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Family Arbitration in Australia: A Difficult Birth

BY JOSEPH HARMAN*

Abstract

The use of arbitration in family law effectively commenced with the promulgation in April 2016 of Family Law Rules to facilitate arbitration. This article accesses all available data of the Federal Circuit Court (as it then was) regarding the use of arbitration for the three years from April 2016 to 2019. The data discussed paints a picture of the birth of family arbitration in Australia and charts trends in the use and facilitation of arbitration over this important, formative period.

I Introduction

Whilst mediation and family dispute resolution (FDR) have been widely embraced by those practicing in the family law sphere,[1] the family law jurisdiction has been slow to utilise arbitration as a means of dispute resolution. This might be partially explained by public policy considerations which might be argued to obviate against the arbitrability of many family law disputes. As expressed by Wendy Kennett 'until recently few jurisdictions have allowed arbitration of family law disputes, considering such arbitration to be contrary to public policy. But policies favouring private ordering, combined with pressures on family courts have encouraged reconsideration of the policy issues'.[2]

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[1] This is at least so as regards parenting disputes, See, eg, Lixia Qu, 'Family Dispute Resolution: Use, Timing, and Outcomes' (2019) 40(1) *Australian and New Zealand Journal of Family Therapy* 24. Although the use of FDR in financial proceedings would appear to be significantly less. See Joe Harman, 'Should Mediation be the First Step in All Family Law Act Proceedings?' (2016) 27(1) *Australasian Dispute Resolution Journal* 17. Further, the legislative imperative of attendance or attempted attendance at FDR, introduced in 2006 amendments to the *Family Law Act 1975* (Cth), has played a role in the development of this mediation culture.

[2] The role of delay as a strong motivation to consider alternate dispute resolution, and especially the use of arbitration, is eloquently discussed by Wendy Kennett, 'It's Arbitration, But Not as We Know It: Reflections on Family Law Dispute Resolution' (2016) 30(1) *International Journal of Law, Policy and the Family* 1, 1.

Family arbitration was introduced to the *Family Law Act 1975* (Cth) ('FLA') in 1991. However, an appropriate framework to facilitate arbitration was not available until amendments to the Family Law Rules which commenced on 1 April 2016. It is from this date, 25 years after the first inclusion of family arbitration within the FLA, that court-ordered arbitration effectively commenced.[3]

This article explores the use of family law arbitration for the period 1 April 2016 to 1 September 2020 in the Federal Circuit Court of Australia (FFC) (as it then was – the Court was merged with the Family Court of Australia on 1 September, 2021 and is now Division 2 of the Federal Circuit and Family Court of Australia). [4] This article commences with a brief consideration of the then current legislative regime applicable to family arbitration.[5] The article then considers data relating to all cases referred to arbitration by the Federal Circuit Court in the four-and-one-half year period from 1 April 2016 to 30 September 2020. Finally, the article considers what conclusions might be drawn from this data and contemplates the future use of family law arbitration.

The intention of the article is to introduce and consider previously unavailable data relating to the use of family law arbitration in the FCC to stimulate further research and discussion.

II The Current Legislative Regime

Family law arbitration is only applicable to financial proceedings. Parenting proceedings cannot currently be arbitrated under the provisions of the FLA.[6]

Arbitration is a consensual means of dispute resolution wherein the parties contract with an independent third party (the arbitrator) to have that independent third party determine their dispute in a binding manner.[7] Litigation, on the other hand, involves the determination of

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[3] A limitation of this article is that the data collected, as will be discussed under 'Methodology', is confined to court-ordered arbitration. Discussion regarding the use of consensual arbitration, whether an arbitral award was registered by the Court or not, is not included.

[4] Ideally this article would be read in conjunction with Matthew Shepherd, 'Family Law Property Arbitration Progress, Reviews and How to Increase Uptake' (2019) 28(1) *Australian Family Lawyer* 11.

[5] For a more detailed discussion of the legislative provisions then applicable see Matthew Shepherd, 'Family Law Property Arbitration' (2017) 36(1) *The Arbitrator and Mediator* 42. The *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) Div 1.2.6 now apply.

[6] The Australian Law Reform Commission (ALRC), *Family Law for the Future – an Inquiry into the Family Law System* (Report No 135, 10 April 2019) recommended the expansion of the use of arbitration in the family law context, including an expansion of arbitration beyond financial disputes to some parenting disputes as well as consolidation and simplification of the present legislative regime referrable to arbitration (recommendations 26 to 29).

[7] Eloquently described by William West in 1641 as 'an arbitrator is an extraordinary judge, which is chosen and hath power to judge given to him by only the mutual consent, will, compromise and election of private persons striving to the end that they decide their controversies' as quoted in Derek Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I* (Halo Books, 2015).

disputes by a court as the judicial branch of government. As such, there are important differences between the judicial determination of a dispute and an arbitral determination:

- Arbitration involves a voluntary submission to be bound by the arbitral process and the arbitrator's determination.[8] The jurisdiction of courts arises from the social contract of the 'consent of the governed'[9] as a function of democratic governance.
- An arbitrator must apply the law but does not create precedent. A judicial determination of disputes, even by first instance trial courts, creates precedent and gives rise to issues of comity.
- Arbitral proceedings are confidential, private and unreported. Court proceedings are open, transparent and reportable.
- The 'enforceability' of an arbitral award comes from the agreement of the parties to be bound by the decision of the arbitral tribunal,[10] and through statutory provisions that allow the registration and enforcement of the award. As such there are avenues of review and a general oversight of the arbitral process by courts. Judicial determinations, whilst subject to appeal in the event of error, are binding as and of themselves.

As observed by the Australian Law Reform Commission, the legislative provisions which define and facilitate family law arbitration are unnecessarily complex, being spread across the FLA, the Family Law Regulations ('FL Regs') and Family Law Rules ('FL Rules').[11]

The FLA defines arbitration as '[…] a process (other than a judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute'.[12]

The FLA envisages that arbitration may occur with or without court order. When arbitration is undertaken with the consent of the parties and without court order,[13] the scope of what can be arbitrated is broader. In

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8 The Court's authority is not reliant upon voluntary submission. To the extent that the language of 'consent' is relevant with respect to judicial authority, the consent to jurisdiction is, in a democracy, the consent of the governed. See, eg, John Locke, *Two Treatises of Government: In The Former the False Principles and Foundation of Sir Robert Filmer and His Followers, are Detected and Overthrown. The Latter is An Essay Concerning the True Original Extent and End of Civil Government* (Awnsham and John Churchill, 3rd ed, 1698) sec 140.

10 Under the FLA, the arbitral tribunal generally comprises a single arbitrator. An arbitral tribunal can, and historically has, and in some non-family law jurisdictions does, comprise more than one arbitrator, with one of the arbitrators comprising the arbitral tribunal being designated as the umpire with the 'casting vote' in the event that a determination is not unanimous. (This model is, for example, adopted by article 10 of the *UNCITRAL Model Law on International Commercial Arbitration*.

11 See also ALRC (n 6) 279-294.

12 FLA s 10L.

13 Referred to in s 10L of the FLA as 'relevant property or financial arbitration'.

these cases (defined as 'relevant property or financial arbitration'),[14] the arbitrator can deal with and determine:

- Part VIII proceedings (property adjustment between married parties);
- Part VIIIA proceedings (financial agreements between married parties);
- Part VIIIAB proceedings (property adjustment between de facto couples);
- Part VIIIB proceedings (superannuation splitting);
- Section 106A proceedings; or
- any part of such proceedings, any matter arising in such proceedings or a dispute about a matter with respect to such proceedings.

When arbitration is court-ordered pursuant to s 13E of the FLA (known as section 13E Arbitration),[15] only Part VIII proceedings or Part VIIIAB proceedings [16] can be arbitrated. Accordingly, there is some controversy as to whether court-ordered arbitration can or cannot deal with superannuation splitting. [17]

Neither form of arbitration can deal with Part VIIIAA proceedings (Orders and Injunctions Binding Third Parties) or Part XIV proceedings (Injunctions). This is consistent with the concept that matters that impact third parties or pertain to issues of public interest are not generally arbitrable.[18]

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[14] FLA s 10L(2)(b).

[15] FLA s 10L(2)(a).

[16] Other than proceedings relating to financial agreements which are excluded by reg 67C of the FL Regs.

[17] It is beyond the scope of this article to engage in this controversy, however it was touched upon by the Australian Law Reform Commission (n 6) paragraph 9.13. Footnote 17 of Chapter 9 of the report, upon which the ALRC's discussion is prefaced, refers to an article by Justice Watts which eruditely discusses the possible bases upon which superannuation might permissibly be addressed in court-ordered arbitration. However, the specific permissibility of non-court-ordered arbitration to determine superannuation splitting in contradistinction of that which is permissible in court-ordered arbitration might obviate against this interpretation. There would not appear to have been judicial determination of the issue.

[18] Notwithstanding that the FLA defines the categories of cases that are capable of being arbitrated, there remains a broader consideration of whether arbitration is *appropriate* in any given case or whether the dispute is 'arbitrable'. A good starting point from which to consider arbitrability is the English Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richards and Another* [2012] Ch 333 [40] in which Patten LJ stated that 'it is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process'. Public interest in the subject matter of a dispute or in the determination of the dispute (whether outcome or process) could potentially render a dispute non-arbitrable. In the absence of any settled authority, and noting the current restriction of arbitration to financial proceedings, it could be argued that disputes are not arbitrable if they relate to or will involve a finding of fact relating to: the perpetration of fraud by a party (whether upon the other party or a third party such as the Office of State Revenue or Australian Taxation Office); relief that will impact third parties; allegations of criminal conduct; and cases involving significant allegations of family violence.

When arbitration occurs, the Court retains a power to assist and facilitate arbitration. The parties can seek the Court's assistance by issuing a subpoena, seeking rulings on points of law and applying to register and enforce the arbitral award.

Arbitral awards can be registered with the Court irrespective of whether the arbitration was undertaken by court order or not. Registration of awards can be opposed on grounds relating to the integrity of the arbitral process.[19] Once an arbitral award is registered, arbitral awards can be enforced as though they are decrees of the Court. Arbitral awards are subject to judicial review and application can be made to vary or set aside arbitral awards albeit on grounds more limited than apply to similar applications to vary or review court orders.

III Methodology

The data considered in this article was collected in two tranches. The first tranche of data was collected in April 2018.[20] At this point, matters which had been referred to arbitration by court order in the period 1 April 2016 to 1 April 2018 were identified. As the FCC did not have a centralised database of matters referred to arbitration it was necessary, at that time, to survey all FCC Judges sitting in the Court's family law jurisdiction, to ascertain what matters had been referred to arbitration by each judge.[21] With the involvement and assistance of the Chief Judge the response rate was 100%.

Judges were asked to provide the proceedings number of any matter which had been referred to arbitration. This enabled an approximate 'base line' understanding of arbitration use as of 1 April 2018. Whilst judges were not asked to provide any additional information, a number volunteered further information that also gives some insight into judicial attitudes towards arbitration.[22]

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[19] As to consent, see *Pattison & Loomis* [2021] FamCAFC 41. Otherwise as regards objections to registration, see *Wright & Rebane* [2021] FedCFamC1F 154. On reviews of arbitral awards, see *Griffiths & Griffiths* [2022] FedCFamC1F 219 and *Bakalov & Bakalov* [2021] FedCFamC1F 161, and on applications to vary or set aside arbitral awards, see *Caine & Caine (No.2)* [2020] FCCA 3473 and *Jancos & Abelas* [2020] FCCA 459.

[20] With ethics approval provided by the Chief Judge of the FCC, a request was made of each FCC Judge to manually search for, obtain and provide data. The total number of judges was 70 judges, 9 of whom sat exclusively in General Federal Law. Hence, the responses of the 61 judges who sat in the Family Law jurisdiction are the basis of this data.

[21] It should be noted that whilst the FCC was a national court, the FCC did not, and now Division 2 of the Federal Circuit and Family Court of Australia does not, exercise family jurisdiction in Western Australia as the Family Court of Western Australia does so under the *Family Law Act 1975* (Cth) and *Family Court Act 1997* (WA). Hence, data with respect to the use of family arbitration in Western Australia is not considered in this article.

[22] Seven judges in total made unsolicited but illuminating comments including three judges from the Melbourne Registry who, in response to the question whether they had ever made an order referring a matter to mediation, had responded to the effect that they had not as they had never been asked to.

The second tranche of data was obtained by a file review of matters referred to the National Arbitration List ('NAL') as at 30 September 2020.[23] The NAL was established in April 2020 and provided for the transfer of all matters which had been or were subsequently referred to arbitration to a single, nationally managed list.[24]

By use of the proceedings number for each matter it was possible, by electronic file review, to ascertain, with respect to each matter referred to arbitration:

1. The judge (or registrar) who had made the order referring proceedings to arbitration.
2. The date of the order referring proceedings to arbitration.
3. Whether arbitration proceeded or whether the matter was resolved in some other way (such as orders made by consent).
4. The time from referral to arbitration until the conclusion of the proceedings (whether by registration of an arbitral award or otherwise).
5. The arbitrator who arbitrated the dispute.

There are a number of limitations to the data. These include:

1. The initial survey of FCC judges was necessary as the Court's systems did not record referral to arbitration or the conclusion of proceedings by registration of an arbitral award. Accordingly, it was necessary for chambers staff for each judge to manually search orders and bench sheets. Due to differences in data storage, it is possible that matters have been referred to arbitration which are not recorded for the purpose of this research. Accordingly, the total number of matters referred to arbitration will be referred to as a 'not less than' figure rather than a definitive number.
2. Following the introduction of the NAL it was the expectation that all matters which, to that point, had been referred to arbitration, or which were subsequently referred to arbitration, would be transferred to the NAL. This was, however, dependent upon each judge's chambers actually referring such matters to the NAL. Consequently, limitations include:

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[23] Being nearly four and a half years after the commencement of the FL Rules which enabled effective referrals to arbitration by the Court and five months after the NAL was commenced.

[24] In September/October 2020 all FCC matters then listed or subsequently subject of an order for arbitration were referred to the Family Court of Australia (now Federal Circuit and Family Court of Australia Division 1) whilst the National FCC Arbitration List Judge was on extended leave. This might be borne in mind if any future research is undertaken with respect to the Family Court or Federal Circuit and Family Court's consideration of arbitration (as opposed to FCC) as this significant influx of matters would, absent acknowledgement of same, suggest a dramatic and erroneous change in the pattern of referral to arbitration.

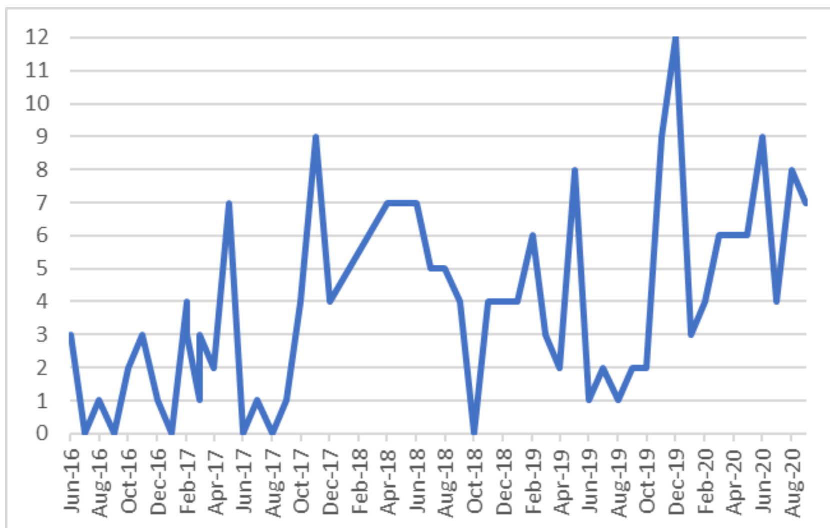
a. if a matter was retained by the docketed judge rather than referred to the NAL, then these matters would not be reflected in the data collected and;
b. even if all matters were referred to the NAL, the data collected would not include matters referred to arbitration after the first tranche of data was collected (1 April, 2018) if the matter concluded before the NAL commenced (April, 2020).

3. The data relates to the FCC only and does not include any matters referred to arbitration by judges of the Family Court of Australia.
4. The data reflects only FCC Court-ordered arbitration and does not include consensual arbitration absent court order ('relevant property or financial arbitration').[25]

IV The Data Obtained

The first recorded order referring FCC proceedings to arbitration was made by a judge of the Parramatta Registry in June 2016. In the period 1 April 2016 to 30 September 2020, the total number of matters referred to arbitration, was not less than 197 (an average of 3.65 referrals to arbitration per month (or a little under one per week) nation-wide). These data are represented, on a month-by- month basis, in Figure 1.

Figure 1.
Referrals to Arbitration by Month

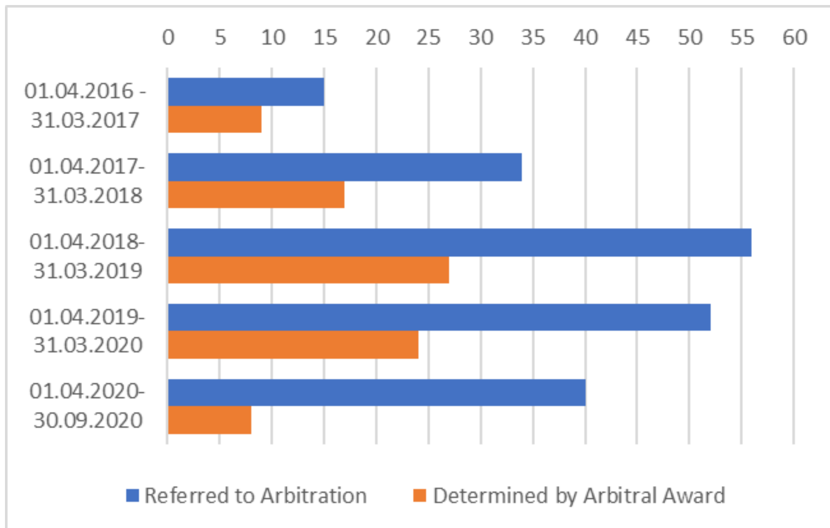


[25] In Shepherd (n 4) it was reported that, following a survey of family arbitrators in February 2019, in 80 of 107 arbitrations an order for arbitration had been made, leaving 27 of 107 arbitrations in which arbitration had proceeded consensually without Court order.

Whilst there was steady growth in court referrals to arbitration, the rate of referrals to arbitration then seemed to plateau or stabilise. If, for example, the two most significant periods of referral to arbitration are compared, being April 2018 - April 2019 (58 referrals to arbitration) and August 2019 - August 2020 (72 referrals to arbitration), then a clear increase in the rate of arbitration being ordered (24%) is apparent. However, if the months of November and December 2019, when 9 and 12 matters respectively (21 in total) were referred to arbitration, are treated as anomalous, there is in fact a slight decrease in the rate at which arbitration was ordered between the two periods. These two months can be identified as months when large call-overs of matters occurred at the Parramatta Registry and when listing pressures meant that few, if any, hearing dates were available. The significant use of arbitration, especially in the Parramatta Registry, has corresponded with significant delays and the absence of available hearing dates and has, in all probability, contributed significantly to the increased use of arbitration.

Figure 2 shows referrals to arbitration by year. This table more clearly demonstrates pattern of arbitration referral from year to year.

Figure 2.
Referrals to Arbitration by Year



By considering referrals to arbitration on a year-by-year basis two trends are observable.

Firstly, there is a growth in the use of arbitration from 2016 until 2019, followed by a slight contraction in 2019/2020. Growth is again observed from April 2020 (albeit the year to April, 2021 is incomplete with only a 6 month period considered). If the pattern of arbitration

referral were to have continued for the remaining 6 months (October 2020 to April 2021) then certainly a substantial increase in the use of arbitration would have been observed.

The slight contraction in the rate of referral to arbitration corresponds with two listing developments within the FCC:

- Pilots of registrar case management commenced which saw the listing and management of property cases assumed by registrars whereas previously all case management had been undertaken by a judge. This change resulted in an immediate and significant reduction in referrals to arbitration especially within the registry of the Court (Parramatta) which had been responsible for the majority of referrals across the entire FCC until that time. In the first nine months of registrar case management of property cases at the Parramatta Registry, all but one referral to arbitration arose from judicial call overs. In fact, as will be seen, referrals to arbitration are overwhelmingly made by judges rather than registrars in all registries of the Court save Brisbane.
- In the later portion of this period, the FCC announced the commencement of the Priority Property Pools under $500,000 (PPP500) pilot that would see the expedited listing of property matters for hearing. For a good number of matters, which had previously waited an inordinate period for determination, a relatively expeditious hearing before a judge was achieved.

Secondly, approximately half of the matters referred to arbitration were determined by arbitral award. The remaining matters were resolved by consent or, in the case of the period 1 April - 30 September 2020, by consent or awaiting arbitral hearing.

