation

3.26 LAQ takes the view that for arbitration matters the parties must be legally represented because parties need to understand the law, including how property division is made and the factors which can be taken into account. The documents required for the arbitration and for eventual court orders are more complicated than in children's matters. It is also important that parties have their view of what they expect to get out of the process and that the value of particular items be reality tested.

Costs

3.27 When a matter is referred to arbitration a grant of aid is made to the legally aided party or to each party if they are both legally aided. The aid is for 14 hours at $120 per hour ($1,680). A

[32] See Legal Aid Queensland, *Grants Handbook*, viewed 10 May 2007, <http://www.legalaid.qld.gov.au/grantshandbook/>.

period of 12 hours is earmarked to cover the cost of conducting the process and 2 hours to convert the arbitral award to consent orders. A further $50 is allowed for initial disbursements.

3.28 Privately funded clients must pay $975 up front being half of the costs of anticipated disbursements. In addition to this amount the privately funded client is responsible for meeting his or her own legal costs with the private solicitor. If these funds are not fully expended any balance is refunded. If disbursements incurred exceed that amount no additional charges are levied.

3.29 A grant of aid of seven hours at $120 per hour is made to the arbitrator ($840). If required, valuations are obtained jointly by the parties from a valuer selected from a panel of valuers which is maintained by LAQ. The cost per valuation is $300.

Qualification and selection of the arbitrator

3.30 The arbitrator is selected from a panel which is maintained by LAQ. In order to be on the panel the arbitrator must comply with Family Law Regulations and have completed their arbitral training after 1 October 1998 or have two referees who can attest that although the training was done prior to 1998 the applicant has had demonstrated experience as an arbitrator. The panel members are appointed for a period of three years and at the end of this period they may apply for reappointment for a further term.

3.31 The parties do not have a choice of arbitrator. The allocation of the arbitrator to a particular matter is made by LAQ.

Matters excluded from arbitration

3.32 The following categories of property matters are excluded from the arbitration scheme:

- where there is negative equity
- where there is an attached dispute about where a child of the marriage will live
- where there is an unvalued business
- where there is an unsecured third party claim, and
- single issues in a property hearing.

Where an application is out of time, the parties must have leave of the court to commence proceedings out of time before the matter can be accepted into the arbitration program. Likewise, if the time period is about to expire or would do so during the arbitration process, parties must commence court proceedings and seek to have the matter referred to arbitration by consent to avoid the expiration of the time period.

Conduct of arbitral hearing

3.33 Hearings are conducted on the papers. While there is no right of physical attendance the parties do have the opportunity to make oral submissions by telephone. The arbitrator will issue an arbitral award within 28 days of oral submission or tendering of final documents.

Training

3.34 LAQ conducts regular training for its panel solicitors. In recent years this has been biannual training and it is intended that this will increase to annual training. Part of that routine training includes arbitration and there is a detailed practitioners' manual for arbitration.

3.35 The referral figures show that legal practitioners are strong referrers to the scheme. This could be as a result of the regular training offered to the panel practitioners. Referrals from the court are low in number.

Evaluation of the scheme

3.36 Since its inception in 2001, there has been a steady growth in the number of matters referred to Arbitration scheme. Not all matters referred to the Arbitration scheme are in fact arbitrated. Matters may be excluded as unsuitable or one or other of the parties may refuse to consent.

3.37 Table 1 sets out the numbers of matters referred to the LAQ Arbitration scheme since its inception in November 2001.

Table 1: Matters referred to LAQ Arbitration Scheme

November 2001 – June 2003	476
July 2003 – June 2004	230
July 2004 – June 2005	212
July 2005 – June 2006	367
July 2006 – March 2007	269

3.38 The scheme was formally evaluated in June 2002, and as a result LAQ has decided that the scheme will be part of the core dispute resolution services offered by the Commission.

3.39 LAQ considers that arbitration has a number of advantages. It provides a cost effective option for clients with property disputes and overcomes the problem of delays in the court system. The normal court delays are exacerbated in the case of property matters because children's matters are, as is appropriate, always given priority over property matters. The Arbitration scheme allows LAQ to offer a good service to rural and remote areas of the state because neither the parties not the arbitrator are required to travel.

Australian State schemes for arbitration

Uniform Commercial Arbitration

3.40 All Australian states and territories have adopted Commercial Arbitration Acts (CAA), in broadly the same terms, to govern commercial arbitration. The scheme aims to provide parties with a flexible and reliable system for arbitration, free from excessive curial intervention and delay.[33] The majority of the provisions of the CAA can be modified or excluded by agreement of the parties.[34] The original proposal from the Standing Committee of Attorneys-General in 1984 was to

[33] Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2002, p 301.
[34] ibid, p 302. See, for example, s 9.

implement uniform legislation in similar terms to the 1979 English laws on arbitration. When actually implemented, there were some differences between jurisdictions.[35] In addition, Queensland did not participate, although the terms of the *Arbitration Act 1973* (Qld) were broadly similar to those of the uniform Acts. The laws have since converged further.[36] For the sake of convenience, the following discussion will refer to the provisions of the New South Wales version of the legislation, the *Commercial Arbitration Act 1984* (NSW).

3.41 The CAA establishes a system for non-court annexed consensual arbitration. The authority of the arbitrator derives from the agreement to arbitrate a dispute. Funding for the arbitration is also derived entirely from parties. The courts do, however, have some role to play in the system. Subpoenas may be obtained by application to the Supreme Court, and if a witness refuses, fails to attend before an arbitrator, fails to produce a document, or refuses to take an oath or answer a question, an application may be made to the Court to force the person to comply.[37] Preliminary points of law may be determined by the Court with the consent of the arbitrator, or of all parties to the dispute, but only if it is likely to produce substantial cost savings, or where the question of law is one in respect of which leave to appeal would likely be granted.[38]

3.42 Arbitrators under the CAA are chosen by agreement between the parties, with fallback provisions where one party has defaulted in the obligation to choose an arbitrator. In such cases, the choice of the other party will come into effect.[39] The CAA does not place any restrictions on the qualifications or training of the arbitrator — the parties are left to make a choice as best they may. Therefore arbitrators may be lawyers, or technical experts in a particular field. Arbitrators are granted immunity for liability for negligence for anything done in their capacity as arbitrator, but are liable for fraud.[40]

3.43 The CAA provides for relatively flexible procedure. Subject to other provisions in the CAA, and exclusions in the arbitration agreement, the arbitrator may conduct proceedings as they see fit.[41] Evidence may be given orally or in writing, and the arbitrator may require that it be given on oath or by affidavit.[42] Representation by lawyers and non-lawyers is allowed by agreement of the parties, assent of the arbitrator, and in a number of other circumstances.[43] Finally, determination of the issues is presumed to be made according to law, unless the arbitration agreement states that it should be made as an amiable compositeur (ex aequo et bono).[44]

3.44 The Commercial Arbitration Acts aim to provide certainty to the party by emphasising the finality,[45] formality, and enforceability of arbitral awards. Awards must be made in writing, signed, and state reasons for making the award.[46] Slip provisions are included to allow the correction of an

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35 The current implementations are: *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act* 1986 (ACT); *Commercial Arbitration Act 1990* (Qld).

36 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2002, p 300.

37 *Commercial Arbitration Act 1984* (NSW), s 18.

38 ibid, s 39.

39 ibid, s 8.

40 ibid, s 51.

41 ibid, s 14.

42 ibid, s 19.

43 ibid, s 20.

44 ibid, s 22.

45 ibid, s 28.

46 ibid, s29.

award by an arbitrator where the award contains minor problems.[47] By leave of the Court, awards may be entered as judgments of the Court, and enforced as such.[48] The Courts have the power to review awards on a question of law,[49] but unless both parties agree to the appeal, only where there is a manifest error of law on the face of the award, or where there is strong evidence that there is an error of law and the determination of the question 'may add, or may be likely to add, substantially to the certainty of commercial law.'[50] The limited nature of these grounds of appeal is a response to the initial broad interpretation by the courts of the circumstances in which they could review the decision of an arbitrator.[51] Moreover, both the ability to refer points of law to the Court, and to appeal on a question of law, can be excluded by the arbitration agreement.[52] The Court may, however, set aside the arbitration where there has been misconduct on the part of the arbitrator, such as corruption, fraud, partiality, bias, or a breach of the rules of natural justice.[53]

Victorian Magistrates Court

3.45 The *Magistrates Court Act 1989* (Vic) sets out a scheme for mandatory arbitration of small claims under $10,000. The scheme provides for simple, flexible, and cheap resolution of uncomplicated matters with a small monetary value. In doing so, it helps the Magistrates Court to deal with large volumes of cases in an expeditious and efficient manner. The scheme is strongly court-annexed, and is mandatory. Arbitrations are conducted by magistrates or registrars, on the premises of the Court, and are wholly funded out of Court funds.

3.46 Section 102(1) of the Act provides that all complaints for amounts of monetary relief of less than $10,000 must be referred to arbitration, subject to a number of exclusions found in section 102(3), such as where the complaint involves complex questions of law or fact. Hearings are conducted by a magistrate[54] or for matters under $5,000, a judicial registrar,[55] are not bound by the rules of evidence[56] and proceedings need not be conducted in a formal manner.[57] However, arbitrators are still bound by the rules of natural justice,[58] must determine the matter in accordance with law,[59] and may still exercise any powers that the Court may exercise in hearing and determining a complaint.[60] Awards must be in writing, but the reasons for the award need not be in writing. If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.[61]

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47 ibid, s30.
48 ibid, s 33.
49 ibid, s 38(2).
50 ibid, s 38(5).
51 See, for example, s 38(5) of the *Commercial Arbitration Act 1990* (Qld); Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2002, p 305.
52 *Commercial Arbitration Act 1984* (NSW), s 40(1). Agreements excluding the right to appeal or refer questions of law cannot be made where the arbitration relates in whole or in part to a question falling within the Admiralty jurisdiction, a dispute arising out of a contract of insurance, or a dispute arising out of a commodity contract: s 41.
53 ibid, s 42, s 4(1).
54 s 103(1).
55 *Magistrates Court (Judicial Registrars) Rules 2005* r 4(1)(c).
56 *Magistrates Court Act 1989* (Vic) s 103(2)(a).
57 ibid, s 103(2)(c).
58 ibid, s 103(2)(b).
59 ibid, s 103(4).
60 ibid, s 103(2)(d).
61 ibid, s 104.

3.47 This scheme has enjoyed considerable usage by the Court. In the 2005–2006 financial year, 3,680 matters were finalised at arbitration.[62] The scheme was expanded in that year to cover cases up to the value of $10,000, from a previous value of $5,000.[63] This is a strongly court-annexed scheme, designed with the clear intention to expedite the hearing of the large numbers of cases which the Magistrates Court sees each year in which the value of the claim is very small.

New South Wales arbitration of civil actions

3.48 In New South Wales, arbitrations that have operated pursuant to the *Arbitration (Civil Actions) Act 1983* (NSW) have led to the resolution of thousands of common law Supreme and District Court actions.

3.49 Arbitration was adopted as a preferred form of alternative dispute resolution by the Supreme, District and Local Courts of New South Wales from the late 1980s. The form of the process was said to follow a 'Philadelphia' style (see discussion below). The process is informal and appeal rights are fairly wide. Referral to arbitration is by a court official or judicial officer and the arbitration is conducted by appointed expert lawyers who ordinarily carry out the arbitration on court premises.[64]

3.50 In the Supreme and District Courts of New South Wales, arbitration is used to deal with civil matters — and, in particular, personal injury claims. Changes to personal injury legislation in 2002[65] have decreased the number of civil claims in recent years and there has been a dramatic fall in the number of matters proceeding to arbitration.

3.51 Table 2 demonstrates the dramatic effect of the *Civil Liability Act 2002* (NSW).

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62 Magistrates Court of Victoria, *Annual Report 2005–2006*, 2006, p 13.

63 ibid, p 25.

64 Examples of that process may operate pursuant to legislation such as the *Arbitration (Civil Actions) Act 1983* (NSW) — eg, personal injury arbitrations in the Supreme Court and District Court of New South Wales.

65 The changes were introduced in the *Civil Liability Act 2002* (NSW).

Table 2: Civil Matters Registered and Referred to Arbitration in the NSW District Court

Year	Civil matters registered (NSW including Sydney)	Civil matters registered (Sydney)	Referred to arbitration (Sydney)
1998	12,500	7,182	2,563
1999	14,261	8,272	3,074
2000	15,070	9,348	3,198
2001	20,784	12,916	4,604
2002	12,686	8,220	6,575
2003	7,912	5,755	1,973
2004	6,275	4,570	455
2005	5,659	4,115	296
2006	3,798	3,491	126

3.52 The District Court experience demonstrates that arbitration can be flexibly used when workload varies.

3.53 Arbitrations were the subject of criticism in a number of reports where party perceptions of the process were often reported to be unfavourable.[66] The concerns related primarily to the way in which parties were involved in the process and the extent of participation appears to have been a relevant factor. The common concerns related to litigants not feeling 'respected' or 'feeling pressured to settle.' These factors may be related to arbitrator training and the lack of a clear arbitration model as well as expectations about arbitration. There appears to be little public information available to litigants prior to commencing arbitration. Most litigants in the Supreme or District Courts are represented at an arbitration hearing although in the Local Court this may not be the case.

3.54 Rehearing rates are also relatively high. The Table below shows referral rates and rehearing rates in the Sydney District Court for the past three years. No rehearing rates are available prior to 2004. It is not clear why the rehearing rate in 2004 was so high. Between 1998 and 2004 approximately one third of all matters were referred to arbitration each year.

[66] See for example T Sourdin and T Matruglio, *Evaluating Settlement Week*, 2004.

Table 3: District Court Registration And Referrals To Arbitration

Year	Civil matters registered (Sydney)	Referred to arbitration (Sydney)	Arbitration Awards	Arbitration Rehearings	Percentage of Referrals Reheard
2004	4,570	455	230	182	40%
2005	4,115	296	133	45	15.2%
2006*	3,491	126	22	17	13.4%

*** Figures to August 2006. Rehearing rates not available prior to 2004.**

3.55 Local Court arbitration referrals have also fallen. The table below shows referral and hearing rates in the Local Courts of NSW.

Table 4: Referrals To Arbitration From Local Court

Year	Referred to arbitration	Arbitration Awards	Arbitration Rehearings	Percentage of Referrals Reheard
2003/2004	1,488	757	194	13%
2004/2005	1,230	507	146	12.1%
2005/2006	992	428	119	11.9%

3.56 Clearly the proportion of arbitral awards which are reheard in each jurisdiction has increased over past years — however in each jurisdiction referral to arbitration has prompted settlement which according to District Court and Local Courts will often take place on the day of the listed arbitration.

New South Wales Workers Compensation Commission

3.57 Arbitration has also been widely used in the workers compensation jurisdiction in New South Wales. Proceedings in the Commission are governed by the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), the *Workers Compensation Commission Rules 2003* ('the Rules'), and the guideline document, *The Practice of the Conciliation/Arbitration Process in the Workers Compensation Commission*.[67]

[67] Workers Compensation Commission, *The practice of the conciliation/arbitration process in the Workers Compensation Commission*, viewed Monday 16 April 2007, <http://www.wcc.nsw.gov.au/NR/rdonlyres/F62FC9E9-0E1C-4E35-9B87-BF3086CC85DE/0/GUIDELINEPracticeofConArbintheWCCFinal1Novem.pdf>.

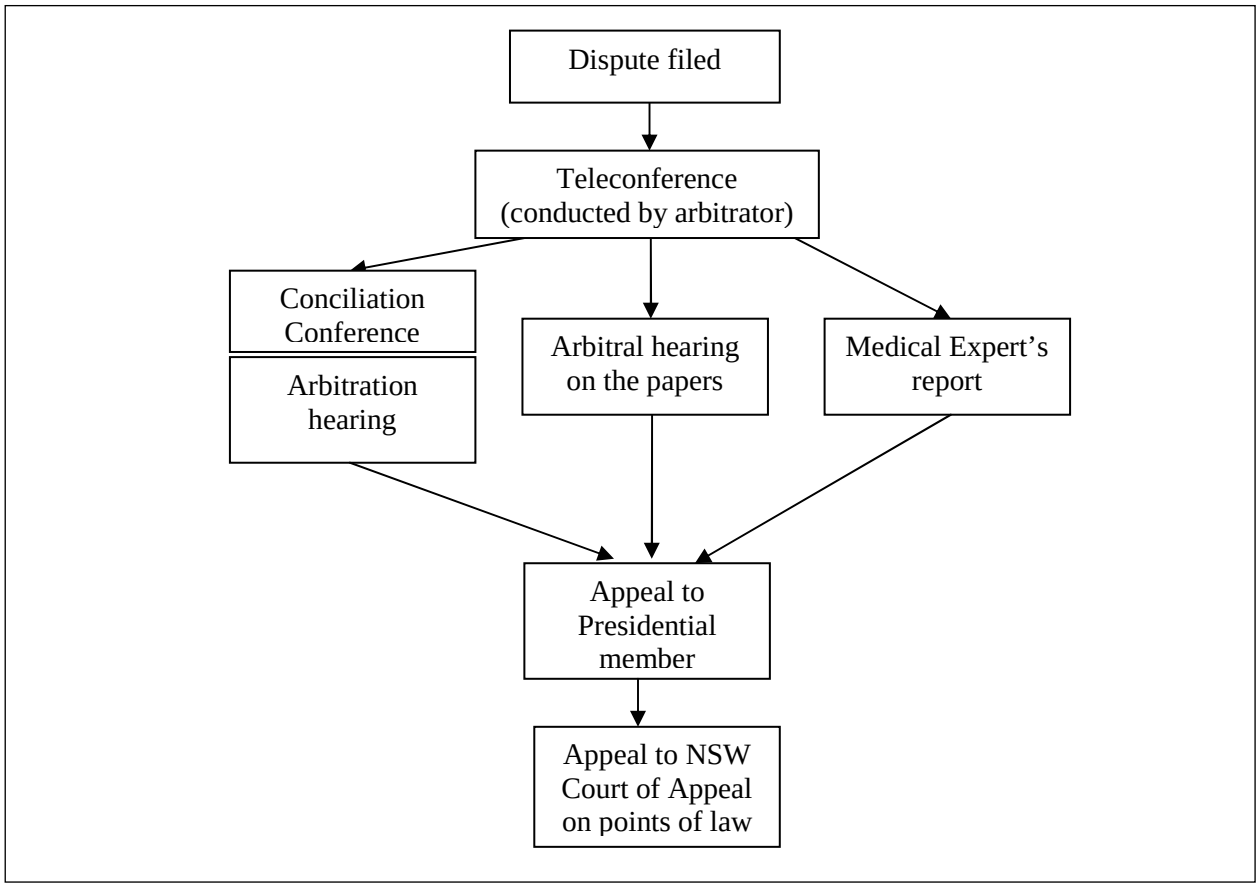
3.58 The Commission's Annual Review for 2005 shows that there were 12,761 applications to resolve a dispute registered in 2005 and 14,548 applications were finalised in the year, with 65% of finalisations being by way of settlement or discontinuance. [68] In 2005, 3,400 matters were determined by an arbitrator, 331 appeals against arbitrator's determinations were lodged in the Commission and 224 appeals were finalised. The Annual Review shows that only 2% of determinations were overturned on appeal. This appeal rate and percentage settlement rate is considerably different to that experienced in the arbitration system conducted in the NSW Supreme, District and Local Courts. The difference is said to primarily relate to the blended conciliation/ arbitration. Research conducted by the Commission suggests that satisfaction rates of litigants are higher when litigants consider that they can participate and contribute to hearings and conciliation conferences.

3.59 The arbitrators have diverse qualifications and expertise. Whilst most are legally qualified, others hold qualifications or accreditation in alternative dispute resolution and have experience working within the New South Wales workers compensation scheme. The New South Wales Workers Compensation Commission has established a professional training and development program in order to support its arbitrators.

3.60 The litigation pathway offered by the Commission for disputes other than disputes about the degree of permanent impairment proceeds through a number of stages, with increasing formality at each step.

[68] New South Wales Workers' Compensation Commission, *Annual Review* 2005, viewed 18 January 2007, <http://www.wcc.nsw.gov.au/NR/rdonlyres/3677E8C2-9AFF-4889-BFCB-7ADA54AF7BD9/0/AnnualReview2005.pdf>.

Figure 2: Procedure of the NSW Workers Compensation Commission



3.61 As can be seen from the figure above, the NSW Workers Compensation Commission makes arbitration a mandatory step for all matters except where a dispute is simply as to the existence or severity of an injury, and is therefore referred to a medical expert for a report.

3.62 The NSW workers compensation scheme seeks to ensure rapid determination of matters. One strategy for achieving this is a legislated limitation on the legal costs for which parties to disputes can be liable, providing a strong incentive to lawyers to constructively engage in the litigation process. Time limits are imposed on the arbitral hearing to ensure that proceedings do not drag on for extended periods, and parties cannot use arbitration to delay determination of a matter. Arbitrators are encouraged to make their best efforts to bring about settlement at the conciliation conference by the structure of costs for the conference, which makes conciliation a more lucrative proposition per hour. In addition, arbitrators have a number of duties, one of which includes a duty to ensure matters settle as quickly as possible.[69]

Teleconference

3.63 The first stage in the process after filing is the teleconference, broadly-speaking the equivalent of a Case Assessment Conference in the Family Court. Parties and their legal representatives are

[69] See New South Wales Workers Compensation Commission, *Arbitrator's Code of Conduct*, viewed 12 February 2007, <http://www.wcc.nsw.gov.au/NR/rdonlyres/60DD4949-0038-42ED-9A76-8204416B108C/0/ArbitratorCodeofConductJanuary2007_2.pdf>.

required to attend at the teleconference. Teleconferences are conducted by an arbitrator, who explores resolution of the case, and explains to the parties the nature of the proceedings. They will invite the applicant and respondent to put forward offers of settlement or suggestions as to how the dispute might be resolved, and will assist discussions about dispute resolution.[70] If at the teleconference stage all issues have been settled, the arbitrator will determine how the matter is to be finalised. If not, the arbitrator will clearly identify the issues remaining in dispute and ensure the matter is ready for the next phase of the process.[71]

3.64 If at the end of the teleconference there are still issues outstanding, the arbitrator must make a decision as to whether the matter will be determined by an arbitrator on the papers, or if the dispute must proceed to a full conciliation conference/arbitration hearing. The arbitrator will prepare the matter for the next stage by:

- Identifying issues resolved, and those still in dispute.
- Directing the parties to file a joint signed statement of the facts and issues in agreement, and those in dispute.
- If the arbitrator has reached a preliminary view that the matter can be decided on the papers, ask the parties whether there is any reason why it should not be determined in that way.
- Reminding parties that the matter may be settled by agreement at any stage.[72]

3.65 If the arbitrator has determined that a matter can be decided on the papers, at the teleconference, he or she will:

- Identify and confirm the documents to be used as a basis for the arbitration.
- Make directions with a timetable for the filing and exchange of written submissions.
- Advise the parties of the timeframe for delivery of the decision.

If the matter is arbitrated on the papers, decisions will usually be delivered 14 days after the date of the teleconference or the receipt of submissions, whichever is the later.[73]

3.66 If the dispute must proceed to conciliation/arbitration, the arbitrator will:

- Confirm the date, time and venue for the hearing.
- Check any facilities or services needed for the conference.
- Explain the process for the conciliation/arbitration of the case.
- Organise the evidence:
  - Identify the evidence to be used as a basis for the determination of the matter.
  - Remind the parties that arbitration by the Commission has a strong inquisitorial flavour and usually proceeds on the basis of documentary evidence.
  - Make any appropriate Direction/Order.[74]

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[70] Workers Compensation Commission, *The practice of the conciliation/arbitration process*, pp 6–7.
[71] ibid, p 5.
[72] ibid, p 7.
[73] ibid, p 8.
[74] ibid, p 8.

Conciliation/arbitration conference

3.67 If a matter has proceeded to conciliation/arbitration, a combined conciliation and arbitration hearing will be conducted by the arbitrator. The arbitrator first attempts conciliation and, if that fails to settle all outstanding issues, proceeds to arbitrate the matter. Strict times limits are allowed for each stage of the proceedings, and arbitrators are paid on lump sums which encourage them to expedite decisions insofar as possible. Arbitrators are paid $400 for the conciliation hearing, and a further $400 for the arbitration, with a rarely-used possibility of an extension for two hours at $150 an hour.

3.68 At the conciliation phase of the conference, the arbitrator will invite the parties to make any offers of settlement or suggestions as to how the issues remaining in dispute might be resolved, and will act as a neutral party to encourage a fair settlement through the normal techniques of conciliation. If all issues are finalised at conciliation, the arbitrator will organise the necessary documentation to ensure finalisation occurs.[75]

3.69 If the matter does not completely settle at conciliation, the arbitrator will proceed to arbitration. A short break is provided between the conciliation and arbitration, which the parties are encouraged to use to undertake further settlement discussions. The arbitrator then proceeds to arbitration, which occurs with an inquisitorial procedure and relaxed rules of evidence. While the arbitrator is not bound by the rules of evidence, evidence adduced must still be logical and probative, relevant, not based on speculation or unsubstantiated assumption, and should not be an unqualified opinion. If the arbitrator decides there is a need for oral evidence, they may question the parties or witnesses, take evidence on oath or affirmation, and permit parties or their representatives to ask questions of witnesses. Questioning and cross-examination of witnesses will be permitted in very limited circumstances. Before making a final determination, the arbitrator may receive oral or written submissions, which must be brief and only address matters in issue. If a 'novel or complex' legal question arises, the arbitrator may make a reference on a question of law to a Presidential member of the Commission at the request of a party or at the arbitrator's own motion.

3.70 The arbitrator will then make a decision which may be either delivered orally (ex tempore) or reserved for written decision. The standard timeframe for the delivery of written decisions is 14 days after the completion of evidence and submissions. Reasons for the decision must include findings on the material questions of fact, reference to the evidence or other material upon which those findings were based, the arbitrator's understanding of the applicable law, and the reasoning process that led the arbitrator to the conclusions reached.[76]

Right of appeal

3.71 Appeals against arbitral decisions may be lodged within 28 days of the award, with leave.[77] Generally, appeals will be held on the papers. Parties must provide reasons why a fresh hearing is necessary if they object to a Presidential member of the Commission deciding the appeal on the papers. New evidence cannot be given without leave. Applications for leave to appeal against the decision of an arbitrator must provide

- arguments in favour of review of the decision,
- the amount of compensation alleged to be at issue,

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[75] ibid, pp 8–10.
[76] ibid, pp 10–11.
[77] *Workers Compensation Commission Rules 2006* (NSW) R 16.2(1).

- any new evidence in respect of which leave is sought, and
- any reasons for an objection to the decision of the appeal being decided solely on the basis of the written application and any written application of opposition lodged.[78]

No application for leave to appeal will be accepted where the amount in issue is less than $5000 or 20% of the value of the award.[79] Once an application for leave to appeal has been submitted, the other parties to the appeal may respond with a Notice of Opposition to Appeal Against Decision of Arbitrator, which should include submissions in opposition to the identified grounds of appeal, reasons why the appeal should not be determined on the papers, and any fresh evidence, including reasons as to why the new evidence should be submitted.[80]

3.72 Once leave to appeal is granted, if the Commission as constituted by a Presidential member is satisfied that sufficient information has been supplied to the Commission in connection with the proceedings, the Presidential member can determine the appeal without holding any conference or formal hearing, on the papers. While it is open for a hearing to be held, this is rarely the case. The Commission will advise the parties of the reason for decision in writing as soon as possible.[81]

3.73 Appeal from the decision of a Presidential member of the Commission may be made to the Court of Appeal, on matters of law only.

International arbitration schemes

Philadelphia

3.74 Philadelphia has a system of compulsory arbitration for civil claims, other than real estate or equitable actions, which are less than $50,000 USD.[82] Local court rules may lower this limit but must not exceed it.[83] The case is heard by a panel of three court-certified arbitrators who are legal practitioners within the Philadelphia region. The proceedings are held in a permanent arbitration centre. When both parties arrive, the matter is assigned a 'ready' status for hearing. The cases are then assigned to available panels and the arbitrators are required to identify themselves and the firms to which they belong. The parties may not object to the particular arbitrator assigned to their case, but they may request that the arbitrator disqualify himself or herself on the same grounds as a judge may be disqualified (eg conflict of interest). The proceedings are governed by the usual rules of evidence, stipulated in the *Pennsylvania Rules of Civil Procedure* (PRCP) and the *Philadelphia Civil Rules*.[84]

3.75 At the conclusion of the hearing, the parties leave the room to allow the arbitrators to discuss the case and reach a decision. Rule 1306 of the PRCP states that an award must be made 'promptly', in practice this appears to be on the day of the hearing. The award must dispose of all

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78 *Workplace Compensation Commission Rules 2006* (NSW), R 16.2(8); Workers Compensation Commission, *Practice Direction no. 6 Appeal against a decision of the commission constituted by an arbitrator 1 November 2006*, pp 4–5.

79 *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 352(2).

80 Workers Compensation Commission, *Practice Direction no. 6 Appeal against a decision of the commission constituted by an arbitrator 1 November 2006*, p 5.

81 ibid, pp 6–7.

82 Philadelphia Court of County Pleas, *Civil Administration At A Glance 2005–2006*, viewed 10 December 2006, <http://courts.phila.gov/pdf/manuals/civil-trial/compulsory-arbitration-center.pdf>.

83 r 1301 Pennsylvania Rules of Civil Procedure.

84 Philadelphia Court of County Pleas, *Civil Administration*.

matters. The award is then entered on a 'Report and Award of Arbitrators' form, which is submitted to the assignment desk. A copy is then left at the front of the bench in the Assembly Room and the parties can view it and learn the result on the day of the hearing. Any obvious errors (eg mathematical) may be brought to the panel's attention either on the day or within 30 days. If neither party has appealed the award after 30 days, judgment on the award must be entered and is enforced in the same manner as any other court judgment.[85] If a party fails to appear at the arbitration, the matter may be heard by a judge. If this occurs, there is no right to a hearing de novo and the matter must be heard by an appellate court in the event that an appeal is lodged.

3.76 The decision of the arbitration panel may be appealed by filing a notice of appeal within the 30 day period. Payment must be made for the compensation of the arbitrators. This payment must not exceed 50% of the amount of the award and cannot be recovered as costs.[86] The prothonotary gives notice to each party to the appeal, but failure to give such notice will not invalidate the appeal. An appeal is assumed to be by all parties on all issues unless the parties have stated otherwise in writing. The appeal is by way of a hearing de novo and an arbitrator cannot be called to testify as to what occurred before the arbitrators.[87] The parties are entitled to recover a maximum of $50,000USD.

United Nations Commission on International Trade Law (UNCITRAL)

3.77 The UNCITRAL Arbitration Rules are based upon the consent of the parties and only apply where the parties have agreed, in writing, that the UNCITRAL Arbitral Rules shall apply.[88] The parties may agree to alter parts of the rules[89] and may elect which laws should apply. If no election is made the arbitrator(s) will decide which law is applicable to the dispute.[90] If the parties' agreement fails to specify the number of arbitrators to hear the dispute, and if within 15 days after receipt by the respondent of the notice of arbitration, the parties have not agreed that there shall only be one arbitrator, three arbitrators are appointed.[91] Where three arbitrators are selected, each of the parties may choose one arbitrator. The additional arbitrator, who controls the proceedings, is selected by the two arbitrators who have been appointed by the parties.[92] Decisions are made by the majority[93] and are binding on the parties.[94] The parties are allowed 30 days from the final decision to request an interpretation of the award,[95] a correction[96] and an additional award.[97] Generally, the hearings are held in private unless the parties agree otherwise.[98] The enforcement of an award depends on the arbitration laws of the particular countries.[99]

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85 The Pennsylvania Code, Chapter 1300 Arbitration, viewed 12 December 2006, <http://www.pacode.com/secure/data/231/chapter1300/chap1300toc.html#1308>.
86 r 1308(1).
87 r 1311.
88 UNCITRAL, *UNCITRAL Arbitration Rules*, viewed 8 December 2006, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.
89 Article 1.
90 Article 33.
91 Article 5.
92 Article 7.
93 Article 31.
94 Article 32.
95 Article 35.
96 Article 36.
97 Article 37.
98 Article 26.54.
99 W.W. Park 'Duty and discretion in international arbitration,' (1999) 93 *The American Journal of International Law* 805.

China International Economic and Trade Arbitration Commission

3.78 Arbitration cases heard in China are governed by the China International Economic and Trade Arbitration Commission (CIETAC) Rules.[100] CIETAC manages cases which involve international or foreign-related disputes, disputes related to the Hong Kong Administrative Region, the Macau Administrative Region, or the Taiwan region, and domestic disputes which arise within China.[101] Where parties have stated in their agreement that matters will be dealt with by the CIETAC, they are deemed to have agreed to arbitrate in accordance with the CIETAC rules. Arbitrators are independent from the parties[102] and the arbitral tribunal is composed of one or three arbitrators.[103] The arbitrators are appointed from the panel of arbitrators selected by CIETAC.[104] If the parties have provided for the dispute to be heard by someone other than a CIETAC arbitrator, that arbitrator may act as co-arbitrator, presiding arbitrator, or sole arbitrator provided that the appointment has been confirmed by the chairperson of CIETAC. Within 15 days of notice of the arbitration, each party may nominate an arbitrator or entrust the Chairperson with appointing an arbitrator, if a party does neither, the chairperson will appoint an arbitrator.[105] The presiding arbitrator is then appointed jointly by the parties or by the chairperson.[106] Parties are allowed to nominate up to three arbitrators, if one arbitrator has been nominated by both parties they will automatically be the presiding arbitrator. If there is more than one name in common, or if there are no names in common, the Chairman of CIETAC will choose which arbitrator will be the presiding arbitrator.

3.79 The arbitral tribunal may conduct hearings in a manner it considers to be appropriate, unless the parties have agreed otherwise[107] and may decide where hearings should be held if the parties have not specified where the proceedings should take place.[108] Unless the parties decide otherwise, the proceedings are held in private and anyone involved in the proceedings is not to disclose substantive or procedural information to outsiders.[109]

Saudi Arabia

3.80 Saudi Arabia's system of arbitration is governed by the 1983 *Arbitration Code*. Arbitration is only allowed for commercial and civil matters and a party to the arbitration must have 'full legal capacity' (ie a minor or bankrupt entity cannot resort to arbitration).[110] In Saudi Arabia the judicial authority retains a supervisory role over arbitration proceedings. The arbitration documents must be approved by the authority which would have originally had jurisdiction over the dispute. The documents must be signed by the parties, specify who has been nominated as arbitrators and provide details of the dispute. The Authority (Board of Grievances) must confirm or disallow the arbitration instrument within 15 days of it being submitted. Before arbitration can start, the arbitration instrument must be certified by the judicial authority.

