



Australian Government

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19 December 2023

Senate Legal And Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House Canberra ACT 2600

Via email only: legcon.sen@aph.gov.au

Dear Committee Secretary

Submission to inquiry into the Attorney-General's Portfolio Measures Miscellaneous Bill 2023 [Provisions]

This submission by the Family Law Council (the Council) is in response to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Attorney-General's Portfolio Measures Miscellaneous Bill 2023 (the Bill).

The Council advises and makes recommendations to the Attorney-General about:

- (1) the workings of the Family Law Act and other legislation relating to family law;
- (2) the working of legal aid in relation to family law; and
- (3) any other matters relating to family law.

The Council's membership includes judges of the Federal Circuit and Family Court of Australia (FCFCOA) (Division 1) and (Division 2), and experts from a range of professional backgrounds, including lawyers, family dispute resolution practitioners, family counsellors, academics, and public officials.

This submission is restricted to those areas that overlap with the Council's terms of reference endorsed by the Attorney-General on 13 September 2022.

The Council supports Schedule Four, Part One of the Bill which will provide that applications for the determination of a question of law in arbitration and review of an arbitral award can be made to both divisions of the Federal Circuit and Family Court of Australia.

The Council understands that when Arbitration reviews are filed in Division 2 of the Court, they are then transferred to Division 1 for hearing. Hence, the amendments will not increase the workload of Division 1 Judges. We also understand Brisbane, Sydney and Melbourne have specialist Division 1 Arbitration List Judges to ensure the smooth running and specialist attention to arbitration reviews.

Further, the proposed amendment will overcome the problem identified in *McLaughlin & McLaughlin*¹ where at [34] - [38] the trial judge observed:

JURISDICTION

[34] At the commencement of the proceedings before me on 19 July 2023 (“Review proceedings”), counsel for the wife advised the Court that the wife pressed her application for review of the award pursuant to both ss 13J and 13K of the Act.^[1]

^[1] Review transcript 19 July 2023, p.5 line 38 and p.6 lines 18–20

[35] Section 13J of the Act relevantly provides:

Federal Circuit and Family Court of Australia (Division 2) can review registered awards

(1) A party to a registered award made in section 13E arbitration or relevant property or financial arbitration may apply for review of the award, on questions of law, by:

- (a) **the Federal Circuit and Family Court of Australia (Division 2)**; or
- (b) a single judge of the Family Court of a State.

Note: There may be Rules of Court providing for when, and how, an application for review of the award can be made (see paragraph 123(1)(sf)).

(2) On a review of an award under this section, the judge or Federal Circuit and Family Court of Australia (Division 2) may:

- (a) **determine all questions of law arising in relation to the arbitration**; and
- (b) make such decrees as the judge or Federal Circuit and Family Court of Australia (Division 2) thinks appropriate, including a decree affirming, reversing or varying the award.

(Emphasis added)

[36] Section 13K of the Act relevantly provides:

Federal Circuit and Family Court of Australia may set aside registered awards

¹ *McLaughlin & McLaughlin* [2023] FedCFamC2F 1160, [34] - [38] (emphasis in original)

- (1) If an award made in section 13E arbitration or relevant property or financial arbitration, or an agreement made as a result of such arbitration, is registered in:
 - (a) **the Federal Circuit and Family Court of Australia (Division 1)**; or
 - (b) the Federal Circuit and Family Court of Australia (Division 2); or
 - (c) 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.

- (2) The court may only make a decree under subsection (1) if the court is satisfied that:
 - (a) the award or agreement was obtained by fraud (including non-disclosure of a material matter); or
 - (b) the award or agreement is void, voidable or unenforceable; or
 - (c) in the circumstances that have arisen since the award or agreement was made it is impracticable for some or all of it to be carried out; or
 - (d) the arbitration was affected by bias, or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

(Emphasis added)

- [37] In circumstances where, consistent with s 13H(1)(a) of the Act, the award was registered by Wilson J presiding as a judge of the Federal Circuit and Family Court of Australia (Division 1), I determined, in Review proceedings, that I had no jurisdiction to consider the wife's application pursuant to s 13K, as I was sitting as a judge of the Federal Circuit and Family Court of Australia (Division 2) and not as a judge of Division 1.^[2] Accordingly, I advised the parties that I intended to proceed with the wife's review application pursuant only to s 13J of the Act.

^[2] Review transcript 19 July 2023, p.28 lines 3–10.

- [38] There is, in my view, no legislative justification for restricting the operation of s 13J of the Act to the Federal Circuit and Family Court of Australia (Division 2) and doing so has the potential to create the logical non sequitur that is apparent in this case. Nevertheless, it is my view that, fortunately, there is no detrimental consequence, in the circumstances of this case, where counsel for the wife indicated reliance upon s 13K only insofar as it expressly referred to a "denial of natural justice"^[3] in the way in which the arbitration process was conducted and where counsel for the husband, appropriately, in my view, conceded that failure by an arbitrator to afford the parties procedural fairness would constitute an error of law and, thus, fall within the contemplation of s 13J.

^[3] Review transcript 19 July 2023, p.6 lines 23–26.

In other words, the proposed amendment gives appropriate flexibility for all issues relating to the challenge to the arbitral award to be dealt with in the one Court and avoids the situation where an applicant may be forced to abandon elements of an asserted error on the basis of lack of jurisdiction.

We thank you for the opportunity to express our support for the amendments proposed with respect to arbitrations.

The Council's Secretariat can be contacted if any additional clarification is required on the matters raised in this submission via

Yours sincerely

Deputy Chief Justice Robert McClelland
Chairperson
E-mail: