



Representing Family Lawyers Throughout Australia

18 September 2006

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Family Law Arbitration

The purpose of this letter is to seek an amendment to Regulation 67Q of the *Family Law Regulations 1984*.

The Family Law Section of the Law Council of Australia (FLS) and the Australian Institute of Family Law Arbitrators and Mediators are actively promoting the use of arbitration under the Family Law Act as a low cost and efficient alternative to litigation through the Family Law Courts. It is encouraging to note that with the anticipated enactment of *Tax Laws Amendment (2006 Measures No. 4) Bill 2006*, a major impediment to the substantial uptake of arbitration will be removed when CGT rollover relief is extended to registered Arbitrator's awards.

An arbitral award gains its enforceable status from registration under Regulation 67Q. Once registered, an award is able to be enforced as if it were an order of the court made under Part VIII of the Family Law Act (Sec 13H and Reg 67S) subject to review on a question of law only (Sec 13J).

However, a close examination of the Family Law Regulations underpinning the arbitration scheme reveals a fundamental anomaly in the review process which has the potential to erode the efficacy of the arbitration process and which FLS recommends should be rectified by a change to the Regulations.

Regulations 67Q(3) and (5) currently provide as follows:

[Objection to registration]

67Q(3) A party on whom an application is served may, within 28 days after service, bring to the attention of the court any reason why the award should not be registered. Note An example of a way of bringing a matter to the attention of the court is by filing an affidavit.

67Q(5) [Determination where objection]

If a party brings a matter to the court's attention under subregulation (3), the court must, after giving all parties a reasonable opportunity to be heard in relation to the matter, determine whether to register the award.

The application being referred to in Regulation 67Q (3) is an application to register the award.

The impact of Regulations 67Q (3) and (5) is in effect to provide a second avenue for review, other than on a question of law. By providing a party dissatisfied with the arbitrator's decision with an invitation to argue issues concerning the perceived "fairness" or "justice" of the award, the breadth of these sub-regulations almost guarantees that the process will be utilised by "unsuccessful" parties to endeavour to relitigate in the Courts the issues which have already been determined in arbitration, thus frustrating the utility of the arbitration process and undermining the ability to achieve finality between parties by way of a binding arbitral award.

No other legislative provision in the Family Law Act, Rules and Regulations allows for a "double dip" at the appeal or review process. The reason for these regulations is not immediately apparent and it is submitted that there are sufficient safeguards in the review provisions of Section 13J without the need for recourse to additional opportunities for litigation as found in the present Regulation 67Q.

FLS recommends that:

- Notwithstanding the current reference on arbitration to the Family Law Council, this anomaly be rectified as soon as possible
- Regulation 67Q be amended to read as follows:

67Q(1) For section 13H of the Act, an application to register an award made in an arbitration must be in accordance with Form 8.

67Q(2) [Duty to register]

Upon an application for registration being filed the court must register the award.

67Q(3) [Service of Registered Awards]

The party who applied for the registration of the award must serve a registered copy of the award within 28 days of it being registered.

67Q(4) [Enforcement]

No registered award may be enforced against a person unless that person has been served with a registered copy of the award.

I would be happy to discuss this proposal further with you or officers of your Department.

Yours sincerely



Ian Kennedy AM
Chair