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[100] CIETAC, *CIETAC Arbitration Rules*, viewed 10 December 2006, <http://www.cietac.org.cn/english/rules/rules.htm>.
[101] Article 3.
[102] Article 19.
[103] Article 20.
[104] Article 20.1.
[105] Article 22.1.
[106] Article 22.2.
[107] Article 29.
[108] Article 31.
[109] Article 33.
[110] Y. Al-Samaan, 'The settlement of foreign investment disputes by means of domestic arbitration in Saudi Arabia' (1994) 9 *Arab Law Quarterly* 217.

3.81 The code provides for both existing and future disputes. An 'arbitration agreement' is created when the parties agree to submit an existing dispute to arbitration whereas an 'arbitration clause' provides that future disputes will be decided by arbitration. Arbitration clauses are separable from the main contract, thus a dispute about the validity of the contract will not invalidate the arbitration clause. Parties may choose the number of arbitrators but an odd number must be appointed. Arbitrators are required to have knowledge of the principles of Sharia, commercial codes, and the customs and traditions of Saudi-Arabia.

3.82 Unlike many other arbitration systems, the arbitration proceedings are conducted in public, unless the arbitrators or one of the parties requests that proceedings be conducted privately. Parties may specify a time limit within which the arbitrator must make an award, if the parties have not set a date, the award must be made within 90 days of the date on which the arbitration agreement is approved. The award must be made by majority vote, provide written reasons for the decision and be signed by the arbitrators. It must then be submitted to the judicial authority within 5 days. Parties are given 15 days from notification of the award to appeal the award. The judicial authority then issues an enforcement order. Once this has occurred, the award has the same status as a judgment.

Conclusions

3.83 Arbitration is not commonly used to resolve family law disputes. The Legal Aid Queensland scheme does however offer some experience of a functioning arbitration scheme. Although referrals to the scheme have increased since its inception in 2001 the number of arbitrations carried out has remained limited because of the consensual nature of the scheme. There are no figures available for rehearing rates. Within these constraints the scheme has enjoyed some success and acceptance to the extent that it has now been adopted by Legal Aid Queensland as a core part of Legal Aid Queensland's dispute resolution services.

3.84 There are also a number of successful arbitration schemes in operation in jurisdictions other than family law, and Council has carefully considered the positive aspects of these schemes. At present, the Council favours a model for arbitration in the family courts which draws on some of the elements of the successful NSW Workers' Compensation Commission scheme of arbitration. The scheme is carefully balanced to provide incentives to all parties to proceed with the action as quickly as possible, and has had demonstrated success in handling large volumes of cases, with a relatively low rate of appeals. However, some modifications to the model are necessary in order to avoid constitutional concerns. In particular, Council's preliminary view is that any scheme will need to allow an automatic right of rehearing de novo, without any leave being necessary. It should also be noted that, while Council is considering giving courts a discretion to order referral to arbitration, it is not contemplating establishing arbitration as a mandatory step in the process for resolving all financial property matters. Proposals for possible models are discussed below at Chapter 7.

4 ARBITRATION IN FAMILY LAW

Background

4.1 A number of attempts have been made to set up an effective system of arbitration under the Family Law Act. In 1991, in order to fulfil the then Prime Minister's election promise and in response to the 1988 Family Law Council report, legislation was passed amending the Family Law Act to introduce mediation along with arbitration as two additional methods of alternative dispute resolution in family law matters. The Government declined to impose detailed rules on the arbitral system, instead providing in the amendments a skeletal framework around which an arbitration scheme might develop.[111] The amendments to the Family Law Act commenced operation on 27 December 1991. This legislation is discussed later in this chapter.

4.2 Mediation was an immediate success, enjoyed rapid uptake, and was provided funding. Arbitration, however, got off to a very slow start. No structure for court-ordered compulsory arbitration was implemented.

4.3 In his speech to the National Press Club in October 1996 the then Attorney-General, Daryl Williams, announced that he was planning to facilitate greater use of arbitration. He said it had not happened in family law to date because of 'deficiencies in the existing legislative system' and because the previous Government had not made the necessary regulations to enable arbitrators to be approved so that the Family Court could refer matters to them.[112]

4.4 In 2000 the Family Law Act was amended by the *Family Law Amendment Act 2000*. Those amendments removed compulsory referral to arbitration following the handing down of the *Brandy* decision and constitutional concerns. Under this scheme awards could only be reviewed on matters of law. Further minor amendments to the scheme of voluntary arbitration were made in 2006 as part of the *Shared Parental Responsibility Act 2006*.

4.5 The rest of this chapter will look in detail at each of the 1991, 2000, and 2006 schemes.

The 1991 legislation

4.6 The *Courts (Mediation and Arbitration) Act 1991* (Cth) introduced a system for arbitration of family law disputes. The relevant provisions were inserted in Division 2 of Part 3A of the Family Law Act. The amendments established a system of court-annexed compulsory arbitration, as well as a system for registration of the awards of private, consensual arbitration. The scheme provided for review of awards by the Family Court of Australia, either de novo for compulsory arbitral decisions or on matters of law for consensual arbitral decisions.

4.7 The system introduced by these reforms was in many ways less sophisticated and broad-based than that envisaged by the Family Law Council's 1988 report, *Arbitration in Family Law*.[113] Arbitration was only available for Part VIII matters, covering property and spousal maintenance. By contrast, the Council had recommended that consensual arbitration should not only cover these

[111] Michael Duffy, *House of Representatives Official Hansard*, 30 May 1991, p 4454.
[112] Daryl Williams, *Speech to the National Press Club*, 15 October 1996, paragraphs 77 and 82.
[113] Family Law Council, *Arbitration*. For a summary of the recommendations, see pages iii–xiv of the 1988 report.

matters, but also guardianship and custody matters, access, child welfare, some proceedings in relation to an approved maintenance agreement, and 'related matters' (matters of practice and procedure only, or a matter of mere machinery).[114] The Report also recommended that compulsory arbitration should include proceedings as to child welfare, and 'related matters'.[115]

4.8 Other important recommendations were also not adopted. The Council had recommended a costs structure which was intended to discourage litigants from frivolous appeals from the results of arbitral proceedings.[116] The report had also recommended rules concerning the duties of arbitrators, and a series of rules for the qualification, appointment, and payment of arbitrators.[117] Council suggested rules of procedure for arbitration.[118] Finally, Council recommended a programme of education.[119] These recommendations were not implemented. Instead, the legislation established a basic framework for arbitration, and left the details to be filled in by the Rules of Court.

4.9 Section 19D: The 1991 scheme gave the court a discretion to order court-annexed, compulsory arbitration as well as referring parties to private arbitrators for voluntary arbitration. The court could adjourn proceedings to enable arbitration to take place. This section provided for rules of court to be introduced by the Family Court to control the process and for referral to an arbitrator approved under regulations to be promulgated by the Attorney-General. Neither avenue was ever pursued.

4.10 Section 19E: This section provided for private consensual arbitration. Once parties reached an agreement to have their dispute dealt with by way of private arbitration, they could approach the court to make such orders as the court thought appropriate to facilitate the effective conduct of the arbitration. When an award was made it could be registered in accordance with the rules of court and once registered would have effect as if it were a decree made by the court.[120]

4.11 Section 19F: This section provided that a review of an award made in a private consensual arbitration could only be determined by the Full Court on questions of law.

4.12 Section 19G: This section provided that the review of an award made as a result of a court ordered arbitration would be by way of a hearing de novo by a single judge of the Family Court.

4.13 The rationale in the distinction between s19F and s19G was that if parties voluntarily entered into a consensual arrangement whereby a third party was chosen to determine their dispute then that determination should be more final than a determination made by a court imposed referral to arbitration. There is a strong constitutional basis for this distinction. The constitutional issues are discussed in chapter 6.

The 2000 legislation

4.14 The Family Law Act was amended by the *Family Law Amendment Act 2000*. The then Attorney-General, Daryl Williams, explained that amendments to the Family Law Act were necessary to enable consensual private arbitration of disputes about property. He said this would

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[114] ibid, Recommendations 11–15, 21 and 26.
[115] ibid, Recommendations 15 and 26.
[116] ibid, Recommendations 34 and 35.
[117] ibid, Recommendations 42–51.
[118] ibid, Recommendation 52.
[119] ibid, Recommendation 4.
[120] *Family Law Act 1975* (Cth), Section 19D(4).

give the parties greater choice in property settlement, and would 'provide a more efficient and less costly means of dispute resolution in property matters'.[121] Amendments were made to remove the option of court-ordered compulsory arbitration, to confine the right to review to questions of law, to allow arbitrators to charge fees directly to the parties, and to allow arbitrators to refer questions of law to the Family Court of Australia or the Federal Magistrates Court which was established in 1999.

Legislative amendments

4.15 A number of amendments were made to the Family Law Act.

- Subsection 19D(2) was amended so that the court could no longer impose arbitration on an unwilling party.
- Section 19F(1) was amended so that the review of the award of a private, non-court ordered arbitration on a question of law would be to a single judge of the Family Court rather than the Full Court. Section 19FA(1) was inserted to allow review on a question of law by the Federal Magistrates Court.
- Section 19G, which allowed for review of an award made in court-ordered arbitration by way of a full hearing de novo, was repealed. New sections 19G and 19GA were inserted to allow arbitral awards to be set aside on a question of law only. This was possible where the arbitration process was affected by fraud (including non-disclosure of a material matter), bias, lack of procedural fairness, where the agreement was void, voidable, or unenforceable, and where circumstances had arisen which made it impracticable for all or part of the award to be carried out. This meant that an award made by a private arbitrator would be more final than both an order made under s79 by a judge at a contested hearing and more final than even an order approving a s 87 Agreement. (See s79A, s79A(1), and s87(8).)
- Section 19H was inserted to provide for payment by the parties to the arbitrator of any fees charged by the arbitrator.
- Sections 19EA and 19EB were inserted to allow an arbitrator to refer a question of law in relation to an arbitration to the Family Court of Australia or the Federal Magistrates Court, and for remittal back to the arbitrator.

The 2006 legislation

4.16 In 2006, the Family Law Act was amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.[122] The legislation made a number of minor changes to the system of arbitration in the Family Law Act, including setting out a definition of an arbitrator, and the arbitrator's rights, duties and obligations. The existing sections dealing with arbitration were relocated in the Family Law Act. The 2006 amendments, like the 2000 amendments, only provide for a consensual system of court-annexed arbitration. The current provisions on arbitration are in Part II Division 4 and Part IIIB Division 4 of the Family Law Act. Their operation is discussed in more detail in Chapter 3.

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[121] Daryl Williams, "Second Reading Speech, Family Law Amendment Bill 1999", *House of Representatives Official Hansard*, Wednesday, 22 September 1999, p 1052.

[122] No. 46 of 2006.

Experience of arbitration and mediation

4.17 The introduction of mediation as an optional dispute resolution method led to immediate rapid success. Despite the simultaneous introduction, mandatory arbitration and later consensual arbitration have not been embraced as normal ways of settling disputes. There are a number of reasons why these two forms of dispute resolution had such different levels of acceptance despite being first introduced into the Family Law Act at the same time.

4.18 Firstly, there were already a number of organisations in place with skills in mediation and conciliation prior to the introduction of mediation as a legislatively-sanctioned process in family law. Governments had used funding to encourage the development of marriage counselling and similar services since the federal uptake of family law responsibility in the 1960s,[123] and individuals regarded community-based (often religious) organisations as being appropriate for mediation of family matters.

4.19 Secondly, Australian governments already had a record of providing funding to mediation bodies, such as the Community Justice Centres, and, based on previous experience of success with mediation, very quickly came to provide funding for mediation of family matters, allowing the development of full pilots and encouraging professionals to train as mediators. For example, even before the 1991 amendments, there were eight organisations receiving funding for family mediation.[124] Funding increased through the 1990s.[125]

4.20 Finally, parties and the courts themselves were eager to use mediation as a form of primary dispute resolution. Courts had already come to regard mediation as being an effective means of reducing case lists, particularly for simpler cases,[126] and government support for mediation thus resonated with a growing feeling in the courts that mediation was an effective dispute resolution mechanism. As a result, mediation, when introduced, was rapidly taken up by parties even before becoming a mandatory part of the pre-trial process, as it has for children's matters following the introduction of the Shared Parental Responsibility Act in 2006.

4.21 Arbitration faced, and continues to face, a very different situation, enjoying few of the advantages that mediation enjoyed in its early years. While arbitration is well accepted in a general commercial context, it has not been well used in the family law context. AIFLAM has conducted courses for family law arbitrators at an average rate of one per year since 1998.[127] Since 2000, a list of qualified arbitrators has been kept in compliance with the Family Law Regulations.[128] However, qualified arbitrators until now have had little work to do. No funding has been made available for

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[123] Stephanie Charlesworth, 'The Acceptance of Family Mediation in Australia', (1991) 8 *Mediation Quarterly* 265 at p 267.

[124] ibid, p 275.

[125] Dale Bagshaw, 'Mediation of family law disputes in Australia', (1997) 8 *Australian Dispute Resolution Journal* 182 at p 183.

[126] As evidenced by the success of initiatives in the early 1990s such as the NSW Settlement Weeks and the Victorian 'Spring Offensive', and subsequent introduction of more permanent court-connected mediation services: Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, 2002, pp 254–256.

[127] In each of 1998, 2002, and 2005 one course was held; three courses were held in each of 2001 and 2006. Courses have been held in Melbourne, Canberra, Hobart and Perth.

[128] Regulation 67B(d) *Family Law Regulations* provides that the list of arbitrators be kept by the Law Council of Australia or by a body nominated by the Law Council of Australia of legal practitioners who are prepared to provide legal arbitration services under the Act. The nominated body is AIFLAM.

court-annexed arbitration,[129] and there has been a general reluctance amongst parties to go to arbitration.

4.22 This was demonstrated in a recent informal survey conducted by the Family Court of Australia. Registrars conducting case assessment and conciliation conferences collected data from a small sample of case assessment and conciliation conferences (approximately 200) across a number of registries during one month in 2006.[130] Parties were asked if they had attended arbitration as part of their pre-action dispute resolution proceedings, and if they would consider being referred to arbitration at this point. In the sample of 204 cases, only one had already attended arbitration, although 13% indicated they had attended another similar process. 82% of the parties indicated they were not prepared to consider arbitration at this point, and none agreed to an immediate consensual referral. The reluctance to consider arbitration is likely to be due to a lack of knowledge and understanding of the process and potential benefits of arbitration. This may indicate that a well-established and credible arbitration system might attract more litigants than the current system.

4.23 There have been a number of attempts to introduce an arbitration system in family law. Despite these attempts, arbitration has continued to languish. Reasons have included a continued lack of funding, lack of recognition of arbitration as a viable option in the legal community, and a sense that the limits on review were too stringent, making arbitration a potentially risky strategy. It seems likely that without a fundamental reconstruction of the framework for arbitration the attitudes to arbitration will not change sufficiently for it to become a widely used dispute resolution mechanism. This suggests that in order for arbitration to succeed there must not only be a solid framework and community education, but there also needs to be a system which forces appropriate cases into arbitration in the pre-trial process.

[129] See, for example, the comments of Alastair Nicholson CJ, 'Mediation and court order arbitration — the Family Court experience', (1993) *Proceedings of the 28th Australian Legal Convention*, vol 2, Hobart, p 237 at p 244.

[130] Results provided to the Family Law Council by Angela Filippello, Principal Registrar, Family Court of Australia by e-mails on 6/11/2006 and 04/01/2007.

5 COSTS OF A NEW ARBITRATION SCHEME

Current costs of proceedings in the family law courts

Costs to the Government of the current system

5.1 The potential saving to government lies in the notion that the cost of funding an arbitral system will, over time, be less than the cost of funding increasing numbers of judicial officers to dispose of *all* of the cases.

5.2 The Federal Government provides significant annual funding to the Family Court, the Federal Magistrates Court and State Local Courts for the determination of matters under the Family Law Act. The courts do not give a breakdown of the costs of a final hearing or the costs at various points in the litigation pathway. However, it is a common assumption that the most expensive part of the litigation pathway is the hearing before the judicial officer, as this is both the most labour-intensive part of the process, involves the highest-paid personnel, and requires a great deal of formal documentation, such as affidavits and other case documents. The study conducted by Pesce discussed below supports this view. Only around 5% of matters proceed to judicial determination, but these cases involve a substantial proportion of the costs to the court. These court costs are largely funded by the federal government. The costs to government will be reduced if a significant proportion of property and financial matters can be resolved at an earlier stage by arbitration, because, over time, the expansion of the appointment of Family Court Judges or Federal Magistrates will not need to be as great. It is not possible to quantify the reduction because it would depend on the level of uptake of arbitration and the level to which the arbitral process is financially supported by the government.

Costs to the parties

5.3 It is difficult to determine the average costs incurred by the parties. Counsel fees do, however, give some indication of the expensive nature of court proceedings. Absent private agreement, counsel fees are prescribed by Schedule 3 of Family Court Rules.[131] Senior counsel may charge $371–2650 for attendances less than three hours, fees for Junior counsel are $198.20–$928.55. For a hearing or trial which takes between three hours and one day, Senior counsel fees are $689–$5300 and Junior counsel fees are $677.35–$1565.60. For longer hearings fees range from $1749–$5300 per day for Senior counsel and $1565.60–$2301.25 per day for Junior counsel. Hearing fees are also a significant burden for parties: in the Family Court of Australia, there is a hearing fee of $383 for defended matters, and in the Federal Magistrates Court, the hearing fee is $364.[132]

5.4 A small study conducted in 2002 by G Pesce examined 47 cases in the family law jurisdiction, covering property as well as children's matters.[133] Rather than focusing purely on the expense of court proceedings, figures were collated from 47 family law bills of costs which included expenses incurred from first contact with counsel to last charge. Two observations of

[131] Family Law Rules Schedule 3.

[132] Family Law Courts, *Court Fees*, viewed 9 May 2007, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Fees/Court+fees/>.

[133] G Pesce, 'Analysing the structure of litigation costs,' (2002) 16 *Australian Journal of Family Law* 1.

particular relevance for the debate about whether to introduce discretionary court-ordered arbitration may be drawn from this study. The first is the extended delay between the first and last contact between clients and lawyers. The median duration of proceedings was 20 months,[134] a lengthy delay which indicates that further efforts to emphasise non-judicial determination of matters may be useful. The second is the breakdown of the costs to clients of the various stages of the litigation pathway. The study found that the median cost to the client up to and including the pre-hearing conference was $10,389, while the cost from the commencement of the trial to the last contact with the lawyer was $23,804.[135] This clearly indicates that the trial is by far the most expensive part of the litigation process for clients.

5.5 The average length of time between first contact with Counsel and final charge was 22 months, the highest was 51 months. It should be noted that not all cases proceeded to trial and the figures include costs incurred after trial (eg arguments over who should pay costs of trial, consideration of appeals and enforcement issues).[136] The costs incurred by parties from a pre-hearing conference to trial ranged from $1,602–$293,368 and the average was $28,951. Overall, the median total cost incurred by a party, from the point of first contact with counsel to last charge, was $25,785 and the average was $45,456. The minimum amount incurred was $3,980 and the maximum was $382,659.[137]

Potential cost savings

5.6 Arbitration offers the advantage of reducing delays and expenses. If parts of complicated proceedings can be determined by arbitration, court time will be reduced and so will the associated costs. For less complex cases, arbitration provides an opportunity for parties to avoid court proceedings and their associated expense, even if conciliation and mediation has failed. Generally speaking, arbitration proceedings are less formal than court hearings. Furthermore, arbitration proceedings may be brought more quickly than court proceedings, thereby reducing costs. A government funded arbitration system would clearly save costs to the parties. Indeed, even if parties were forced to bear the costs of arbitration, if the appeal rate were low enough, it is likely that on average parties would make considerable savings from arbitration. However, if the arbitration award for a particular matter is appealed, the costs to the parties in that case will increase.

5.7 Another relevant factor is the costs expended by the parties and the cost of providing the services of the courts in comparison to the amounts in dispute. The principle of 'proportionality' suggests that the procedure for resolving a given dispute should be proportionate to the value, importance and complexity of the dispute.[138] The principle is one which is increasingly being used to underpin the management of litigation,[139] and is included in a number of court rules or court

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[134] ibid, p 4.

[135] ibid, p 6. Note that this figure is the cost for only one party. Total costs to the parties are obviously higher than this figure, although it is impossible to say exactly how much so.

[136] ibid.

[137] ibid.

[138] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, 2000, [1.92]–[1.93]. See also Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1996; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project 92, 1999.

[139] Lord Falconer, *Doing Law Differently*, 2006; P Cashman, *The Cost of Access to Courts*, Paper delivered at Confidence in the Courts Conference, Canberra, 9–11 February 2007.

directives, including in the family law courts.[140] While it is not suggested that a simple quantitative analysis determine the time and money that should be allocated to any particular family law dispute, proportionality is a principle that has relevance in the family law context and in particular to the development of cost-effective forms of dispute resolution for appropriate cases.

5.8 Arbitration has the potential to reduce costs to both the government and the parties. Judicial determination is by far the most expensive part of the litigation process. If it can be avoided or shortened through a successful arbitration, the parties, the courts and the government should realise savings.

Costs of arbitration

Remuneration of arbitrators

5.9 If an effective system of arbitration is to be introduced it will be necessary to provide appropriate remuneration in order to attract sufficient numbers of qualified decision makers. If legal practitioners are used as arbitrators in a new arbitral system,[141] fees for counsel may provide an approximate benchmark as to the rough costs necessary to attract practitioners. The current fees prescribed under the Family Law Rules allow Senior Counsel to charge up to $5,300 per day and for Junior counsel up to $2,301.25 per day.[142] The proposed arbitral system is primarily aimed at reducing court delays, and doing so in a cost effective manner. The system of remuneration for arbitrators should reflect these two goals by ensuring that it is both attractive to arbitrators, and structured to encourage arbitrators to provide a swift decision.

5.10 Council seeks submissions as to whether an arbitrator should be paid a flat rate for each adjudication performed or on the basis of time expended. The NSW Workers' Compensation Commission Model pays a flat rate for each adjudication, as does the Legal Aid Queensland scheme. If arbitrations are assumed to take on average four hours, a rate of around $1,500 per arbitration may be appropriate. This ensures that costs are kept under control, and in any event at a rate much lower than the cost of litigation to the courts. In order to make the system attractive to arbitrators, arbitrations should be limited in time such that the flat rate is still relatively attractive. Four hours may be an appropriate maximum period of time for an arbitral hearing. Some matters will be able to be dealt with in less than four hours, some matters will take longer. If arbitrators are able to deal with more than one matter a day, the remuneration and variety provided by the work may make being an arbitrator an attractive option to practitioners.

5.11 If registrars are used as arbitrators, it may be appropriate to review their remuneration or to create a special class of registrar-arbitrators in order to reflect the increased decision-making responsibilities of an arbitrator. Because of the increased demands on the time of registrars, it is also likely that the numbers of registrars employed by the courts would have to be increased. The possible use of registrars as arbitrators is further discussed in Chapter 10.

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[140] See, eg, *Family Law Rules 2004* (Cth) Rule 1.07 regarding the main purpose of the Rules; and Sch 1 Rule 1(6)(h) in the Pre-action Procedures for Financial Cases.

[141] See discussion of this point in Chapter 10.

[142] *Family Law Rules 2004* (Cth), Schedule 3.

Infrastructure

5.12 Depending on how the arbitration system is to be established, the cost of venues will also need to be considered. For example, if a court-annexed system similar to the Philadelphia model is to be used, the cost of establishing and running such a facility must be considered. Some existing court premises may have suitable accommodation to hold an arbitration. If a court-annexed scheme is run with registrars acting as arbitrators, it will probably be appropriate to use existing court resources for arbitral hearings. If parties are allowed to choose where the arbitration takes place, it may also be possible to hold arbitrations in inexpensive places such as the arbitrator's chambers. Consideration could be given to hearing arbitrations in the Family Relationship Centres. This would have the dual advantages of avoiding the costs of purpose-built premises, and increasing availability of arbitration in regional areas.

5.13 The use of hearings by electronic means such as telephone might also be appropriate in some circumstances. This approach is adopted by the Legal Aid Queensland scheme discussed in Chapter 3.

Implications for legal aid

5.14 Legal aid for property matters is rarely available, however, in those cases where aid is granted adoption of an arbitral system is likely to have some impact on Legal Aid. Arbitration will introduce a new option into the litigation pathway for family law property matters, potentially requiring legal representation for a party at a new litigation event. If the legally-aided parties choose to appeal an arbitral decision, this will extend the amount of time Legal Aid lawyers must spend on that matter. However, Legal Aid would need to be satisfied that a review of the arbitrator's award was appropriate. The question as to whether an arbitral system would be overall more or less expensive for Legal Aid than the current system depends to a significant extent on the exact nature of the arbitral model adopted, and its success in diverting cases from judicial hearings. If an arbitral system is adopted which limits the time and formality of an arbitral proceeding, and from which appeal rates are low, then it is likely that a system of discretionary court-ordered arbitration will reduce costs to Legal Aid by reducing the number of defended cases they are involved with before a judicial officer. If, on the other hand, there is a very high rate of appeal from arbitral decisions, it could increase costs to Legal Aid.

5.15 Similar considerations apply to the overall costs of an arbitral system. It is also worth noting that the advantages and impact of arbitration on legal aid costs will probably be limited by the selective nature and strong guidelines for the conduct of legal aid proceedings, which ensure that a higher number of legally-aided clients settle before they reach court, and that relatively few property matters receive legal aid.[143] The fact that Legal Aid Queensland has adopted consensual arbitration as part of its core services[144] augurs well for arbitration as a method to resolve disputes for legal aid clients.

[143] Rosemary Hunter, 'Through the looking glass: Clients' perceptions and experiences of Family Law litigation', (2002) 16 *Australian Journal of Family Law* 1 at pp 11–12.

[144] See discussion in Chapter 3.

Funding sources

User-pays

5.16 One option for funding a court-annexed arbitration scheme is to adopt a strictly user-pays scheme. In this model, the parties bear the entire cost of arbitration. In return, the user receives much faster adjudication of their matter than they would have received in the normal litigation pathway. This is not of itself attractive to litigants, as the lack of interest in the current scheme of arbitration in family law demonstrates. While litigants must pay the costs of their lawyers and court fees in the court system, court proceedings are heavily subsidised inasmuch as litigants make no payment towards the costs of judges, buildings, and associated administrative costs. A rapidly arbitrated matter might be cheaper for parties than litigation of the same dispute because its efficiency may lead to reduced legal fees. However, this may only apply to the simplest, most easy to resolve matters, or to a model which enforces simplicity and rapidity, such as a mandatory hearing on the papers. Thus, while there are substantial cost incentives for courts to push parties into arbitration, this model may provide fewer incentives to litigants to consent to arbitration.

5.17 There are two examples of the user-pays principle in the family law context which might provide some guidance as to how a user-pays principle might operate in arbitration. These are the Independent Children's Lawyers (ICLs), and legal aid for property cases. When a legal aid commission appoints an ICL, they are funded to do so by the government, but on the basis that they will seek to recover the costs of the ICL from parties who are financially able to pay. They will also seek some upfront payment, usually in the form of a partial prepayment, from parties who are financially able to pay. At the end of a case, the ICL makes an application to the court for payment of costs by parties who are able to do so. Section 117(4) of the Family Law Act provides that if a party is legally aided or a party would suffer financially as a result of the order, then no order for costs for the ICL can be made against them. The result is that those users who are able to pay do so, otherwise the state will fund the costs of the ICL.

5.18 Similarly, in a case in which a legal aid commission has funded a property case, and a party they have aided has kept the house, the commission will sometimes take a charge over the house so that if at any future time it is sold, they are then repaid the funds that they had advanced to the party for litigation.

5.19 It would be usual that in a property case both parties would have funds available at the end of the case. Therefore, one possibility is that the Government could underwrite the cost of the arbitration on the basis that the parties would have an obligation to repay the government once they were in a financial position to do so. Parties with sufficient liquid assets would have to pay immediately, whereas payment would be deferred until an asset such as the house is liquidated where liquid assets were not immediately available.

5.20 A wholly user-pays model in the context of discretionary court-ordered arbitration has a number of disadvantages which can be loosely described as considerations of fairness. Disadvantages include:

- requiring parties to arbitrate where the parties have limited or no funds available to meet the costs of arbitration,
- referring parties to arbitration where one party refuses to meet the costs of arbitrating, and
- imposing additional costs on parties if after an award is made one party appeals.

All these are factors which would make it unfair to have a wholly user-pays model in the context of discretionary court-ordered arbitration. Moreover, it is likely that a user-pays model for discretionary court-ordered arbitration would be politically unacceptable.

Direct Commonwealth subsidy

5.21 Another option is for the Australian government to directly subsidise court-annexed arbitration proceedings. Direct funding of an arbitration system would recognise that an arbitration system keeps litigants out of court, relieving pressure on the court system and saving money. It would also encourage litigants into arbitration by making it a cost-effective alternative to litigation. From the government's point of view there would be savings in court costs if a significant number of matters are resolved by arbitration.

Offset from Court funding

5.22 Funding for arbitration might also be derived from funding which would otherwise have been allocated to courts. This would be justifiable on the basis that a successful arbitration system would reduce the courts' workload. Again, this would have the advantage of providing litigants with cheap or free arbitration, encouraging them into the arbitration system, and saving them time and possibly money. Arguably, because arbitral matters are less expensive than final orders on a case by case basis, the courts would still derive a benefit from such an arrangement, because their case load would decline faster than their funding.

5.23 The disadvantage to this model is that in linking increases in funding for arbitration to reductions in funding for courts, it encourages the courts to see arbitration as a direct competitor for funding. This is likely to have an adverse impact on the willingness of the courts to refer cases to arbitration, or even to put systems and rules in place to facilitate it. This potentially leads back to a situation similar to that after the 1991 reforms.

Mixture of funding sources

5.24 Finally, funding for an arbitration scheme might be derived from a mixture of the above funding sources. This would have a number of potential advantages. Costs to litigants might be limited enough that the savings in time become worth a small outlay in money to them. Alternative funding sources might also help to submerge competition for funding between the courts and arbitral systems, helping to ensure that arbitration helps to relieve pressure on the courts, and does not merely reduce their funding commensurately. It would also help to limit the pressure on the public purse. However, such a system is likely to require a substantial amount of negotiation and fine-tuning.

Question 1: Should the Family Law Act be amended to provide for discretionary court-ordered arbitration?

Question 2: If discretionary court-ordered arbitration is introduced should the litigant or the government meet the costs of the arbitrator and the venue, or should it be shared in some proportion?

Question 3: Should fees be payable to arbitrators on a per matter rate, or on an hourly or daily rate? What would be an appropriate level of payment?

Question 4: Should consensual arbitration be available without the parties funding the cost of the arbitrator?

Education

5.25 It is important to the success of an arbitration scheme that the legal profession, the courts, and the general public have as much information as possible about the benefits and workings of that scheme.

5.26 The Family Law Section of the Law Council of Australia has often, upon the introduction of any substantially new legislation, conducted a National Seminar Series at which judges, federal magistrates and members of the legal profession provide information about the new processes. This type of education has traditionally been provided to the legal profession on a user-pays basis with no input of funding from government (an exception to this was the recent introduction of the new Part VII).

5.27 The Legal Aid Queensland experience demonstrates the efficacy of regular training in encouraging referrals to arbitration. A substantial proportion of the referrals to the Arbitration scheme run by Legal Aid Queensland come from their panel of preferred practitioners.[145] This group has the benefit of regular training and detailed materials on the services offered by the Legal Aid Queensland. This contrasts with the small number of referrals from the courts which have not had any training other than a brochure at the time the scheme commenced.

5.28 Government may however need to provide funding for the education of staff at Family Relationship Centres and the public generally.

Question 5: If a new arbitration scheme is introduced, is there a need for education about that scheme, and how should the education be funded?

Conclusions

5.29 Council's preliminary view is that a mixture of funding sources is appropriate because this option recognises the benefits of arbitration for all stakeholders: the litigants, the courts, the legal profession and the government. It also encourages all stakeholders to take the process seriously, as they will all have direct financial interests in its success.

5.30 Until the exact details of a proposed model are finalised, it is very difficult to make definitive statements about the likely costs and potential cost savings of an arbitral system. However, it is possible to put forward a number of general propositions with some confidence:

- Arbitrations will take less time than court hearings. This particularly is so if parties agree for hearings to be conducted on the papers. Where arbitration is successful in finalising a matter, this will provide a concomitant saving to parties (and to Legal Aid where relevant) through reduced costs for legal representation.
- Arbitration is less formal and adversarial than court hearings of property matters. This may allow parties to avoid legal representation and its associated costs altogether, providing a further costs saving as against judicial determination of a matter.

[145] In the 2005/2006 financial year 90 of the 367 referrals were made by panel solicitors.

- Arbitrations need not have a major cost impact in terms of infrastructure. Depending on the model adopted, arbitration may be conducted in the arbitrator's chambers or office, on court premises or by teleconference (as in the Legal Aid Queensland scheme). These arrangements are not likely to have a significant cost implication for the parties or the courts.
- Judicial determination of matters is very expensive. Diverting even a modest proportion of cases away from judicial determination will allow the courts to avoid substantial costs.
- An arbitration model which can be turned on or off at will is ideally suited to managing infrastructure costs such as court buildings and judicial resources. It will allow temporary periods of high demand at particular registries to be dealt with in a much more cost effective and flexible way.

Therefore, while it is difficult to say exactly what the impact would be, it seems probable that a successful arbitration model will likely produce substantial cost savings over the status quo.

6 THE CONSTITUTIONAL IMPLICATIONS OF NON-CONSENSUAL ARBITRATION IN THE FAMILY LAW CONTEXT

The two legislative approaches which could be adopted

6.1 Subject to certain rights to delegate, only Chapter III judges and magistrates and state courts vested with federal jurisdiction can exercise judicial power in relation to disputes covered by federal law.[146]

6.2 Legislation allowing for non-consensual arbitration in the family law context could be enacted by adopting one of two approaches:

1. Delegation of judicial power to court officers called 'arbitrators', or
2. Conferring non-judicial powers on arbitrators who would not form part of the family law courts.

What is judicial power?

6.3 The classic dictum is that of Griffith CJ in *Huddart Parker and Co Pty Limited v Moorehead* (1909) 8 CLR 330 at 357:

> ...the words "judicial power" mean the power which every sovereign authority must of necessity have to decide controversies between its subjects ...whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a *binding and authoritative decision* (whether subject to approval or not) is *called upon to take action.* (Emphasis added)

6.4 In *Brandy v Human Rights and Equal Opportunity Commission and Others* (1995) 183 CLR 245, the High Court said that some of the elements of judicial power are:

- the giving of a binding and authoritative decision;
- determining existing rights and duties according to law; and
- ability to take action so as to enforce that decision.

However judicial power is notoriously difficult to define. As submitted by the Solicitor-General in *Viper*[147] (discussed below) there may be a "grey area" of powers that are judicial if entrusted to a court but non-judicial if entrusted to a non-judicial body or person.

[146] *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[147] *Australian Communications Authority v Viper Communications Pty Ltd* [2001] FCA 637 at paragraph 61.

1. Delegating judicial power to court officers called 'arbitrators'

Harris v Caladine (1991) 172 CLR 84

6.5 This case concerned a constitutional challenge to the role of registrars in the Family Court. The High Court held that whilst directly conferring judicial power upon court officers who were not Chapter III judges was inconsistent with the Constitution, Parliament was able to provide for the delegation of the powers of the court to officers who were not Chapter III judges (in this instance, registrars) subject to certain conditions being met.

6.6 Mason CJ and Deane J held that delegation can only be valid to the extent that it could be properly said as a practical and theoretical matter that judges constitute the court.[148] They explained that this "means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters".[149] Put another way, they argued that court officers authorised to exercise judicial power must be "under the real supervision and control of the justices of the court"[150] and that the role of court officers exercising judicial power "is to assist judges" and must be "secondary to that of the judges".[151] Dawson J agreed and added that a court cannot abdicate any of its judicial functions in such a way that they are no longer performed by it or on its behalf.[152] The High Court also emphasised the importance of decisions not made by a judge or magistrate being subject to a review de novo.[153]

Discussion

6.7 If judicial power is delegated to arbitrators, the High Court's decision in *Harris v Caladine* must be observed. Namely, there would need to be sufficient judicial control and supervision over the arbitration process. As Gaudron J points out, "the requirement that delegation be consistent with the power being vested in the courts directs considerations of both substance and degree".[154] As such, any evaluation of the constitutionality of non-consensual arbitration in the family law context cannot be conducted in the abstract and much will depend on a comprehensive examination of the details of the specific scheme itself. For instance, as Dawson J noted,[155] whether there is adequate judicial control and supervision of any potential arbitration scheme may greatly depend upon pragmatic considerations such as how many Chapter III judges there were in a particular registry compared to the number of arbitrators.

6.8 When delegating judicial power, care must be taken not to create a situation in which arbitrators are exercising a jurisdiction clearly different to that exercised by judges or federal magistrates and performing a function that judges or federal magistrates do not or could not perform. Under a delegation of judicial power model, as a theoretical and practical matter the judges and federal magistrates must constitute the court, with arbitrators merely performing a role of assisting the court.

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148 *Harris v Caladine* (1991) 172 CLR 84 at 122.
149 ibid, at 597.
150 ibid, at 90–91 quoting Murphy J in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at p 66.
151 *Harris v Caladine* (1991) 172 CLR 84 at 95.
152 ibid, at 122.
153 A hearing de novo is a re-hearing when the matter is heard afresh, and the evidence given previously may be given again before the Judge or Magistrate.
154 *Harris v Caladine* (1991) 172 CLR 84 at 151.
155 ibid, at 122.

6.9 If the delegation of powers approach is chosen, consideration must be given to two matters: firstly what powers would be delegated, and secondly whether arbitrators would be court officers.

The arbitrator's powers

6.10 The constitutionality of non-consensual arbitration in the family law context under a delegated power model may greatly depend on which matters arbitrators would be enabled to hear and what powers they are granted. For example, if they are permitted to arbitrate a wide range of matters it becomes difficult to argue pursuant to *Harris v Caladine* that judges and federal magistrates still constitute the court or that arbitrators exercise secondary power only. Similarly, it is unlikely that judges or federal magistrates could validly delegate all their powers as it would be difficult to assert in those circumstances that arbitrators were merely 'assisting' judges and federal magistrates, as required by *Harris v Caladine.*[156] In this regard it is worth reiterating that s 37A of the Family Law Act limits the powers of registrars to exercise the jurisdiction of the Family Court. This serves to preserve the judicial domain and was significant to Gaudron J who reached the conclusion that the limits imposed by Chapter III of the Constitution had not been transgressed "having regard to the limited range and the subject matter of the powers" that had been delegated.[157]

Whether arbitrators be appointed as court officers

6.11 In *Harris v Caladine* Mason J commented that the jurisdiction and powers of a court may be delegated and exercised by officers who were not judges "provided, of course, that they are officers who truly form part of the organisation".[158] In the light of this, it is unclear whether Family Court arbitrators would fulfil this requirement in any real or practical sense as their whole function would appear to be exercising delegated judicial powers and they would not have any responsibilities for the administration or organisation of the functions of the Family Court, which is somewhat different to the role of registrars.

6.12 Nevertheless, some indication as to the High Court's view on this issue may be gleaned from Mason CJ and Deane J who did refer to powers and functions of the court being delegated to court officers and "other persons".[159] Gaudron J also expressed the opinion that a power or function of a court could be delegated to a person who is not part of the organisational structure of the court, although her view was limited to the example of taking evidence on commission outside the jurisdiction and she may not have envisaged this to extend to handing the whole of the determination of a property or maintenance matter to an arbitrator who is outside the organisational structure of a Chapter III court.

6.13 Under a delegated power model, registrars of the court could be appointed as arbitrators and in this case there would be no issue of the arbitrator being outside the organisation of the court. However concerns as to the extent of the power being delegated would still remain.

The role of registrars

6.14 There is a question as to what role, if any, registrars and deputy registrars of the Family Court could have in any process of arbitration. Registrars of the Court currently have considerable skill at

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[156] ibid, at 95 per Mason CJ and Deane J.
[157] ibid, at 151–52.
[158] ibid, at 91.
[159] ibid, at 94.

a process of conciliation. The registrars at the moment however do not have any power to make any type of award at the end of the conciliation process. Registrars of the Court could be arbitrators under the conferral of non-judicial power model. Whether they would need to fulfil that role "persona designata" is a question to consider.

2. Conferring non-judicial powers on arbitrators who would not form part of the Family Court or the Federal Magistrates Court

6.15 Under this approach the arbitrator would be exercising non-judicial power independently and separate to the framework of the family law courts when determining the substance of disputes. The award itself is not binding. Parties would only become bound by an award subsequent to an order by a judge or federal magistrate giving effect to the arbitral award. The constitutionality of this has been considered in a number of cases.

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

6.16 This case concerned the process by which the Human Rights and Equal Opportunity Commission determined discrimination complaints. The Commission could make an inquiry and a determination of a matter which was not immediately binding. The determination had to be registered in the Federal Court and upon registration had effect as if it were a Federal Court judgment. There was provision for review, however although the court could re-examine all matters of fact and law, parties could only adduce fresh evidence with leave.

6.17 The majority of the High Court found the Human Rights and Equal Opportunity Commission's process for determining discrimination complaints was unconstitutional. The High Court highlighted that the Commission's determination effectively became a Federal Court decision upon registration without any judicial determination or involvement in the decision, except when there was a request for review. Failing to make provisions for a hearing de novo as of right strengthened the conclusion that the scheme in reality involved an administrative body making decisions of the Federal Court.

6.18 Thus from this decision it is clear that two requirements must be met if a non-consensual arbitration scheme is to be found constitutionally valid. Firstly, it is crucial that judicial power is not conferred on the arbitrator without provision being made for a full rehearing de novo as of right. Secondly, it must be ensured that determinations made in court-ordered arbitration are enforceable only after the involvement of the court and not simply as a result of registration.

Henrick Fourmile v Selpam Pty Ltd & the State of Queensland (1998) 80 FCR 151

6.19 In this case a process established by the *Native Title Act 1993* (Cth) (NT Act) and involving matters referred to a tribunal similar to that which was considered in *Brandy* was examined. The NT Act allowed unopposed applications (ie the only party is the applicant or all other parties have indicated in writing that they do not oppose the application) to be heard by the tribunal whilst other matters had to be referred to the Federal Court for decision. The tribunal's decisions had to be registered in the Federal Court and had effect as if it were a Federal Court decision, like the determinations of the Human Rights and Equal Opportunity Commission in *Brandy*. Similarly, parties were given 28 days to appeal the decision but this was not a hearing de novo. The Federal Court, following the High Court decision found those provisions to be unconstitutional.

Australian Communications Authority v Viper Communications [2001] FCA 637

6.20 In this case the Federal Court considered the Telecommunications Industry Ombudsman (TIO) scheme which was established by the *Telecommunications Act 1997* (Cth) and distinguished its provisions from *Brandy*. Under the Act the TIO was given powers to investigate, make determinations and give directions in response to complaints by users of the service (s 125 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (Service Standards Act)).

6.21 Sackville J identified two factors which distinguished this scheme from that in *Brandy*.[160] Firstly, although the decisions of the TIO were expressed to be binding on the service provider, they were not in fact enforceable without the intervention of a court. Decisions could be enforced in one of two ways: the Australian Communications Authority might apply to a court for a performance injunction pursuant to s 564(2) of the Service Standards Act; alternatively, the TIO might take action in a court to enforce the determination pursuant to the statutory contract which established the body. Thus, Sackville J argued that "an independent exercise of judicial power [is] required to give effect to a determination", and the TIO's determination was "not immunised from 'collateral damage' " in the courts. Secondly, the Commissioner did not have to decide controversies by determining rights and duties based on the application of the principles of law to the facts as found. Rather, the Commission was to achieve a resolution based on what was fair and reasonable. These two differences from the scheme in *Brandy* led Sackville J to conclude that the decision-making functions conferred on the TIO did not constitute "exclusive and inalienable exercises of judicial power", and the issues which arose in *Brandy* were avoided.[161]

Luton v Lessels [2002] HCA 13

6.22 In this case the High Court examined a scheme which was established under the *Child Support (Registration and Collection) Act 1988* (Cth) (Collection Act) and the *Child Support (Assessment) Act 1988* (Cth) (Assessment Act). The scheme allowed a person to apply to a child support registrar for administrative assessment of child support, the registrar applied a statutory formula, unless the registrar or a court decided it should not apply. Upon acceptance of the application a parent's liability to pay child support arises and upon assessment becomes a debt owing to the Commonwealth which can be recovered in court. The Assessment Act allowed the registrar to determine that the statutory formula should not apply to a particular case.

6.23 This scheme was found not to give judicial power to the Child Support Registrar. Gleeson CJ reiterated that the mere fact that the Registrar was empowered to make decisions with reference to facts did not necessarily mean that they were exercising judicial powers. Gleeson CJ also stated that the registrar was not making decisions based on pre-existing rights; rather, the Registrar was creating new rights. The inability to enforce a decision without the intervention of the court indicated that there was no exercise of judicial powers. Hayne and Gaudron JJ concluded that the registrar was not exercising judicial power. Their reasons were: the fact that the decision was not binding, that it was subject to review and did not involve any fact-finding process.

6.24 Kirby J said:

> "*Lack of self-enforcement*: The Registrar is not empowered to enforce his own assessments, another feature commonly regarded as characteristic of the exercise of judicial power. Instead,

[160] At paragraphs 101–102.
[161] At paragraph 103.

> the Assessment Act provides that an amount of child support payable by a liable parent as a debt to the carer may be sued for, and recovered, in a court having jurisdiction under that Act. It follows that before any debt arising under the Assessment Act may be enforced by execution, there is interposed an "independent exercise of judicial power". This is the most significant difference between the legislation in the present case and the legislation that was declared defective in *Brandy v Human Rights and Equal Opportunity Commission*. In this case, the scheme of the Assessment Act does not purport to clothe the Registrar's determination of the rights and liabilities of the parties with characteristics that are binding, conclusive and immediately enforceable by him or her."[162]

Determining existing rights

6.25 A number of cases have made the point that the creation of new rights and new obligations which are to govern the future does not normally involve an exercise of judicial power (see *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 and 378); *Luton v Lessels* [2002] HCA 13.

6.26 The House Standing Committee on Family and Community Affairs in their 2003 report *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the event of family separation* said:

> "The committee received expert constitutional advice with respect to how a tribunal could be established in a way that would be constitutionally valid".[163]

The report went on to say:

> "The major constraint of the Constitution is that judicial power of the Commonwealth – to make enforceable orders – must be exercised by a court established in accordance with the requirements of Chapter III of the Constitution. The Judges and Magistrates of those Courts, and any officers to whom responsibility is delegated, must act judicially. However, the Committee has been advised that, whilst this is the position with respect to decisions about adjusting existing legal rights, decisions which are essentially about adjustment of rights in the future, based on what is in the best interests of the child, can be made administratively. The Committee is proposing that this be done by a new Families Tribunal."[164]

6.27 It seems therefore that the Parliamentary Committee had received private advice as to the constitutionality of creating a system of arbitration on the basis that it could be said that parenting orders made for a child's future were orders that were adjusting rights in the future.

6.28 Although it is outside the Council's terms of reference, arbitrators might also be used in children's matters to resolve minor issues that arise. If however those issues relate to variations of existing orders the question arises as to whether or not that falls within the notion of creation of new rights.

Conclusion

6.29 The actual constitutional soundness of conferring powers may greatly depend upon the precise nature of the review process and the corresponding extent of judicial involvement in

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[162] At paragraph 129.

[163] House Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the event of family separation*, 2003, at paragraph 4.81.

[164] At paragraph 4.83.

arbitrator's determinations. Any review process would need to be sufficiently comprehensive so that it could not be argued that arbitrators were effectively making binding decisions and, as such, exercising judicial power.

6.30 Government would usually seek its own advice on any scheme that may in the future be subject to constitutional scrutiny.

The constitutionality of consensual arbitration in the family law context

6.31 The constitutionality of consensual arbitration is not controversial. Consensual arbitration is already available in Sections 13E–13K Family Law Act. Its utility, to date, has not been fully realised.

6.32 The Commonwealth Government can introduce legislation that allows the enforcement of awards that persons obtain as a result of consensual private arbitration.[165]

6.33 It is hoped that over time, if a structure is set up which is shown to be effective, arbitration will gain credibility amongst the legal profession and litigants. That credibility will lead to parties agreeing to that structure as the one under which they will settle their dispute, rather than being compelled to use it.

[165] *The Minister for Home and Territories v Teesdale Smith & Others* (1924) 25 CLR 120; *Attorney General of the Australia v Breckler* (1999) HCA 28.

7 MODELS OF DISCRETIONARY COURT-ORDERED ARBITRATION

Introduction

7.1 The Council has considered four possible models for discretionary court-ordered arbitration, taking into consideration the constitutional consequences and the cost and efficiency ramifications of each. This chapter examines the bare bones of the court-ordered models, and puts forward two models preferred by Council. The structural features of the preferred models draw in part on the successful NSW workers compensation scheme. Chapter 8 looks at certain aspects of consensual arbitration.

7.2 The constitutional issues surrounding discretionary court-ordered arbitration require each of the models to provide for a rehearing de novo. The number of rehearings must be at a level so as to achieve an overall cost benefit. Council has borne this in mind when determining its preferred models.

7.3 Council has considered four possible models for a discretionary court-ordered arbitration scheme.

- Model 1: Arbitration as early neutral evaluation
- Model 2: Registration of award without judicial review
- Model 3: Due process award
- Model 4: Just and equitable award

7.4 Models 1 to 4 vary in the way in which the court deals with the determination made by the arbitrator, and have varying constitutional implications, which are discussed below. They all seek to confer non-judicial powers on arbitrators. Council does not suggest any model based on the delegation of judicial power because it is difficult to construct a model where private arbitrators could be said to be part of the organisation of the courts.

7.5 Each of the models offers some advantages and disadvantages that need to be considered. The preferred model should introduce the maximum possible cost and efficiency savings for parties and the court system, but it must also avoid constitutional difficulties. Council suggests a choice between Models 3 and 4; the due process model and the just and equitable model. In choosing a model it is critically important to ensure that a sound structure is established so that the preferred model has the best chance to secure the confidence of the courts and practitioners. Without this solid foundation, the risks and uncertainty inherent in any new system will deter practitioners and courts from referring cases to arbitration, as happened after each of the three reforms in the last 15 years. Council seeks comments as to which model should be recommended to the government.

7.6 The success of any arbitration system will depend at least in part on the circumstances under which parties are referred to arbitration. Questions such as when arbitration should be offered, what type of matter should be referred to arbitration and who the arbitrator should be are important questions. These questions will be dealt with in Chapters 9 and 10.

Model 1: Arbitration as early neutral evaluation

1. The court orders parties to arbitration.
2. The arbitration is conducted in accordance with court rules.
3. The award that the arbitrator makes has no binding effect.
4. The court will hold an automatic hearing de novo in each case unless:
   a. the parties by consent ask the court for an order in accordance with the arbitration award, or
   b. the parties enter a binding financial agreement in the terms of the award.

7.7 Nothing in the *Brandy* case indicates that there would be a constitutional problem with such an arrangement because the outcome of the arbitration has no binding effect and does not automatically become a judgment without judicial oversight. As set out in chapter 6, the ability for a determination to be enforced is one of the distinguishing features of federal judicial power. In *Brandy*, the High Court indicated that if the determinations of the Commission had not been enforceable, the scheme would have been valid.

> …if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because … its determination would not be binding or conclusive between any of the parties and would be unenforceable.[166]

7.8 If the arbitrator's decision is not binding, it clearly does not amount to an exercise of judicial power, thereby avoiding problems associated with the separation of powers. Furthermore, providing the parties with a full hearing de novo is an indicator that the role of the judiciary has not been usurped and that the judges of the Court "continue to bear the major responsibility for the exercise of judicial power…"[167]

7.9 As there is an automatic hearing de novo in every case, the process is similar to obtaining an advisory opinion. The court hears all of the evidence and retains full control of the decision. However, parties can agree by way of consent orders to accept the arbitrator's award at any time during the proceedings, and this is where savings in court costs and court time can be achieved.

7.10 Although clearly a valid model constitutionally, the arbitration as early neutral evaluation model is not a particularly attractive one from the perspective of time and cost saving and court efficiency, given the default pathway of an automatic rehearing.

[166] *Brandy v HREOC* (1995) 183 CLR 245 at 13 (per Deane, Dawson, Gaudron and McHugh JJ).
[167] Australian Law Reform Commission, *Review of the adversarial system of litigation Rethinking family law proceedings*, Issues Paper 22, 1997, [6.10].

Model 2: Registration of award without judicial review

1. The court orders parties to arbitration.
2. The arbitration is conducted in accordance with court rules.
3. The award is registered in the court whereupon it is enforceable as if it were an order of the court.
4. Each party has a right to a hearing de novo.

7.11 This model was the law from 1991 to 2000.[168] The constitutional difficulties with this model centre on the unconstitutionality of an arbitrator making a binding award and thus exercising judicial power.

7.12 *Brandy* demonstrated that where parties are forced to use an alternative decision-making body, any enforcement provisions which fail to provide for judicial oversight will be unconstitutional.[169] In contrast, the schemes examined in *Attorney-General of the Commonwealth v Breckler*[170] and *Australian Communications Authority v Viper Communications*[171] were not unconstitutional because the parties had voluntarily agreed to be bound by the determinations of the relevant tribunals.

7.13 Whilst this model offers the lowest cost impact and lowest workload for the Courts in processing the arbitrator's award, it is essentially the scheme found to be constitutionally unsound in the *Brandy* case.

Model 3: Due process award

1. The court orders parties to arbitration.
2. The arbitration is conducted in accordance with court rules.
3. The award that the arbitrator makes has no binding effect.
4. Either party to the award can apply to a Judge or Federal Magistrate for an order 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 the terms of the award unless it appeared that the law and rules of court in relation to the arbitration have not been followed so that the award has not been validly made.

7.14 This model recognises the need for judicial oversight of the arbitration process. It is based on the notion that the arbitrator is exercising non-judicial power when determining the substance of the dispute while the court retains judicial power in the form of oversight of the arbitration process. There are strong arguments to suggest that this scheme, where the court ensures a judicial review of the non judicial arbitral process, is constitutionally valid.

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[168] Family Law Act s 19D. See discussion in Ch 4.
[169] *Brandy v HREOC* (1995) 183 CLR 245 at 13 (per Deane, Dawson, Gaudron and McHugh JJ).
[170] [1999] HCA 28.
[171] [2001] FCA 637.

7.15 In this model the judge or federal magistrate would retain judicial responsibility for the decision by making the order giving effect to the terms of the arbitration award, rather than merely relying on the registration of the award itself.

7.16 However, an argument may be made that in overseeing awards only as to process (unless parties opt for a hearing de novo) a judge's or federal magistrate's input is a mere formality and that in reality the court is not being involved to the standard required by *Brandy*. The limited review process proposed by Model 3 exposes it to the criticism that in reality it is the arbitrators who are making binding decisions in the majority of cases as only certain, specific elements of their exercise of non-judicial power would be overseen by judges. In light of *Brandy*, the High Court may consider this insufficient to avoid characterising the powers of the arbitrators as akin to the judicial powers of the Commonwealth.

7.17 The question of how the court might satisfy themselves that the law and rules of court in relation to the arbitration have or have not been followed is also an important question. It might be that the courts develop a check list to assist in their determination as to whether the arbitrator has followed proper processes in reaching the outcome.

7.18 This model provides a halfway option between Models 1 and 2 in terms of cost implications. While the need for judicial consideration of the arbitration process exceeds the costs of merely registering the award, it is clearly more efficient than a model where the court must always have a full hearing after the arbitration process is complete.

Model 4: Just and equitable award

1. The court orders parties to arbitration.
2. The arbitration is conducted in accordance with court rules.
3. The award that the arbitrator makes has no binding effect.
4. Either party to the award may apply to a judge or federal magistrate for an order 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 (s 79(2) Family Law Act),
    b. proper (s 74(1) Family Law Act), or
    c. just (s 117(2) Family Law Act).

7.19 Model 4 will be more expensive for the courts to manage than Models 2 and 3.

7.20 As with Model 3, Model 4 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. As in Model 3, this model gives effect to the arbitrator's award by judicial order. However, in Model 4 the court is required to look at the

reasons given by the arbitrator for the award. Then, depending on the nature of the case, the judge would make a decision as to whether or not the award was just and equitable, proper or just. In Model 4, the role of the court is more extensive and time consuming because the judicial officer is required to scrutinise the outcome of the hearing by the arbitrator as well as the arbitral process. With *Brandy* in mind, Model 4 is constitutionally safer than Model 3, as judges and magistrates would be more involved in the decision-making process. This protects against criticism that in the majority of cases in reality it is the arbitrators who are making binding decisions and thus exercising judicial power, inconsistent with Chapter III of the Constitution.

7.21 In providing for a more comprehensive review process, Model 4 may also better serve the needs of certain segments of the community. For example, family lawyers who are also members of a particular subsection of the community may be preferred arbitrators to resolve family disputes between members of that community. If that were to take place, allowing broad judicial oversight of the reasons for the award would better ensure the award fell within an acceptable discretionary range. It might also better ensure the validity of such determinations, even though they may have been influenced by certain cultural understandings.

7.22 The downside of Model 4 is the cost implication involved in requiring the court to consider the substance of the arbitration award. The practice of the court may have an impact on the extent to which an award is considered, and clearly the more perfunctory the review the higher the cost savings. Detailed guidance in relation to the review may be construed as an interference with judicial discretion, but in the absence of guidance it is possible that the extent of the consideration could become a point of appeal.

7.23 An analogy can be made with the requirement in the Federal Court for the court to approve the settlement of a representative action.[172] There is no legislative guidance on specified factors that a judge should consider when looking at settlements, and it has been suggested that any meaningful evaluation would necessitate a "full-blown fairness hearing".[173] The Federal Court has taken the approach that it must be satisfied that the settlement is 'fair, reasonable, and adequate' and has drawn on United States jurisprudence on approval of class action settlements to develop appropriate factors for consideration.[174] The Australian Law Reform Commission has suggested that specified criteria be developed for judges to take into account in approving settlements in representative actions.[175]

A rehearing de novo

7.24 To meet constitutional concerns, each of the discretionary court-ordered models discussed above provides for a rehearing de novo. This obviously has cost implications for any model of arbitration. Many couples going through the emotions of a relationship breakdown cannot agree. Each wants to know that the result they are ending with is "fair". The law uses other terms: "just and equitable", "proper", and "just". It is enough for many couples to have gone through a process that has aired all the issues and which concludes in a third party, who is seen by both sides as unbiased, giving a result with reasons. Some, however, will seek a rehearing. It is hoped that the percentage of cases where this occurs will be low enough to ensure that the scheme overall is cost effective.

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[172] *Federal Court Act 1976* (Cth) s 33V.

[173] M Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, at p 70.

[174] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465–466.

[175] Australian Law Reform Commission, *Managing Justice*, [7.108].

7.25 An examination of the rehearing rates in the NSW jurisdiction (apart from 2004 in the District Court) shows that in civil cases the rehearing rate was typically in the range of 12–15% of cases referred to arbitration.[176] A more reliable guide to possible rehearing rates for court ordered arbitration would be the rehearing rate from judicial registrars. Currently there are four judicial registrars Australia-wide. Their delegated jurisdiction in financial matters allows them to hear cases involving assets of up to $2 million. Parties who are ordered by the court to a hearing by a judicial registrar have a right of rehearing de novo. The Family Court does not keep statistics as to the rate of rehearings from judicial registrars. Anecdotally, however, the rehearing rate from final orders made by judicial registrars in property matters is very low (thought to be around 2%). If a court ordered scheme were introduced and it turned out that the rehearing rate was unacceptably high then that would probably lead to a situation where courts, as a matter of exercising discretion, would cease to refer matters to court-ordered arbitration. When looking at what matters should be taken into account when considering whether or not to order arbitration, the likelihood of one of the parties seeking a rehearing should be a factor taken into account.[177]

7.26 To reduce ill founded applications to review the arbitrator's decision, it is suggested that there be some cost implications for the applicant who is not successful in bettering their position on review. The Council suggests that there be an amendment to section 117(2A) of the Family Law Act so that when considering an application for costs on a rehearing one factor to take into account would be whether or not the party who has sought to review the arbitrator's award did better than the result in that award. The filing fee for an application for a rehearing of an arbitral award could also be set at a level that would give a party some occasion to pause before deciding to seek a review of the award.

Conclusions

7.27 Overall, at this point in time Council suggests that there is a need to introduce discretionary court-ordered arbitration in order to give courts greater flexibility in reducing waiting times for trial.

7.28 Any system of arbitration introduced must be backed by a reliable, affordable and dependable arbitration process. Once such a scheme is put in place and has the confidence of the courts and litigants, it may be possible to rely on consensual rather than court-ordered arbitration. It is hoped that a by-product of establishing a solid and reputable court-ordered arbitration process is that, in the future, more litigants will seek arbitration before entering the court system. However, at present Council sees that some level of compulsion in referring matters to arbitration is a necessary element to develop a family arbitration process which litigants will trust to resolve their disputes and which will deliver the time and costs savings which particularly the smaller property claims need.

7.29 Of the court-ordered arbitration models discussed, Council suggests that the choice should be between Model 3 and Model 4. In these models the parties still have recourse to a hearing de novo if there are concerns about the outcome, but there is no requirement to enter this process if the parties are happy with the outcome. Council considers that Model 3, the due process model, is constitutionally sound while still offering real cost efficiencies from the arbitration process. However, Council is aware that some may have doubts about the constitutional basis of the model.

7.30 Each of the options for discretionary court-ordered arbitration discussed above will have the greatest benefit where there is a reliable, affordable and dependable arbitration process available. In the absence of this, referral to court-ordered arbitration is likely to be a source of greater

[176] See Chapter 3.
[177] See discussion on factors to consider when determining whether to order arbitration in Chapter 9.

dissatisfaction with the family law system. The remainder of the paper will focus on the elements required to establish an arbitration process that would win the confidence of the court, the legal profession and parties.

7.31 Council has not reached a final view on which model should be adopted, and welcomes input on this discussion of the most appropriate model for an arbitration scheme. Stakeholders may have a suggestion for an alternative model that provides effective cost efficiencies while avoiding constitutional difficulties.

Question 6: If discretionary court-ordered arbitration is to be introduced, which model should be implemented and why?

Question 7: On a costs application after a rehearing of an arbitration, should section 117(2A) Family Law Act be amended to require the court to take into account whether or not the party who has sought the rehearing has done better than the result that that party achieved from the arbitration?

8 CONSENSUAL ARBITRATION

8.1 Models 1–4, discussed in Chapter 7 above, all incorporate mandatory referral from the courts to arbitration. By contrast, arbitration as currently available under the Family Law Act relies on the willingness of the parties to engage in arbitration.

Arbitration currently available under the Family Law Act

1. The court orders parties to arbitration only with the consent of the parties.
2. The arbitration is conducted in accordance with court rules.
3. The award is registered in the court whereupon it is enforceable as if it were an order of the court.
4. Each party has a right to a review by the court on questions of law.

8.2 The existing consensual scheme of arbitration relies on the willingness of the parties to engage in arbitration. The key difference from each of the non-consensual models is that the court can only order arbitration with the consent of the parties and that the right of the parties to a review of the award is limited to questions of law—there is no right to a hearing de novo. The constitutional validity of the consensual scheme is not in question.[178]

8.3 It is possible to envisage alternative consensual models which introduce some of the elements of Models 1–4, such as a right to a hearing de novo, and judicial scrutiny of the process or outcome of the arbitration prior to registration of the award. However, the addition of any of these elements would hinder the cost effectiveness of consensual arbitration.

8.4 Maintaining an opt-in, non-court annexed model of arbitration is useful for a number of reasons. Allowing parties to choose to go to arbitration of their own accord gives them the option to go straight to arbitration before going to court, if they wish, with accompanying cost and delay advantages for all concerned. This may be important for parties who have particularly significant concerns about delay, such as where a party is moving overseas, or where one or both parties are in straitened financial circumstances pending a property settlement. Moreover, a non-court annexed scheme is likely to be much more flexible as to procedure, location and timing than a court annexed scheme, which may be attractive to many parties. Separated couples in regional areas, or with special needs (such as increased privacy, for example) may find this very attractive. Finally, while consensual arbitration is little used at the moment, the fact that it is also entirely paid for by the users means that there is little or no impact on the courts or the government from its ongoing implementation. There therefore seems little to gain from removing the voluntary scheme, while benefits may accrue for the family law system if goodwill from mandatory arbitration spills over to consensual arbitration, and usage of the voluntary system increases.

8.5 The attraction of private arbitration might be increased if it ceased to be a ‘user-pays’ system.

[178] *The Minister for Home and Territories v Teesdale Smith and Others* (1924) 25 CLR 120.

8.6 Council's preliminary view is that consensual arbitration should be maintained alongside any court-ordered system of arbitration which is introduced, regardless of which model (if any) is adopted.

Promotion of consensual arbitration

8.7 Council's terms of reference for this inquiry specifically require consideration of what changes, if any, could be made to promote consensual arbitration.

8.8 It is the hope of the Council that the introduction of a widely used scheme of court-ordered arbitration will encourage a culture of arbitration, including institutions and arbitrators, and will generate confidence in the arbitral process amongst practitioners. In the medium to long term, it is therefore hoped that more people will come to make use of consensual arbitration both before and after commencing the litigation process, as acceptance of arbitration as a means of dispute resolution grows.

8.9 An education campaign to provide the profession, court staff and the general public with information about the benefits and workings of arbitration in family matters, as discussed in Chapter 5, would also be a valuable tool in promoting consensual arbitration. This has been the experience of the Legal Aid Queensland scheme.[179]

8.10 There is an argument that the strict appeal rights on questions of law only for voluntary arbitration discourage some parties from agreeing to arbitration. Council seeks comment on whether it would be appropriate to allow parties who have agreed to go to arbitration to also agree to have a hearing de novo if one of them is dissatisfied with the result. The creation of this larger 'safety net' may encourage more parties to embrace the arbitration process voluntarily.

Question 8: What can be done to improve implementation of consensual arbitration?

Question 9: Should parties be able to go to consensual arbitration and agree that any review be by way of rehearing de novo rather than by way of appeal on a question of law?

[179] See Chapter 3.

9 REFERRAL TO ARBITRATION

9.1 In this paper Council has expressed the view that a discretion to order parties to arbitration should be introduced for property and financial matters. This view is based on the benefits of flexibility and cost saving which arbitration could deliver and the evidence that notwithstanding those benefits, there has been a reluctance to use arbitration voluntarily in family law disputes. The power to order arbitration will be effective in making litigants use arbitration. However, unless referrals to court-ordered arbitration are underpinned by a structure which is clear, cheap and based on arbitrators who inspire confidence, a different set of problems will arise. The questions raised in this chapter are therefore important in the context of both court-ordered and consensual arbitration.

What types of matters should be referred to arbitration?

9.2 In determining which matters should be referred to arbitration, relevant factors include the likelihood that decisions on a particular subject will be appealed after arbitration, whether there are public policy reasons for particular matters to be heard in court, or whether one or more of the parties are acting under a legal disability.[180]

9.3 The Family Law Council's 1988 report on arbitration in family law made extensive recommendations about what matters should be referred to arbitration. The 1988 report distinguished between the matters which should be referred to court-ordered arbitration and matters where consensual arbitration was to be available. The range of matters which could be referred to consensual arbitration was much broader than for court-ordered arbitration. Generally speaking, this was because the report considered that matters with high emotional content or importance, such as custody (as it was then called), were likely to generate an unacceptable number of appeals from court-ordered arbitration.[181]

9.4 There have been a number of changes since 1988 including the widespread use of mediation, the establishment of the FMC, the greater resourcing of community based counselling services, the introduction of pre-action procedures, and the establishment of Family Relationships Centres. These changes may have affected the types of cases that remain in the pool of cases available for referral to discretionary court-ordered arbitration.

9.5 Council's current terms of reference are limited to property and financial matters. This includes matters under Part VIII, Part VIIIA, and Part VIIIB of the Family Law Act. This chapter will look at the current legislation and then at Council's 1988 report before putting Council's preliminary views on which property and financial matters should be referred to arbitration.

Current Legislation

9.6 Section 13E provides that a court may refer Part VIII proceedings to arbitration. This allows matters related to property, spousal maintenance, and maintenance agreements to be arbitrated. However, in matters which involve property to which an approved maintenance agreement under

[180] See Family Law Council, *Arbitration*, p 60.

[181] See, for example, Family Law Council, *Arbitration*, p 68. That Council report considered arbitration for children's matters. Children's matters fall outside the Terms of Reference for this inquiry.

s 87 of the Act applies, a Part VIII proceeding, a part of a Part VIII proceeding, or a matter arising in a Part VIII proceeding must not be dealt with by arbitration under the Act.[182]

Council's 1988 report

9.7 Limiting consideration to property and financial matters we note that Council's 1988 report identified a number of matters which were not considered suitable for arbitration, whether court-ordered or consensual. These were s 87 and s 86 maintenance agreements, their enforcement or revocation, child agreements, injunctions, and enforcement generally.[183]

9.8 The 1988 report formulated a set of principles to guide its consideration as to matters which should be referred to arbitration. [184] Consistent with these principles, matters where one party is under a legal disability and enforcement matters generally were not considered suitable for arbitration.

