

Arbitration Kit

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Introduction

In 2006, Parliament amended the Family Law Act to make provision for Arbitration as a preferred form of non-court based resolution in family law financial proceedings.

In 2008 the Family Law Section of the Law Council of Australia produced the first Arbitration Kit to assist arbitrators and the profession with the then new initiative to use arbitration as a primary dispute resolution process.

There has been renewed interest in use of arbitration arising in part from the introduction in April 2016 of the new Chapter 26B in the Family Law Rules which contains new rules about disclosure and subpoenas and more certainty about the processes for referring matters to court in aid of arbitration, referral of questions of law and how awards are registered.

As a result of the renewed interest, the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) has published this new version of the Arbitration Kit.

The Kit is intended to be a one document resource that will provide a guide to all facets of arbitration under the Family Law Act for arbitrators, family law practitioners, and other stakeholders.

AIFLAM wishes to acknowledge the enormous contribution made by the Family Law Section in producing the first Kit. This new version of the Kit endeavours to build on the work done by the Section in producing the first Arbitration Kit.

A. Arbitration – An Alternative to Litigation

1. The challenges of modern litigation

Parties to a dispute have a number of options to resolve those disputes including mediation, arbitration and litigation. It is generally accepted that litigation should be the option of last resort being by far the most costly, personally problematic and time-consuming option.

The demands being placed upon modern court services is an ever-increasing problem which is not being met by the necessary additional judicial appointments. As a consequence, litigants are experiencing unprecedented delays in the court system both in terms of being allocated precious court time and then receiving decisions from an over-burdened judiciary. These ingredients add greatly to the stress and costs experienced by those locked in that system. There is an alternative to this strained public litigation system.

Private arbitration is not a new concept and has been part of the legal framework for many years. In the commercial arena, it is the option of first resort in many if not most cases and is used to determine the most complex and costly disputes. It has been less commonly used in the past in family disputes but successive Federal Governments have promoted private arbitration as a means of managing some of the challenges associated with the public system and have passed legislation to meet that need.

The Family Court and The Federal Circuit Court have also recently expanded their Rules as a means of facilitating and encouraging the effective use of this option.

This document is designed to provide an understanding of the private arbitration process and to explore some of the advantages of it.

2. The private arbitration alternative

Private arbitration is a process where the matters in dispute are referred to a private arbitrator to determine an outcome to the dispute and to make any awards necessary to bring an end to the dispute. The issues in dispute are determined according to the relevant family law, and the award, once registered, has the same binding and enforceable effect as an order made by a court.

The arbitrator must be a person who meets the requirements of Regulation 67B being an experienced and duly qualified lawyer who has completed specialist arbitration training and is included on an authorised list of arbitrators.

The arbitrator, like a Judge, is responsible for the conduct of the arbitration and the necessary decision making required. It is the responsibility of the arbitrator to ensure that procedural fairness is afforded to all parties involved.

The parties have the right to appear, to be heard, personally or through legal representation and to produce evidence. Subject to the direction of the arbitrator, evidence can be tested through cross-examination. The rules of evidence may apply or be dispensed with at the election of the parties by agreement.

The arbitrator has an obligation to produce to the parties a written decision after the conclusion of the hearing within the period of days specified in the arbitration agreement.

The award made by the arbitrator finally determines the issues between the parties and the award may be registered, in which case, it has the same effect as an order of a court and may be enforced through the courts.

3. What may be arbitrated?

The matters which may be arbitrated include, in the case of court-ordered arbitration (s.13E), all or any part of Part VIII or Part VIIIAB proceedings other than proceedings relating to financial agreements and, in the case of private arbitration, all or any part of a dispute about which proceedings under Part VIII, Part VIIIA, Part VIIIAB, Part VIIIB or section 106A could be instituted.

Generally, financial disputes between parties to a marriage or a de facto relationship may be arbitrated. Applications for property settlement and maintenance and related relief can be determined in this way and an arbitrator has, largely, the same powers and responsibilities as a Judge exercising jurisdiction in relation to such matters under those parts of the Family Law Act. This enables

the arbitrator to deal with related issues such as, for example, the transfer of property, the payment of debt, the splitting of superannuation and the like.

Children's issues and child support issues may not be arbitrated.

4. The Advantages of Arbitration

- **Privacy/Confidentiality** – Arbitration is a confidential dispute resolution process arranged privately between the parties, their legal representatives and the arbitrator. The Arbitrator, parties and legal representatives are bound by obligations of strict confidentiality. Sensitive documents do not have to be filed and stored in public institutions. Hearings are conducted in private and are not open to the public.
- **Timeliness** – Public litigation can take many months, sometimes years, to run its full course. Private arbitration time lines can usually be measured in weeks, depending on the readiness of the matter for determination.
- **Choosing the Arbitrator** – In litigation, the parties do not have any choice in selecting the person who will hear and determine their disputes. That limitation may have a bearing upon matters of delay and confidence in the process. In arbitration, parties and their legal representatives are given the opportunity to choose the arbitrator who is best suited to the case and best able to determine the matter in a reliable and timely fashion
- **A Say in the Process** – parties and their legal representatives have reserved to them substantial control over the timing and degree of formality/informality involved in the arbitration process.
- **Prompt Decision** – as part of the obligations imposed upon an arbitrator, he or she is required to produce a decision and any award within a specified number of days after the completion of the hearing. Arbitrators are not entitled to be paid in full until such a written decision is provided. Unfortunately, in litigation, the release of such decisions can take many months after the final hearing is completed.
- **The benefits for the Practitioner**- experience demonstrates that the capacity to provide your clients with an option for the efficient and timely determination of their disputes is likely to not only serve your clients well but is also likely to enhance your professional reputation and your opportunity to enjoy the fruits of the efficient and timely disposition of your core business. The more protracted a matter becomes, the more difficult it may be to justify the legitimate but escalating costs to your client giving rise to the prospect of ongoing efforts producing diminishing returns.
- **Savings, Financial and Personal** – as discussed below

5. Costs and Fees – Outlaying and Saving

As discussed earlier, the reality is that litigation is invariably the most costly option for dispute resolution. Litigants are exposed to the prospect of multiple court events and associated costs. Filing fees and hearing fees continue to be payable. The formality of court processes and the need to comply with rules of court and the directions of the Judge all add to the costs.

Private arbitration is designed to be less protracted and the process leading to the hearing less onerous, formal and costly. Importantly, access to an early determination through arbitration, should alleviate the need for multiple interim hearings, continual refreshing of evidence and the substantial costs to parties of needing to continually engage with legal representatives over extended periods, sometimes to be measured in years.

In a private arbitration, the parties must meet the costs and fees of the arbitrator. The costs associated with private arbitration hearing or a public hearing in a court may be similar, although there is the opportunity for substantial savings for the reasons set out above.

Arbitration also lends itself to the most cost-efficient ways to handle simple cases or single issue matters. Simple matters may be determined without the need to convene a hearing. Parties can rely upon documents placed with the arbitrator which identify the relevant issues and the history to be referred to and the arbitrator makes the necessary determination and award based on the information included in the papers.

Similarly, if parties have a single issue such as, for example, valuation of property or treatment of an inheritance, that single issue can be referred to the arbitrator either on the papers or with limited evidence and the arbitrator can make the necessary determination enabling the parties implement their agreement having had the issue that was keeping them apart, separately determined in a way which would be substantially less than would apply if the parties awaited a court trial on the issue.

6. Personal Savings

What can only be measured by the parties, is the value to them, monetary and otherwise, of having their family and financial issues addressed and resolved in a private, timely and less imposing and formal way. The delays, costs and challenges of litigation can be personally and financially debilitating. The value of having important issues addressed, uncertainty removed and the capacity to be able to make personal and financial decisions moving forward in the short term rather than having these matters unresolved for many months or even years, is an assessment which can only be made individually by the parties involved in the dispute.

7. The Arbitration Process

7.1 Generally

One of the great advantages of arbitration is the flexibility to design processes best suited to the needs of the parties and the issues in question. At one end of the scale, in simple matters or narrow issue cases, arbitrations may be conducted either on the papers without the need for any appearances as discussed above or by the taking of oral evidence without the need to file any material. At the other end, the process can be as regulated and formal as traditional court processes, albeit conducted privately and confidentially. Discussed below is a guide to the type of process which might be followed in a typical arbitration in this field.

7.2 The Engagement

Arbitration can be pursuant to an order made by a court in relation to proceedings already on foot in that court. Such an order for arbitration can only be made with the consent of both parties. Parties can also choose privately to arbitrate before any legal proceedings have been instituted. Once an order or decision to arbitrate has been made, it is simply a matter of agreeing upon an arbitrator and engaging him or her for that purpose. The arbitrator may forward an arbitration agreement or notice of arbitration and/or the arbitrator will appoint a time and place for a conference to manage the conduct of the arbitration.

7.2 The Arbitration Agreement

The arbitration agreement sets out the terms of the engagement of the arbitrator and addresses issues such as the arbitrators obligations and powers, the parties rights and obligations and includes the formalities required under the regulations relating to costs and the conduct of the arbitration. Parties must enter into a written agreement or be issued with an arbitration notice addressing similar matters in order to comply with the legal requirements of arbitration.

7.3 The Preliminary Conference

The preliminary conference may be conducted in person or by using telephone or video links. Matters which may be addressed include the following:

- Settlement of the terms of Notice of Arbitration or Arbitration Agreement
- Identification of matters in issue/ determinations being sought
- Application of the rules of evidence and level of formality/informality sought
- Determination on the papers – is the matter capable of being so determined
- Property pool, superannuation and valuation/single expert considerations
- Disclosure and discovery issues – nature, extent and timing

- Evidence to be produced by each of parties – nature, extent and timing
- Witnesses to be called/cross-examined
- Duration of any hearing
- Need for interpreters, recording, transcription and security
- Readiness, timetable and venue for hearing and determination
- Costs and outlays – responsibility and timing of payment
- Further pre-hearing conferences – is there a need
- Any other issues necessary for the proper management of the matter

7.4 The Hearing

As discussed earlier, one of the potentially significant advantages of private arbitration is that it gives the parties the opportunity to have a say in the design of the determination process. That can include the opportunity to dispense with a hearing entirely and have the matter determined by the arbitrator on the papers submitted to him or her.

In those cases, where it is determined that the matters in dispute require a hearing, questions of timing, venue and format of the hearing will be resolved between the parties and the arbitrator at the preliminary conference. Consistent with the objectives of arbitration, the aim should be to ensure that matters are heard and determined in a manner which as expeditious and simple as is possible whilst at the same time providing procedural fairness.

Subject to any agreed variation, most hearings are likely to be conducted in accordance with familiar practices adopted in proceedings in the Family Court and Federal Circuit Court with the evidence to be relied upon exchanged, cross-examination permitted and submissions allowed.

Parties are entitled to represent themselves or to appear with legal representation.

7.5 The Determination and the Registration of the Award

The arbitrator must provide the parties with an award and a copy of the written reasons for the determination and do so within the period specified in the arbitration agreement. It is critical to the arbitration process that parties understand that an award is intended to be final and binding and may only be set aside on very limited grounds (sections 13J and 13K of the Family Law Act)

Parties have the option of simply implementing the terms of the award privately or they may register the award in court in accordance with the provisions of Regulation 67Q. An award so registered has the effect of a decree of a court (s.13H(2)). An award so registered, may be enforced as if it is an order of the court (Regulation 67S)

B. Legislation – an Outline

The legislation governing arbitration is found in:

Family Law Act 1975

Sections 10L, 13A, 13E, 13F, 13H, 13J, 13K,

Family Law Regulations 1984

Part 5 – regulations 67A to 67T

Family Law Rules 2004

Chapter 26B

In the Act, arbitration in section 10L is defined 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 issue.”

The Act in sec 13A(1)(a) provides that the *objects* of arbitration are:

“To encourage people to use, in appropriate circumstances, arbitration to resolve matters in which a court order might otherwise be made, and to provide ways of facilitating that use.”

The Family Law Act recognises two distinct types of arbitration:

- **Section 13E arbitration**, which is arbitration carried out as a result of a Court order made by consent in current proceedings; and
- **Relevant property or financial arbitration** which is, in practical terms, private arbitration.