This rate of determination by arbitral award is somewhat higher than the rate of determination at hearing by a judge (being 27%). [26] On one hand this is perhaps to be expected in light of the prevailing listing practices and delays, especially in the major registry in which arbitration orders were made (Parramatta). Significant delays to judicial determination and significant delay between allocation of hearing dates and the actual hearing might be expected to see a rise in settlement rates, if only by attrition and the impact of delay and inflating costs. On the other hand, the delivery of an arbitral award would capture both matters that were heard and determined by an arbitrator and those in which an award was made by consent.[27] Hence, the greater rate at which arbitral

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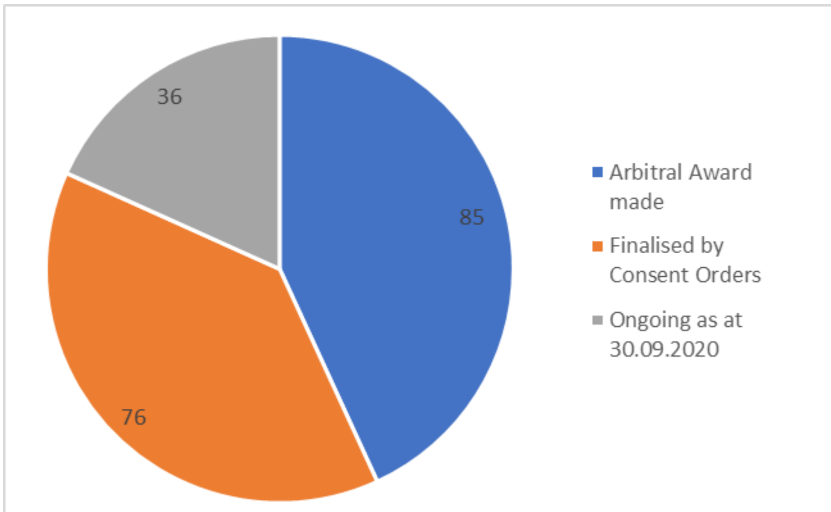
[26] See the FCC Annual Report 2019/2020 (Web page, 2020) <https://www.fcfcoa.gov.au/2019-20-family-court-australia-annual-report>.

[27] Whereas the Court's data collection differentiates between an order made upon delivery of a judgment (judicial determination) and an order made by consent, the data considered in the article identifies only delivery of an arbitral award which would include both contested and consensual determinations.

awards are issued, as against a judgment issued by the Court, need not necessarily be taken as indicative of a lesser settlement rate in the arbitral cohort.

This propensity for settlement of matters once referred to arbitration is consistent with the settlement of matters before the Court following the allocation of hearing dates. In any event, the manner in which matters referred to arbitration are concluded (arbitral award, consent orders and pending determination) is shown in Figure 3.

Figure 3.
Conclusion of Matters as at 30 September 2020



Matters which were capable of resolution (and thus requiring determination), benefited from referral to arbitration and assisted with managing the Court's workload generally. These matters have been determined without delay to the parties or burden to the Court, freeing time for court determination of non-arbitral matters including parenting cases. This might be seen as the parties submitting to arbitration to 'get on with it' when faced with an inability of the under resourced court to hear their case promptly or at all.

The rate of referral to arbitration evident in the data, and especially the referral of matters that have been incapable of resolution, would lend support to the hypothesis of Wendy Kennett that '[…] a common thread in the story of the development or advocacy of arbitration for the resolution of family law disputes is the overburdening or breakdown of the judicial system'.[28]

The FCC was under resourced since its commencement. This has been the subject of comment by judges of numerous courts and was

[28] Kennett (n 2) 4.

remarked upon by the Australian Law Reform Commission.[29] Such under resourcing has more recently been the subject of comment by the Chief Judge of the FCC.[30] Delays in anticipated judicial determination, especially in cases that have, in fact, proceeded to determination, might be seen as a strong thread in the developing use of arbitration.[31]

Whilst there was no particular consistency in the rate of referrals to arbitration, the frequency of referral to arbitration has slowly increased. This may well reflect a growing familiarity with arbitration as a mode of dispute resolution (in very much the same way that the use of FDR has increased over time and as practitioners and litigants have become more familiar with such processes and Family Dispute Resolution Practitioners have become more abundant and available).

The introduction of the National Arbitration List, in April 2020, was intended to stimulate interest in arbitration (especially amongst the legal profession). The list promised expedited and consistent address of applications in an arbitration and registration of awards (although this was occurring within the Federal Circuit Court, as the vast majority of matters referred to arbitration had been so referred by a single judge (the author) whose procedures and protocols for address of applications were, by and large, adopted by and reflected those utilised for the National Arbitration List.[32] It is too early and too limited a data set as considered in this article for any conclusions to be drawn as to whether this goal has been met (with only six months between the introduction of the NAL and the time the data set closed).[33] If the six-month period from April - September 2018 (prior to the introduction of registrar case

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29 ALRC (n 6) 1.08.

30 See, eg, Michael Pelly, 'Chief Justice Sets Family Law Targets After Funding Boost' *Australian Financial Review* (13 May 2021). In this article the Chief Justice was quoted as saying, 'As a result of underfunding…we have a massive backlog, an enormous amount of delay…'.

31 One might consider the under-resourcing of the Court as conceded in light of the number of additional appointments to the Federal Circuit and Family Court of Australia following the merger of the Federal Circuit Court and Family Court in 2021. The merger was advanced as a solution to delay in and of itself and, hence, one might wonder why the further substantial funding of judicial and quasi-judicial positions (such as Senior Judicial Registrars, Judicial Registrars and Deputy Registrars) in the 2022 Federal Budget was necessary, although, in reality, nearly all judicial appointments since the merger have been replacement of previously retired judicial officers or replacement of Division 2 judges who have been elevated to Division 1 as replacements for previously retired judges. See for example, the Court's media release: 'The Federal Circuit and Family Court of Australia to Receive $63.75 Million in Government Funding Announced in the 2022-23 Budget' (Web page, 30 March 2022) <https://www.fcfcoa.gov.au/news-and-media-centre/media-releases/mr300322>.

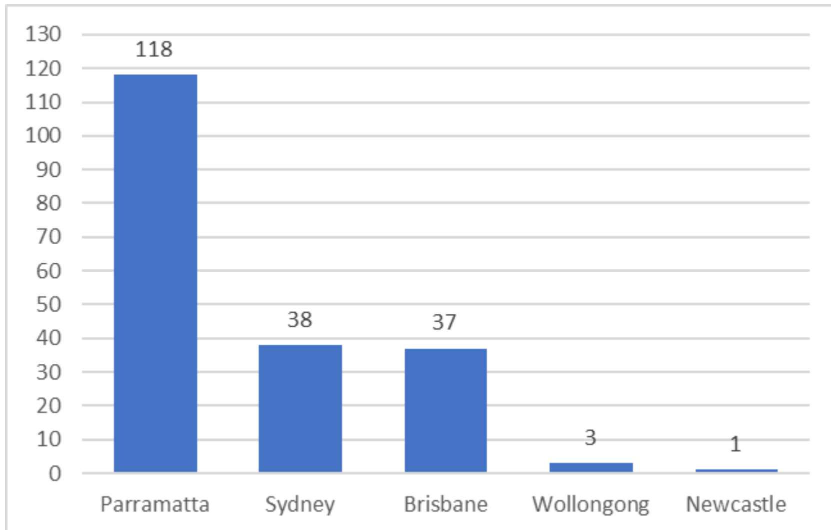
32 Prior to the introduction of the NAL, the median time for registration of an arbitral award was four weeks. As there is a four-week period in which a party may object to registration of an arbitral award, this period is the minimum, absent the consent of all parties, in which an award can be registered. Prior to the commencement of the NAL, more than one half of arbitral awards were, with the consent of the parties, registered within four weeks and 20% of awards were registered within 24 hours of receipt of the arbitral award.

33 The data set considered by this article concludes 30 September 2020, being 6 months after the introduction of the NAL.

management) is compared with the corresponding period in 2020, there was a slight increase in the rate of arbitration ordered between the two periods.[34]

What is readily apparent is that the use of arbitration (and the development of a cultural acceptance of arbitration) is largely driven by judicial officers.[35] Table 4 below sets out the referrals to arbitration by reference to the registry to which the judicial officer who made the order for arbitration was assigned.

Figure 4.
Referral to Arbitration by Judge or Registrar's Home Registry



When referrals to arbitration are considered by reference to the location of the judicial officer who referred the matter, it is apparent that a small number of judicial officers from specific registries are responsible for all matters referred to arbitration to date.[36] These judicial officers clearly support and promote the use of arbitration. In fact, the majority of referrals to arbitration occur during weeks when specific judicial officers have conducted duty lists.

[34] In the earlier period, 35 matters were referred to arbitration almost exclusively by the Parramatta Registry. In the corresponding period in 2019, only 16 matters were referred to arbitration. This period corresponded with the commencement of registrar case management pilots. In the corresponding period in 2020, a total of 40 matters (a 14 percent increase over 2018 figures) were referred to arbitration. This comparison is also subject to the caveats with respect to the data considered by this article and as identified earlier.

[35] A further contribution may well be local and regional culture. For example, save one arbitration order made in the Melbourne Registry, albeit by an inter-state visiting judge, orders for arbitration were not made in the Melbourne Registry in the period considered in this article. The Melbourne 'settlement culture' (and the reality that final hearing dates are listed from the first court event) may well have contributed to this.

[36] For example, in the period 1 April 2016 - 1 April 2019, 69/107 (63.5%) matters referred to arbitration, were referred by a single Parramatta judge.

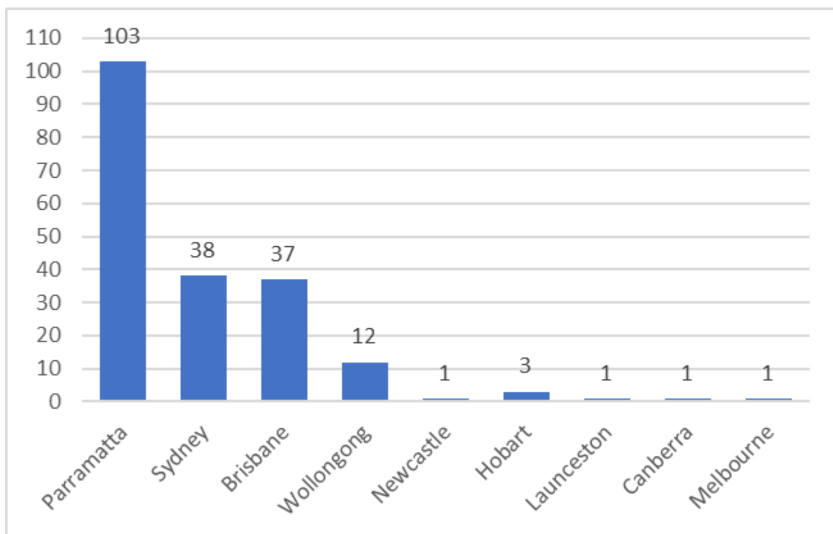
The role of judicial officers in promoting and facilitating the use of arbitration is also alluded to in unsolicited comments made by numerous judges in the first tranche of data. Those comments fell within two categories being (in almost identical language for all who commented):

- 'I have never been asked to refer a matter to arbitration'; and,
- 'Unless there is a rehearing as of right, I will not refer to arbitration'.[37]

These comments reflect the role of judicial activism both in promoting arbitration and also in impeding arbitration.

Curiously, the role of judges in 'driving' arbitration is more readily apparent when consideration is given to the registries in which orders for referral to arbitration are made - as shown in Figure 5.

Figure 5.
Referral to Arbitration by Registry



The majority (9/12)[38] of referrals that occurred in Wollongong and all referrals that occurred in Hobart, Launceston, Canberra and Melbourne were made by a visiting judicial officer from the Parramatta Registry.[39]

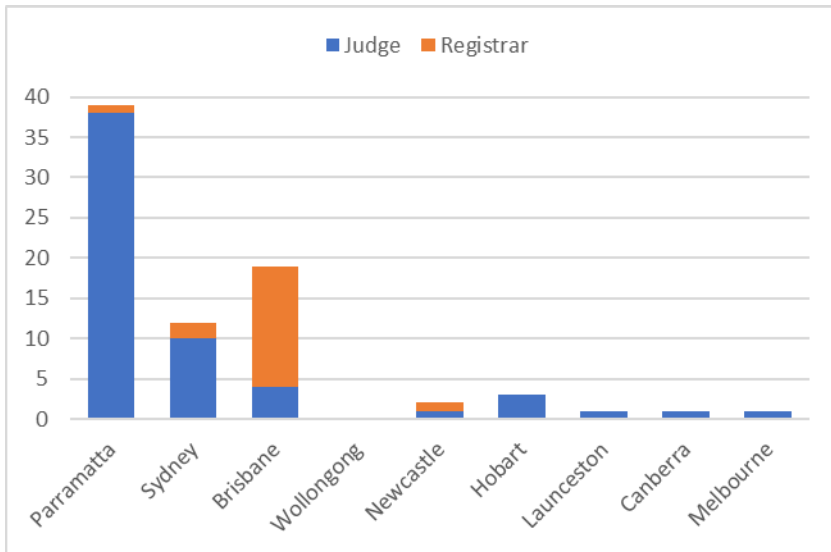
37 This later sentiment has also been expressed to the author by a number of lawyers as well as a telling comment by a Hobart counsel, made to the author, linking delay in court determination to consent to arbitration, being 'why would we consent to arbitration when we can get a hearing before a good judge in less than 6 months?'

38 These nine referrals to arbitration might also have had some impact upon the remaining three referrals made in that location as an 'arbitration' culture developed. This is especially so as 8 of the 9 matters initially referred to arbitration were arbitrated by the same local practitioner.

39 47% of all referrals to arbitration in the period 1 April 2016 to 30 September 2020 were made by a single Parramatta Judge and 60% of all referrals were made by Parramatta Judges.

Referrals to arbitration by judges as opposed to Registrars is shown by Figure 6.

Figure 6.
Referrals by Judges (n=59) v Registrars (n= 19) Since Commencement of Discrete Registrar Managed Property Lists September 2019



In all registries except Brisbane, referrals to arbitration were overwhelmingly ordered by judges.

By comparing the rate of referrals to arbitration by judges and registrars, two trends can be observed:

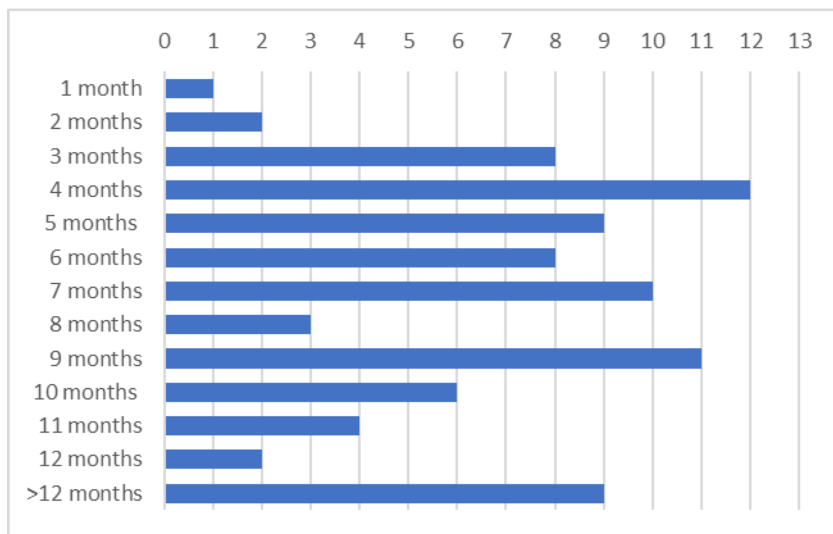
- In registries where registrars (and possibly the profession) embrace and support or 'drive' arbitration, the rates of referral to arbitration are higher [40] and;
- When judges who enthusiastically support arbitration are removed from the procedural conduct of matters, the rate of referral to arbitration declines. This is especially clear with respect to the Parramatta registry where registrar management of all property matters commenced in September 2019. For the 12-month period September 2019 to September 2020, only one matter was referred to arbitration by a registrar whereas thirty-eight matters were referred to arbitration by judges. The Brisbane registry would appear not to have experienced a similar disparity

[40] By reference to the unsolicited comments of a number of judges, that they had not been asked to refer matters to arbitration (and accordingly had not made referrals), it might be seen that judges raising the issue with parties and their lawyers is a driver for arbitration (especially when combined with under resourcing and consequent delays in the court system).

in the rate of arbitration being ordered, with registrars 'driving' the uptake of arbitration in that location.

One of the significant benefits of arbitration is often suggested to be an expeditious determination of the matter. This is borne out to some extent by Figure 7, which records the time from an order referring proceedings to arbitration being made to the production of an arbitral award.