Council's preliminary view

9.9 Council's preliminary view is that consensual and discretionary court-ordered arbitration should be available for all property and financial matters except where they concern property which is the subject of an approved maintenance agreement. However, consistent with its recommendations in 1988, Council considers it is inappropriate to refer a matter to arbitration where one party is under a legal disability. It is important that any party under a disability have the full protection of their interests which is offered by the court system. Council also considers that enforcement proceedings should be excluded from arbitration because allowing arbitrators to hear disputes about the enforcement of court orders would both derogate from the authority of the court, and allow a non-judicial body to exercise a discretion not to enforce a judicial order. It would be appropriate that these particular exclusions be set out in legislation.

Question 10: What property and financial matters, if any, are never suitable for discretionary court-ordered arbitration?

Question 11: What property and financial matters, if any, are never suitable for consensual arbitration?

What factors should govern whether a referral to arbitration is made?

9.10 Without limiting the Court's discretion as to when to refer a matter to arbitration, guidelines may be appropriate to help the Court decide which particular matters are appropriate to be referred to arbitration. Questions to be incorporated into guidelines for referral might include:

- The complexity of a matter. It seems likely that more complex matters would have a greater propensity to generate both appeals from arbitral decisions and referrals of questions of law to the Court. They are therefore more appropriate for the greater experience and knowledge of a judicial officer, and a longer trial that could be accommodated in the court system.[185]

[182] Regulation 67C , Family Law Regulations 1984.
[183] Family Law Council, *Arbitration*, Recommendations 16–20, 22, 23 and 24.
[184] ibid, p 60.
[185] The Queensland Legal Aid scheme excludes matters where there is an unvalued business or an unsecured third party claim, or where there is negative equity.

- Whether the case involves questions of general importance, such that it would be desirable for there to be a decision of a court on one or more of the points in issue.[186]
- Value of the asset pool. Litigants with small asset pools may opt for a low-cost alternative to litigation, and be less willing to incur the substantial costs involved in an appeal. Such an approach should be encouraged by the Court. Cases with limited asset pools are therefore more suitable for arbitration.
- Assessment of the parties. The cost savings of an arbitral system rely on keeping the number of parties appealing to a judicial hearing under tight control. Therefore, if it seems to the Court that litigants are entrenched in the conflict and likely to exhaust all avenues for appeal, the matter should not proceed to arbitration.
- Whether arbitration is likely to be able to deal with a matter at less cost to or with more convenience for the parties.[187] The Queensland Legal Aid scheme for example does not allow arbitrations where there is an attached dispute about where a child will live.
- Availability of a suitable arbitrator. Given the aim of an arbitral system to reduce delay, it would not be appropriate to refer a matter to arbitration in situations in which no arbitrator is available to hear a matter in a timely fashion. In addition, consideration should be given as to whether the matter is best handled by a particular type of arbitrator, such as one with specialist cultural or financial experience.
- Current court delays. One of the aims of an arbitral system is to reduce costs and delays in the courts. Therefore, the greater the current court delays, the more willing courts should be to refer appropriate matters to arbitration in order to reduce case loads and waiting times for litigants.
- Whether, because of the special features of the matter, the risk of one or other of the parties seeking a rehearing of the arbitrator's award are high.
- Whether there are any security issues for parties which might make an arbitration inappropriate, or require the more secure facilities of a court.
- Whether there are any third party interests involved in the case, which make a judicial hearing more appropriate.

9.11 Guidelines should aim to minimise costs to the parties and maximise benefits to the courts by sensitively assessing the needs of each case, and the operational requirements of the court.

Question 12: Should guidelines be developed to assist the determination of whether a particular matter is appropriate for referral to arbitration? If so, what should the guidelines include?

Should part of a matter be referred, or only a matter in its entirety?

9.12 Section 13E of the Family Law Act states that a court exercising jurisdiction in Part VIII proceedings may refer the proceedings or any part of them to arbitration. In those Part VIII matters commonly referred to as house and garden cases, where the assets in dispute are the former

[186] See *Federal Magistrates Court Rules 2001*, Rule 8.02(4)(a), and the then Attorney-General Michael Duffy's Second Reading Speech for the *Courts (Mediation and Arbitration) Act 1991*, *House of Representatives Official Hansard*, 30 May 1991, p 4454.

[187] See Family Law Rules, Rule 11.18(b)(i)-(ii).

matrimonial home and the parties' superannuation, much court time and parties' costs are wasted on determining the value of these assets. Changes to the Family Law Act introducing the single expert have gone some way to mitigating the wasted time and costs. In some cases, arbitration of issues such as valuation of such assets could be of benefit in that once the value of property is determined the likelihood of settlement is increased. If no settlement is reached the time taken to determine the matter would be greatly reduced.

Question 13: Should the court have power to refer either the whole matter or particular aspects of a matter to arbitration?

When should a matter be referred to arbitration?

9.13 Under the Family Law Act, no legislative restrictions are placed on the stage of the proceedings at which a referral to consensual arbitration must occur. The case management guidelines for the Family Court place referrals to arbitration at the procedural hearing which follows the case assessment conference, early in the resolution phase of a family law proceeding.[188]

At what stage should a matter be referred to arbitration?

9.14 There are broadly speaking five points along the litigation pathway at which it may be reasonable for parties to undertake arbitration:

1. Prior to the commencement of proceedings
2. As an alternative to a conciliation conference
3. After a conciliation conference has taken place
4. In the period between listing a matter for trial and the commencement of the hearing, and
5. After the hearing has commenced.

The options are of course not mutually exclusive. Consensual arbitration could be undertaken at any one of the five points. The important question to answer is when should a matter be referred to court-ordered arbitration?

9.15 Given that mediation has wide acceptance, a well-defined structure and proven success rate, it is appropriate that a referral to arbitration not preclude mediation. That said, it is appropriate that information about arbitration as a possible method of resolving family law disputes be made available as soon as possible. For this reason Council's view is that detailed information about arbitration should be made widely available and in particular such information should be disseminated through the Family Relationship Centres.

9.16 It is Council's preliminary view that while there should be a broad judicial discretion as to when to refer matters to arbitration, the procedure adopted for referral of family law matters to arbitration should broadly follow the practice in the NSW Workers' Compensation Commission (WCC) (see Chapter 3). The decision to refer a matter to arbitration in the WCC scheme is made at the teleconference which begins the Workers' Compensation Commission litigation pathway. The Case Assessment Conference in the Family Court or the first return date in the Federal Magistrates Court is an equivalent point in family law litigation. Consideration of whether to refer a matter to arbitration should normally be made at Case Assessment Conference or the first return date.

[188] Family Court of Australia, *Case Management Directions* (Practice Direction 3 of 2004) (2004), paragraph 5.3.3.

What about conciliation?

9.17 As in the WCC scheme, conciliation conducted by the arbitrator should be retained as a step in the litigation pathway prior to arbitration, unless the arbitrator forms the view that it is not appropriate in a particular case. The 2006 family law reforms have emphasised the benefit to parties of reaching an agreed solution. Precluding parties from accessing a mechanism such as the conciliation conference which has a proven track record as a dispute resolution tool by referring them to arbitration before the conference is not appropriate. However, it is not necessary for that conciliation to take place under the court system. It would be most efficient to maintain the model of a combined conciliation conference and arbitration hearing where a matter has been referred to court-ordered arbitration. In this model, the arbitrator or registrar will first attempt conciliation, and only if that fails will they proceed to arbitrate the matter on the same day. Parties will therefore still need to complete conciliation with the arbitrator prior to the arbitrator commencing an arbitration.[189]

Arbitration on the papers

9.18 Examination of the WCC scheme reveals that there is another option besides the fused conciliation and arbitration conference — a simple arbitration on the papers. Arbitration on the papers is conducted in the absence of the parties, and is based on written information submitted by each of the parties prior to the arbitration. The information the arbitrator relies on will come either from forms such as a Form 13 financial statement, or the conciliation conference document, or documents of a similar nature. Such a system would have obvious efficiency advantages, and would conform with the principle of proportionality with respect to allocation of court resources between more and less complex cases. The Legal Aid Queensland scheme adopts a similar procedure with the option of allowing the parties to make submissions by telephone. This is of particular benefit in cases where the parties live in regional or remote areas.

9.19 Under the current case management guidelines and Family Court Rules the registrar at a Case Assessment Conference has a discretion to bypass the conciliation conference in an appropriate case.[190] Referring a matter to an arbitrator on the papers would mirror that discretion. The main disadvantage of arbitration on the papers is that there may be circumstances in which an arbitrator does not have enough information on the papers to make a decision. Although provision might be made for the arbitrator to request further evidence if necessary, this still poses a significant practical problem. Therefore, arbitration on the papers, if adopted as an option, should be limited only to matters of the least complexity. Council seeks input as to whether arbitration on the papers should be available as an option in appropriate cases, and if so, what guidelines there should be for which

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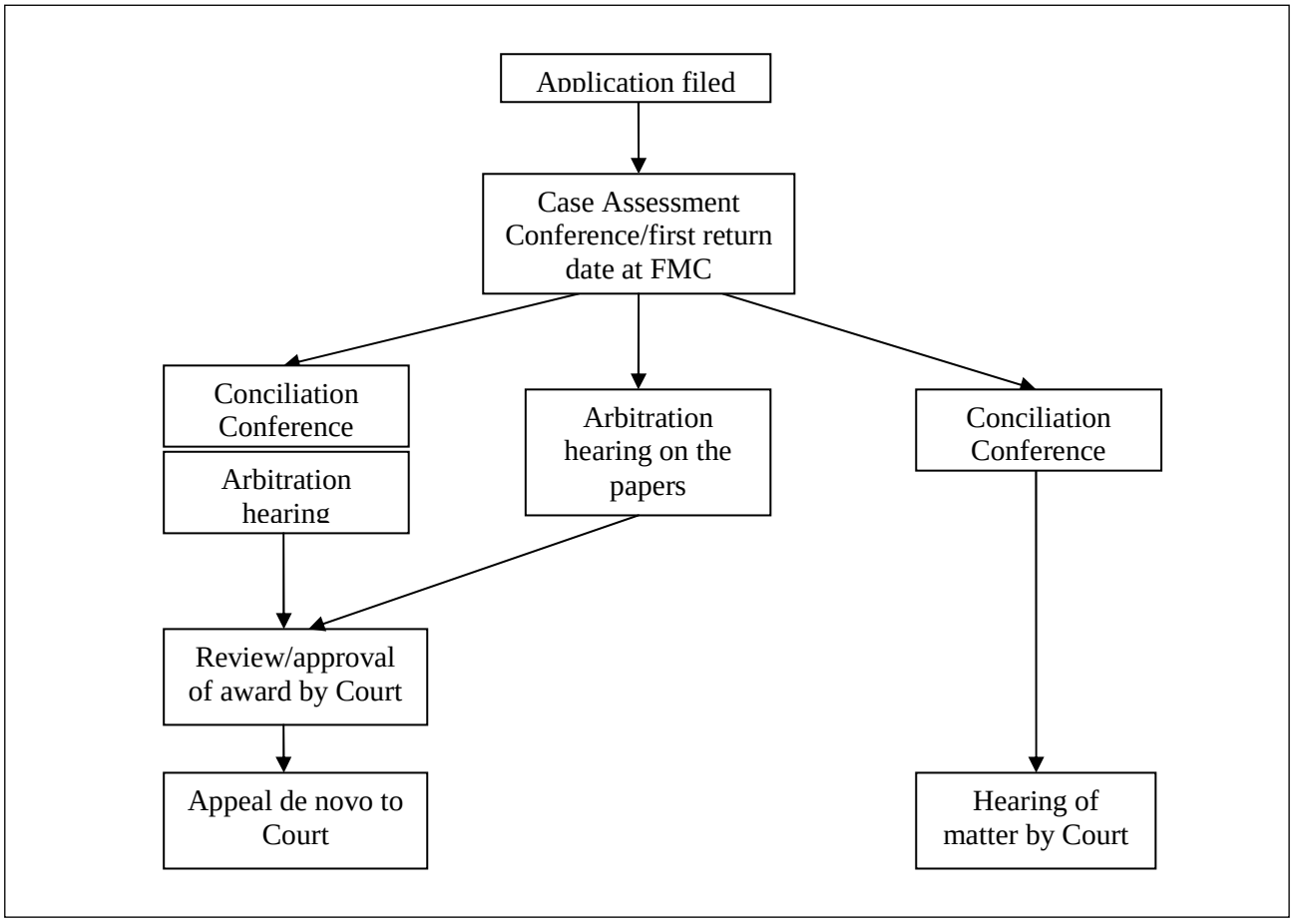
[189] Some other arbitration schemes allow for a dispute resolution process such as conciliation before an adjudicative decision, conducted by the same person. For example, s 27 of the *Commercial Arbitration Act 1984* (NSW) allows the arbitrator to attempt to settle a dispute by "mediation, conciliation, or similar means" before or after the arbitration, without prejudice to the arbitrator's right to continue as an arbitrator if no agreement is reached. Similarly, the *Administrative Appeals Tribunal Act 1975* (Cth) was amended in 2005 to add a new Division 3, allowing the Administrative Appeals Tribunal (AAT) to refer a case for alternative dispute resolution (s 34A). A member or officer who has participated in a dispute resolution process may participate in a full hearing before the AAT if no party objects (s 34F). See Derek Minus' article on combined mediation and arbitration, "You say mediate, I say arbitrate", viewed 9 May 2007, <http://www.lawyersweekly.com.au/articles/05/0C04B905.asp?Type=55&Category=1115>.

[190] See Family Court Rules 2004, R 12.04 and Family Court, *Case Management Directions*, last viewed 9 May 2007, <http://www.familycourt.gov.au/presence/connect/www/home/directions/case_management_directions/>, paragraph 5.3.3.

matters should be referred to this simplified arbitration. Council expects that even if arbitration on the papers is allowed for, it should not be the normal litigation pathway.

Figure 3: Proposed litigation pathway for family law arbitration



Question 14: When in the litigation process is it most appropriate to consider a referral to court-ordered arbitration?

Question 15: Should the courts have power to order arbitration on the papers? If so, what guidelines should govern when a referral to arbitration on the papers is made?

Should arbitrators be allowed to refer questions of law back to the court?

9.20 Under the existing legislation, section 13G of the Family Law Act allows an arbitrator in a section 13E arbitration to refer a question of law to a single judge of the Family Court, a single judge of the Family Court of a state, or to the Federal Magistrates Court, on their own initiative or that of one of the parties, at any time prior to the making of the arbitral award. The provision is mirrored in the general law and in many of the state legislative schemes, as set out in chapter 3.

9.21 The issue of references on questions of law raises competing considerations of cost and certainty. Provision for allowing references has the potential to greatly slow down the progress of an arbitral proceeding, and to use substantial amounts of court time, limiting the savings in time and cost which the arbitral process otherwise allows. However, allowing references has the potential to avoid unnecessary appeals from arbitral decisions on questions of law. References can demonstrate

conclusively to the parties during the arbitral process that the arbitrator is acting in accordance with law, and thus circumvent some potential appeals.

9.22 The Family Law Council's 1988 report recommended that the arbitrator should be given a broad discretion as to whether an issue of law should be referred to a court for decision. It also recommended that parties should not be able to force an arbitrator to refer, because this would allow parties to unreasonably delay the arbitration by forcing the arbitrator to make multiple references on points of law.[191]

9.23 Imposing a requirement that the Court grant leave before hearing a question of law is another possible way to ensure that a proper balance is struck between the imperatives of efficiency and finality in situations where arbitrators have doubts about a question of law. The question of leave could be determined on the papers. Factors which judicial officers might take into account in determining whether to hear a question include:

- the novelty of the question
- the importance of the question to the development of family law, and
- the likelihood of the parties accepting the arbitral decision if the question is determined judicially.

The *Commercial Arbitration Act 1984* (NSW) has two other guidelines:

- whether the determination of the question of law could substantially affect the rights of one of the parties to the arbitration agreement,[192] and
- whether the stated opinion of the arbitrator on the question demonstrates either a manifest error of law, or strong evidence of such an error such that an appeal from the arbitrator's decision would be likely to succeed.[193]

9.24 Council's preliminary view is that arbitrators should have a broad discretion to refer questions of law to the Court, subject to leave being granted, but that parties should not be able to require arbitrators to make a reference.

Question 16: Should arbitrators be allowed to refer questions of law back to the court?

Question 17: Should a judicial officer have a discretion to refuse to hear a question of law referred by an arbitrator if they are not satisfied that it would be an effective use of court time? If so, is there a need for guidelines, in legislation or otherwise, to govern relevant factors which should be considered when dealing with applications for leave to refer a question of law to the court?

Question 18: Should arbitrators be able to refer a matter to the court in any circumstances other than on a question of law?

[191] Family Law Council, *Arbitration*, pp 123–125.
[192] Cf *Commercial Arbitration Act 1984* (NSW) s 38(5)(a) and s 39(2)(b).
[193] Cf *Commercial Arbitration Act 1984* (NSW) s 38(5)(b).

