



FAMILY COURT
OF AUSTRALIA



FEDERAL CIRCUIT
COURT OF AUSTRALIA

Information Notice: The National Arbitration List

What Matters can be Arbitrated under the *Family Law Act 1975*

Arbitration can occur in two ways, either:

- (a) Section 13E arbitration (“Court Ordered Arbitration”) — which is arbitration of Part VIII or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement) or any part of those proceedings; or
- (b) Relevant property or financial arbitration (“Private Arbitration”) — which is arbitration (other than section 13E, Court ordered arbitration) of:
 - (i) Part VIII, Part VIII A and/or, Part VIII AB proceedings,
 - (ii) Part VIII B proceedings or section 106A proceedings; or
 - (iii) Any part of such proceedings; or
 - (iv) Any matter arising in such proceedings; or
 - (v) A dispute about a matter with respect to which such proceedings could be instituted.

Parenting or Child Support proceedings cannot be arbitrated.

Orders Referring Matters to Arbitration

Section 13E of the *Family Law Act 1975* (Cth) (‘The Act’) provides for the court to refer Part VIII or Part VIIIAB proceedings, or aspects of those proceedings to arbitration. This can only be done with the consent of all parties. Importantly, s 13E(2) of the Act provides that when an order is made referring a proceeding or part of a proceeding to arbitration, the court may make any additional orders, as it thinks appropriate, to facilitate the effective conduct of the arbitration.

The court has the option of making orders under this subsection that can prescribe aspects of the conduct of the arbitration, such as providing for the appointment of the arbitrator, for the execution of an arbitration agreement, for the payment of the fees of the arbitrator, providing for the production of documents, providing for the provision of a joint chronology and/or a joint statement of facts.

Alternatively, a court can leave it entirely to the parties to attend to these requirements in accordance with Chapter 26B of the *Family Law Rules 2004* (Cth), or there can be a combination of the two.

It is important to remember that:

1. The jurisdictional basis for referral to arbitration is found in section 13E of the Act. A glossary of the relevant legislative provisions in relation to arbitration, as found in the Act, the *Family Law Regulations 1984* (Cth) and the *Family Law Rules 2004* (Cth), appears below;
2. A referral to arbitration can only be made with the consent of all parties;
3. A referral can only be made to an AIFLAM accredited arbitrator whose name appears on a list located on the AIFLAM web site;
4. Only Part VIII proceedings, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement), or aspects of those proceedings can be referred by court order.
5. Importantly, the Act does not permit the referral of Part VIIIA (Financial Agreements) proceedings, or s 106A proceedings. Those proceedings, as well as De Facto Financial Agreement disputes, can be the subject of a private arbitration, and the parties should be advised of that possibility when an order for referral is being considered.
6. There is an issue as to whether Part VIII B (Super Splitting) Proceedings can be referred to arbitration by a Court. Certainly though it can be the subject of private arbitration.
7. The Court can make orders to facilitate a private arbitration (See s 13F and Chapter 26B of the *Family Law Rules 2004* (Cth)).

Once an order is made

When a Court makes an order referring proceedings to arbitration a copy of the Order will be forward to the relevant National Arbitration List Judge's Associate.

The National Arbitration List Judges for each Court are:

- Family Court of Australia – Justice Wilson, Melbourne;
- Federal Circuit Court – Judge Harman, Parramatta.
- Appeals from both Courts – Justice Strickland, Head of the Appeal Division Family Court of Australia

The referring Court may also include the following orders and notations when referring matters to arbitration;

1. *Transfer these proceedings to the National Arbitration List;*
2. **Noted:** *The proceedings will be listed before the National Arbitration List Judge on a date to be advised by the chambers of the National Arbitration List Judge and in approximately four months hence.*

The Courts' administrative processes will then facilitate the assignment of the relevant National Arbitration List Judge as Case Manager and that judge will receive the Court file. The relevant National Arbitration Judge will then allocate a mention date about four months from when that judge assumes management of the case.

The purpose of the allocated listing date is to allow the parties to arrange and attend arbitration and for an arbitral award to be issued and registered. The intention is that either the allocated future return date will be vacated (upon registration of an arbitral award) or, if necessary, administratively adjourned to permit completion of arbitration (provided that the arbitration has been arranged and a date for arbitration has been scheduled). If neither of these conditions apply, then the matter will be called over at the Court event to ascertain the progress of arbitration and compliance with any procedural orders and directions made by the court or directions issued by the arbitrator.

The Courts will maintain the proceedings as an open matter on their computer systems. It is intended that initiating applications should not be finalised at the time that referral to arbitration occurs. The purpose of the National Arbitration List is to enable Applications in an Arbitration to be made and to enable the parties to use all available "*litigation tools*" (eg the issuing of subpoenae and the disclosure obligations). If the proceedings were concluded this would become difficult.

What Will Happen After Transfer

As soon as an order referring proceedings to arbitration is received in the chambers of the relevant National Arbitration List Judge, the parties will be advised:

- a. That the Order has been received by chambers; and
- b. Of the next listing date as well as the protocols they will need to follow in making any Application in an Arbitration, to register an arbitral award, object to registration or to seek to review or set aside the arbitral award once registered.

In the event that either party wishes to make an Application in an Arbitration, then the parties will be advised, as part of the above protocols, that the application is to be electronically filed and that it will be listed to a date no more than four weeks after the date of filing in consultation with Chambers.

It is intended that all applications will, if possible, be heard and determined on the first return date. Similarly, any Application to object to registration of an arbitral award or, following registration, to seek to review the award or set it aside, will be listed in the above fashion.

An arbitration list will be conducted (subject to volume and need) each Friday or as close to each Friday as can be achieved. It is expected that hearing will be conducted electronically, to ensure that the National Arbitration List judges are available to hear applications in all States and Territories (except Western Australia).

Glossary of Arbitration Provisions

Subject	Family Law Act	Family Law Regulations	Family Law Rules
Definition of Arbitration	10L(1)		
Definition of Arbitrator	10M	67B	
What can be arbitrated	10L(2)	67C	
Arbitrator's fees and costs	10N		
Arbitrator Immunity	10P		
Referral to Arbitration by Court	10L(2); 13E		
Orders facilitating arbitration	13F	67E	26B.34
Determining questions of law	13G		26B.30-31
Registration of Arbitral Award	13H	67Q; 67R	26B.33; 26B.35
Objection to registration		67Q	
Effect of Registration	13H(2)		
Review of registered Arbitral Award	13J		
Varying or Setting Aside a registered Arbitral Award	13K		
Registration of decree affecting registered award		67T	
Applying for Court ordered arbitration	13E	67D	
Arbitration Agreements		67F	
Arbitrator's Duties:			
Notice		67F; 67G	
Costs		67F; 67H	
Issues to be determined		67F; 67I(1)	
Procedural Fairness		67I(2)	
Bias	10L(1)	67I(3)	
Confidentiality		67J	
Remedy non-compliance		67K	
Capacity of parties		67L	
Right to Legal Representation		67M	
Attendance of witnesses		67N	
Application of rules of evidence		67O	
Making arbitral Awards		67P	26B.32
Enforcement	13H(2)	67S	
Disclosure			Part 26B.1
Subpoena			Part 26B.2

Glossary of Arbitration Forms

Subject	Form
Application for Arbitration	Form 6 – Application for Arbitration
Application in an Arbitration	Application in an Arbitration
Response to an Application in an Arbitration	Response to an Application in an Arbitration
Application relating to relevant property or financial arbitration	Form 7 – Application Relating to Relevant Property or Financial Arbitration
Response to an Application relating to relevant property or financial arbitration	Response to an Application in an Arbitration
Subpoena	Subpoena in an Arbitration Notice of Request to Inspect – Arbitration
Registration of an Arbitral Award	Form 8 – Application to Register Arbitration Award
Objection to Registration of an Arbitral Award	To raise an objection to registration, an Affidavit (see reg 67Q(3)), and, if alternative relief is sought, a Response to an Application in an Arbitration
Review of registered Arbitral Award	A form to the effect of a Response
Varying or Setting Aside a registered Arbitral Award	A form to the effect of a Response
Registration of a decree affecting a registered Arbitral Award	Form 9 – Application to register decree affecting registered arbitration award

THE HONOURABLE JUSTICE WILLIAM ALSTERGREN
CHIEF
FAMILY COURT OF AUSTRALIA

CHIEF JUDGE

FEDERAL CIRCUIT COURT OF AUSTRALIA
DATE: 15 MAY 2020