Figure 7.
Time from Order to Arbitral Award



The data analysed for this article reflected a median time from referral to arbitration until registration of an arbitral award as being 7 months.[41] The average time for conclusion of proceedings from referral to arbitration until registration of an arbitral award was 8.4 months. However, the average time is perhaps a less accurate indication of the general practice within the Court, noting that nine matters [42] took a significant period to reach conclusion.[43]

In the context of then present court delays, this represented an earlier median determination than would have occurred by judicial hearing in the registries from which referrals to arbitration were made. However, with the introduction of registrar case management, the PPP500 list and an expansion of senior registrar delegated powers (to enable senior registrars to hear smaller value property cases), these delays would

41 At the point that the arbitral award is registered, the proceedings are then concluded subject to any application for costs. Such applications have been relatively rare.

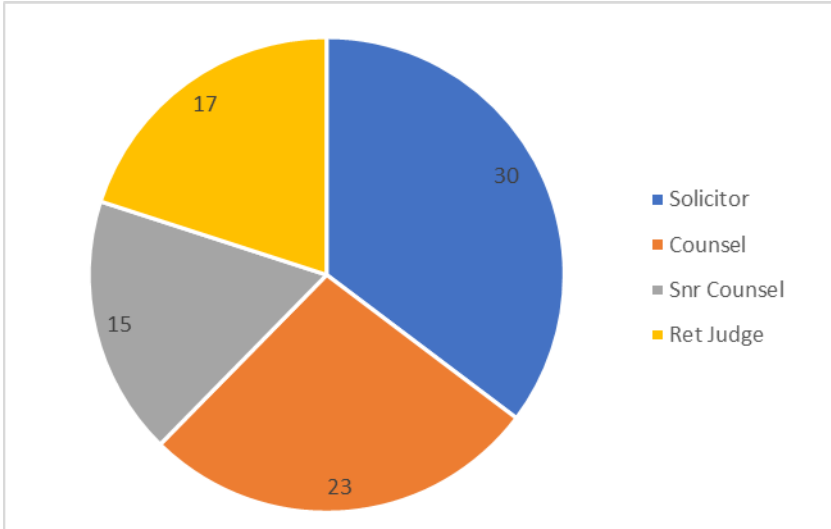
42 Of which three matters might, statistically, be considered outliers.

43 Without undertaking more detailed qualitative analysis of those specific matters, it is not possible to ascertain the contributors to this delay.

substantially erode one of the benefits of arbitration, namely, an expeditious conclusion when compared with court delays.

The final matter arising from the data that warrants noting is the background and qualification of those who are arbitrating disputes. This is shown in Figure 8.

Figure 8.
Who is Arbitrating



The work of arbitration is spread across all branches of the legal profession. Interestingly, the most expeditious arbitrations are undertaken by solicitors and junior counsel and the more delayed and protracted arbitrations are undertaken by senior counsel and retired judges. However, this may well reflect the increased complexity of matters for which senior counsel and retired judges are selected as arbitrators.[44]

V Conclusion

The birth of family law arbitration in Australia could fairly be described as difficult. Notwithstanding that arbitration was introduced to the FLA in 1991 it was another 25 years before the first matter was, in fact, referred to arbitration.

The developing use of arbitration might also be seen as judge driven and the product of chronic under resourcing and delay in the court system. Arbitration has been most strongly embraced in the registries of the FCC with the greatest delays. Thus, Kennett's view that under

[44] Interestingly, the longest arbitration undertaken in this sample involved a hearing of eight days. That arbitration was undertaken by a solicitor arbitrator.

resourcing and delay are the genesis of arbitration must be seen to have some real validity. The newfound vigour of the Federal Circuit and Family Court to encourage and 'drive' arbitration might, similarly, be seen as desirous in terms of decreasing the use of the Court's resources in hearing financial cases and as an aid to easing backlogs for which the Court has been criticised.

Moving forward, there are a number of developments which have already and may well continue to pare back the use of arbitration, including:

- The trialling of expedited lists for the hearing of property only cases with a limited asset pool (the PPP500).
- The expansion of registrar powers to allow property matters to be heard by non-judicial officers and with a review by hearing de novo. [45]
- The long overdue allocation of additional resources to the FCC in the 2021 and 2022 budgets.

The use of family law arbitration, in any substantial way, has been the product of an under resourced court system and a consequent desire by specific judges and, perhaps, the legal profession, to find an alternative means of determinative dispute resolution. Absent vigorous judicial encouragement arbitration has not occurred. [46] Further, in better resourced registries of the Court, there has been little enthusiasm amongst the legal profession to advise clients to consent to arbitration.

At the risk of overstretching the metaphor with which this article commenced, family law arbitration was delivered after a 25-year gestation. The conditions that facilitated the birth of family law arbitration (after relevant facilitated rule changes) were advocacy and activism by a small number of judges in a resource-deprived environment typified by chronic delays. Those conditions are challenged by the removal of judges from the case management of property proceedings and by the address of delay in the ways discussed above. It is unclear whether the modest cultural change that has occurred to date can be sustained to allow family law arbitration to grow and develop further but one might hope, for all of the benefits that such alternative dispute resolution might bring, that it is so.

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[45] This was one of the objections to arbitration expressed by a number of judicial officers.

[46] Noting that no matters have been referred to arbitration by judges from the Tasmanian, Victorian or South Australian Registries of the FCC which has no other basis than that the number of judges relative to the populations of those jurisdictions is higher than, especially, for example, Parramatta.