10 ARBITRATORS

10.1 One of the issues identified by practitioners as an essential element of a successful arbitration scheme is that of confidence in the arbitrator.[194] This chapter examines the current provisions for the appointment of arbitrators and outlines other possibilities.

Eligibility to be an arbitrator

10.2 The current arrangement for maintaining panels of arbitrators is set out in Regulation 67B of Division 2 of the Family Law Act:

> **REGULATION 67B PRESCRIBED REQUIREMENTS FOR ARBITRATOR (ACT S 10M)**
> **67B** For the definition of ***arbitrator*** in section 10M of the Act, a person meets the requirements for an arbitrator if:
> (a) the person is a legal practitioner; and
> (b) either:
> (i) the person is accredited as a family law specialist by a State or Territory legal professional body; or
> (ii) the person has practised as a legal practitioner for at least 5 years and at least 25% of the work done by the person in that time was in relation to family law matters; and
> (c) the person has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators; and
> (d) the person's name is included in a list, kept by the Law Council of Australia or by a body nominated by the Law Council of Australia, of legal practitioners who are prepared to provide arbitration services under the Act.

10.3 The number of arbitrators in each State or Territory who are currently registered by the Law Council of Australia is set out at Table 5:[195]

Table 5: Number of registered family law practitioners

State/Territory	No.
ACT	7
NSW	34
NT	0
Qld	31
SA	6
Tas	2
Vic	28
WA	8
Total	**116**

[194] Family Law Council, *Meeting Minutes Parramatta, 3–4 August 2006*, pp 33, 36, 37 and *passim*.

[195] This data was extracted from the list of arbitrators on the Law Council of Australia Family Law Section website at <http://www.familylawsection.org.au/pages/frmFindLawyer.asp?typ=Arbitrator>, viewed 13 March 2007.

Training and accreditation requirements

10.4 To limit the likelihood of parties appealing from arbitration awards, it is essential that arbitrators have the appropriate skills and qualifications. The skills and integrity of arbitrators will be particularly important if a discretionary court-ordered system is adopted because parties must be satisfied with the outcome of the arbitration in order to avoid appeals from the award. Furthermore, ensuring that arbitrators have the appropriate skills will also encourage the expansion of consensual arbitration.

Who should be arbitrators?

10.5 One of the potential benefits of arbitration is that it is not necessary to rely only on practitioners with legal experience. The arbitrator could be a person with specialist technical knowledge in the area of the dispute, such as a surveyor, a building consultant, a remuneration expert or a valuer. Some disputes may attract an arbitrator with a particular cultural or religious background.

10.6 The Family Law Council's 1988 report discussed some considerations as to who should be eligible to be an arbitrator.[196] Council stressed that the most important factor in making this determination is the need to ensure the confidence of litigants and their legal advisers in the arbitrators. The 1988 report recommended a court-annexed scheme, with a process of accreditation for people who would like to become arbitrators, entitling them to membership of a panel from which parties might choose an arbitrator. Furthermore, Council recommended that 'persons qualified in such areas as law, social work, psychology or psychiatry, accountancy or valuation technique, education, or as a leader in a particular religion or culture' might be suitable to act as arbitrators.[197] Council noted, however, that it would be important that the decisions handed down by arbitrators should be capable of enforcement under the Family Law Act, and thus arbitrators without legal training might need access to a court registrar to advise them on the terms of their decision "so as to ensure that orders are clear in their intent and within the jurisdiction of the Court."[198]

10.7 This difficulty is currently avoided by insisting on legal training for arbitrators. This is intended to ensure that decisions handed down are in accordance with law and in the correct form. The current regulations require arbitrators to be family law specialists, to have completed specialist arbitration training and to be registered with the Law Council of Australia, or a body approved by the Law Council of Australia. Similarly, Legal Aid Queensland's family law property arbitration system requires its arbitrators to be 'experienced legal practitioners' who have also received specialist arbitration training.[199] However, encouraging the involvement of lawyers in the process may have the result of increasing the complexity and formality of arbitral proceedings, reducing the time and cost savings that arbitration has the potential to provide.[200] It also substantially reduces the possibility of the arbitrator having specialist non-legal experience which may be desirable to the parties.

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196 Family Law Council, *Arbitration*, p 129.
197 Family Law Council, *Arbitration*, p 130.
198 Family Law Council, *Arbitration*, p 129.
199 Legal Aid Queensland, *Family Law Property Arbitration*, Queensland, 2006, viewed 16 January 2007, <http://www.legalaid.qld.gov.au/NR/rdonlyres/8D50C450-BDCC-4E77-8EEE-F596AAECC660/0/fs_propertyarbitration_solicitor.pdf>.
200 See Astor and Chinkin, *Dispute Resolution*, pp 298–299.

10.8 Several courses are currently available for arbitrators and specialist family law arbitrator training is available. For example, Bond University has a three day course on family law arbitration.[201] AIFLAM also often offer arbitration courses for legal practitioners. On a more general level, a comprehensive course is offered by the Institute of Arbitrators and Mediators Australia (IAMA), in conjunction with the University of Adelaide. This course runs over two university sessions and students who successfully complete the course are issued with a 'Professional Certificate in Arbitration.'[202] The course covers the Commercial Arbitration Acts and the way in which arbitration proceedings should be conducted. Traditional legal subjects, such as torts and contracts, are also covered.[203] Adopting this approach would open up the practice of arbitration in family law to people other than lawyers but the question remains as to whether this would attract the confidence of parties to a family law dispute.

10.9 Council's preliminary view is that if arbitrators are to continue to be selected from legal practitioners with experience in family law the current requirement for further specific training in arbitration should be retained. If, however, arbitrators without legal qualifications are considered then a more expansive course such as that offered by IAMA would seem to be a minimum requirement. In addition the option of access to a registrar might be considered. Another option is to use suitable officers of the court, such as judicial registrars, either to conduct or to oversee arbitrations. The familiarity and respect accorded to these court officers might help to encourage confidence in the system of arbitration.

Selection of arbitrators

10.10 Provided that the arbitrator for a matter complies with the eligibility requirements in regulation 67B of the Family Law Regulations, parties are currently free to choose their arbitrator.

10.11 Council's 1988 report points out that there is a range of options for selection of arbitrators. One of these, similar to that used in the Commercial Arbitration Acts, is simply to allow the parties completely free to choose an arbitrator from the community. This has the advantages of simplicity and of giving the parties complete control of the appointment of the arbitrator, perhaps giving them more confidence in the competence or suitability of the arbitrator. This option could be implemented in two ways: requiring arbitrators to meet particular broad eligibility standards; or removing all eligibility requirements. Council's preliminary view is that this approach would not assist to build confidence in the arbitral process.

10.12 Council's view based on the need to encourage confidence in the arbitrator, is that panels of arbitrators for discretionary court-ordered arbitration should 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 underperforming arbitrators are removed. Moreover, private practitioners 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. Finally, limitation of the field of

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[201] Bond University, *Dispute Resolution Centre Courses*, Gold Coast, 2006, viewed 11 January 2007, <http://www.bond.edu.au/study-areas/law/centres/drc.html#courses>.

[202] University of Adelaide, *Professional Certificate in Arbitration*, Adelaide, 2006, viewed 16 January 2007, <http://www.adelaide.edu.au/arbitration/about/>.

[203] ibid.

arbitrators will ensure that sufficient work is provided to arbitrators to make membership of the panel an attractive option.

10.13 The Chief Justice and Chief Federal Magistrate could also 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. Finally, use of registrars would allow for a close integration between the conciliation conference and the arbitration, in the manner of the NSW workers compensation scheme.

10.14 One possibility which might be taken into account when selecting arbitrators is their sensitivity to a particular cultural milieu. Without derogating from the requirement for arbitrators to apply the law as provided in the Family Law Act, arbitrators from a particular cultural group may be able to conduct arbitrations and explain decisions in a manner most appropriate for members of that group. This might help to encourage people from ethnically diverse backgrounds to adopt arbitration as an avenue for dispute resolution. This would have advantages for these groups because matters could be decided in accordance with the Family Law Act but with some cultural sensitivity so that decisions would be better accepted by these communities.

10.15 Council's preliminary view is that there should be no fetter on the court nominating a particular arbitrator from the panel of arbitrators to hear a particular case if the court is of the view that a particular arbitrator has certain cultural or specialist skills that would assist in the more expeditious hearing of the issues in the case. Also, once parties have been ordered to attend arbitration (even if one or both of the parties didn't want to go in the first place) there should be no bar to the parties consensually agreeing on the arbitrator by whom they wish their matter heard. Of course if they can't agree they will be allocated the next available arbitrator.

Regulation of arbitrators

Immunities

10.16 The Family Law Council's 1988 report recommended that arbitrators should enjoy immunity similar to that of judges, magistrates, and registrars. This helps to remove disincentives for practitioners from serving as adjudicators, and helps to ensure that those who do act as arbitrators feel free to act independently without facing litigation. This would mirror the immunities derived from the common law.

10.17 Arbitrators currently have the same immunity as a judge of the Family Court has whilst performing their duties.[204] Judges have absolute immunity from any civil actions for anything said or done during the proceedings.[205]

10.18 Council's preliminary view is that this immunity should be retained.

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[204] Family Law Act 1975, s 10P.

[205] *Carbassi v Bila* (1940) 64 CLR 130. Immunity is extended to arbitrators under the common law as well: see *Sutcliffe v Thackrah* [1974] AC 727 at 745 per Reid LJ and *Arenson v Arenson & Casson, Beckman, Rutley & Co* [1977] AC 405.

Arbitrator's rights and duties

10.19 Regulation 67I of the Family Law Act requires that an arbitrator (1) determine issues in the dispute in accordance with the Act; (2) conduct an arbitration with procedural fairness; and (3) inform both parties, in writing, of anything which could lead to direct or indirect bias towards either party.

10.20 Arbitrators are also required to make the following oath before acting as an arbitrator.

> I [name of arbitrator] do swear by Almighty God [or solemnly and sincerely affirm and declare] that I will not disclose to any person any communication or admission made to me in my capacity as arbitrator, unless I reasonably believe that it is necessary for me to do so:
>
> (a) to protect a child; or
>
> (b) to prevent or lessen a serious and imminent threat to:
>
> (i) the life or health of a person; or
>
> (ii) the property of a person; or
>
> (c) to report the commission, or prevent the likely commission, of an offence involving:
>
> (i) violence or a threat of violence to a person; or
>
> (ii) intentional damage to property of a person or a threat of damage to property; or
>
> (d) to enable me to discharge properly my functions as an arbitrator; or
>
> (e) if a child is separately represented by a person under an order under section 68L of the Act to assist the person to represent the child properly.

10.21 An arbitrator must make an award at the end of proceedings containing written reasons which refer to any findings of fact on which the award was made.[206] The arbitrator must give a copy of the award to each party.[207]

10.22 The Family Law Council's 1988 report made a number of recommendations which imposed duties on arbitrators. The report placed particular emphasis on the need to preserve the centrality of natural justice in the adjudicative process and, in particular, that the arbitrator should be disinterested and unbiased. The report also indicated that all parties to the case should be given adequate notice of the case and be given the opportunity to attend and be heard.[208] A duty on the arbitrator to obey the rules of natural justice will, of course, not be a controversial issue.

10.23 The 1988 report also recommended that the arbitrator:

- be required to make his or her determination according to law,
- be required to provide reasons in a brief form for his or her decision so that the parties might be able to understand the decision, and decide on that basis whether to seek a rehearing,
- be accountable for any delay in the performance of arbitrations, and

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[206] Regulation 67P(1)–(2).
[207] Regulation 67P(4).
[208] Family Law Council, *Arbitration*, p 49.

- be under a duty to refer proceedings back to the court in certain circumstances, particularly where a circumstance coming within the exclusionary principles for referral of matters arises[209] (such as allegations of child abuse or legal incapacity of a party).

10.24 The NSW Workers' Compensation Commission scheme may also be of guidance as to the kinds of duties which might be imposed on family law arbitrators. The Workers Compensation Commission imposes a number of duties and responsibilities on its arbitrators within a Code of Conduct.[210] The most important of these include:

- To comply with the objectives of the Commission, such as timeliness, cost effectiveness, accessibility, effectiveness in settling matters and bringing about lasting agreements between parties;
- To uphold the highest standards of integrity, truthfulness, and honesty, and to act ethically in accordance with the law;
- To remain, at all times, independent of the parties in the matter before them and free from any influence external to those proceedings;
- To respect the confidentiality of all matters raised in proceedings before them;
- To conduct proceedings according to the law, with due regard to equity, good conscience, and the substantial merits of the case;
- To abide by the principles of procedural fairness;
- To ensure that decisions are based on relevant and logically probative information;
- To act without bias, and in a way that does not give rise to an apprehension of bias;
- At the earliest opportunity, to 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 the Code of Conduct.
- To never expose themselves to the possibility of using their position or status as Commission appointees to obtain any benefits, preferential treatment, or other advantages. This includes a duty not to receive gifts, benefits, or social invitations from parties or representatives in Commission proceedings.
- To report any instance or behaviour that could be corrupt conduct, maladministration, or criminal conduct, relating to the Commission, to the Registrar or President, and also the Independent Commission Against Corruption (if appropriate).

Some of these duties would be imposed on arbitrators by general considerations of natural justice.[211] However, making them explicit is important in order to promote awareness of them amongst arbitrators, and confidence in the system amongst the general public and practitioners.

10.25 It should be noted with reference to the duty to make the determination according to law that under the current legislative arrangements, arbitral decisions must be made based on the Family Law Act. It is possible to make a valid argument that arbitral decisions should be made *ex aequo et bono*,[212] or even according to cultural norms appropriate to the parties in a case. The current

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[209] ibid, p 60.
[210] Outlined in the Workers Compensation Commission *Arbitrators Code of Conduct*.
[211] See *Gas & Fuel Corporation of Victoria v. Wood Hall Ltd. & Leonard Pipeline Contractors Ltd.* [1978] Victorian Reports 385 at 394 per Marks J.
[212] lit. "from fairness and justice".

proposal, however, is to maintain the status quo. This view is based on the need to promote confidence in the arbitral process.

10.26 Council's preliminary view is that the existing duties of arbitrators should be retained, and that it may be appropriate to impose more extensive duties similar to those imposed in the Workers Compensation Commission in order to promote public confidence in the scheme.

Concluding comments

10.27 Council's preliminary view is that given the past neglect of the arbitral system, it is critical to ensure that all stakeholders in the family law system have the utmost confidence in the arbitrators. In light of this, it should continue to be a requirement that arbitrators have experience as legal practitioners in the family law area and training in arbitration. In addition, the panels of arbitrators available for discretionary court-ordered arbitration should be selected by the Chief Justice and Chief Federal Magistrate, and reviewed at regular intervals to ensure that all arbitrators are performing satisfactorily. This will ensure that practitioners, registrars and judicial officers have confidence that matters will be arbitrated by people with appropriate skills and integrity. Registrars, as respected Court officials with substantial knowledge of family law, should also be available for arbitration provided that they have appropriate skills and experience. Finally, arbitrators should continue to have the current rights, duties, and immunities of arbitrators imposed on them, to ensure that the arbitral process is conducted in as fair and independent a fashion as possible.

Question 19: What rights and duties should an arbitrator have?

Question 20: Should arbitrators enjoy the same immunities as judges, or a more limited set of immunities such as immunity from actions for negligence?

Question 21: Should all arbitrators be legal practitioners?

Question 22: Are the requirements prescribed in Regulation 67B of the Family Law Regulations adequate for the accreditation of arbitrators?

Question 23: Should the court have a discretion to nominate a particular arbitrator to hear a particular case? If so, when would that be appropriate?

Question 24: Should parties ordered to attend arbitration have the option to agree to appoint a particular arbitrator?

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APPENDIX A: FUNCTIONS OF THE FAMILY LAW COUNCIL

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in subsection 115(3) of the Act as follows:

> It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:
>
> (a) the working of this Act and other legislation relating to family law:
> (b) the working of legal aid in relation to family law; and
> (c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 May 2007)

Professor Patrick Parkinson, *Chair*
Ms Nicola Davies
Mr Kym Duggan PSM
Acting Chief Justice John Faulks
Federal Magistrate Norah Hartnett
Mr Clive Price
Ms Susan Purdon
Federal Magistrate Robyn Sexton
Justice Garry Watts

The following seven agencies have observer status. The current representatives of the agencies are listed.

Australian Institute of Family Studies	Ms Ruth Weston
Australian Law Reform Commission	Ms Lani Blackman
Child Support Agency	Ms Yvonne Marsh
Family Court of Australia	Principal Registrar Angela Filippello and Ms Dianne Gibson
Family Court of Western Australia	Principal Registrar David Monaghan
Federal Magistrates Court of Australia	Mr John Mathieson
Family Law Section of the Law Council of Australia	Ms Maurine Pyke

APPENDIX B: MEMBERS OF THE ARBITRATION COMMITTEE

The members of the committee who prepared this discussion paper are:

- Justice Garry Watts (convenor)
- Mr Kym Duggan PSM
- Ms Susan Purdon
- Federal Magistrate Christine Mead
- Ms Lani Blackman
- Ms Maurine Pyke

Consultants who are assisting the committee are:

- Justice Murray Kellam
- Professor Tania Sourdin
- Mr Fabian Dixon QC

Members of the Secretariat who have assisted in the preparation of the discussion paper are:

- Ms Rosa Saladino (Director of Research)
- Ms Dianne Bramich
- Ms Samantha Chung
- Ms Jacqueline Menyhart
- Mr James Mueller
- Ms Roweena Singh
- Mr Stephen Still