Section 13E arbitration can only be ordered where there are proceedings on foot and a Court is exercising jurisdiction under Part VIII of the Act, and is limited to issues arising under that Part: i.e. periodic and lump sum spousal maintenance, modification of spousal maintenance, declarations of property interests, adjustment of property interests, setting aside orders altering property interests, ante-nuptial and post-nuptial settlements and (to the extent that they arise in Part VIII proceedings) bankruptcy issues.

Private arbitration can deal with all of the above matters and in addition issues arising under Part VIIIA (Financial Agreements), Part VIIIB (Superannuation) and s106A (Execution of instruments) regardless of whether proceedings are on foot or not.

C. Who are the arbitrators?

Under regulation 67B of the Regulations a person meets the requirements to be 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.

D. How do you find a family law arbitrator?

Under regulation 67B(d) of the Family Law Regulations, the Australian Institute of Family Law Arbitrators and Mediators (**AIFLAM**) is the body nominated by the Law Council of Australia which maintains the list under the regulation.

All the listed arbitrators and their contact details can be found on the homepage of AIFLAM at www.aiflam.org.au.

Arbitration Agreement

What This Agreement Does

- A. Arbitration is Defined
- B. Parties Agreement to Arbitrate
- C. Appointment of the Arbitrator
- D. Role of the Arbitrator
- E. Costs of the Arbitration
- F. Conduct of the Arbitration
- G. Confidentiality of Arbitration
- H. Settlement of Dispute and Termination of the Arbitration
- I. Exclusion of Liability and Indemnity
- J. Law to be Applied
- K. Legal Advice

THIS AGREEMENT is made on the date specified in Schedule A

BETWEEN

Party 1 (as the case may be) who is identified in the Schedule A who is represented by the lawyer referred to in Schedule A

and

Party 2 (as the case may be) who is identified in the Schedule A who is represented by the lawyer referred to in Schedule A

(who together are referred to as “**the parties to the dispute**”)

and

The **Arbitrator** who is identified in the Schedule A

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.

Arbitration is authorised and facilitated by the Family Law Act 1975, the Family Law Regulations 1984 and the Family Law Rules 2004 and may be either:

- **Section 13E arbitration** --which is arbitration of Part VIII proceedings, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement), carried out as a result of an order made under section 13E (referred to as “**Court ordered arbitration**”); or;
- **Relevant property or financial arbitration** --which is arbitration (other than section 13E arbitration) of:
 - (i) Part VIII proceedings, Part VIIIA proceedings, Part VIIIAB 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.

(Referred to as “**Private arbitration**”)

AGREEMENT TO ARBITRATE

1. The parties to the dispute agree to submit their dispute to arbitration and for that purpose they desire to appoint the Arbitrator to hear arguments and evidence and make a determination to resolve the dispute according to law.

APPOINTMENT OF ARBITRATOR

2. The Arbitrator is appointed on terms and conditions contained in the agreement to conduct the arbitration.
3. The parties to the dispute acknowledge that prior to the appointment of the Arbitrator, the parties and/or their lawyers met with the Arbitrator to settle the terms of this agreement and to prepare the **arbitration plan** which forms part of this agreement in **Schedule A**. The arbitration plan may be changed by consent of the parties or by the direction of the Arbitrator in order to effectively and efficiently conduct the arbitration.
4. This agreement has been entered into by the parties to the dispute with the benefit of their own legal advice about its effect and consequences.
5. The parties to the dispute acknowledge that, unless they otherwise agree in writing or they resolve the dispute by consent, the arbitration;
 - (a) will proceed in accordance with the procedure set out in this agreement;
 - (b) will result in an award which is capable of registration under the Family Law Act in the Family Court of Australia, the Federal Circuit Court of Australia or the Family Court of Western Australia (as the case may be) and, once registered, the award has the same effect as if it were a decree made by the court which can only be set aside, varied or appealed in circumstances referred to in Sections 13J and 13K of the Family Law Act.

ROLE OF THE ARBITRATOR

6. The parties to the dispute acknowledge that the Arbitrator is bound by the oath of office and that the adherence to the oath is a term of this agreement.
7. The Arbitrator warrants being qualified as an arbitrator within the meaning of Section 10M of the Family Law Act and he/she meets the prescribed requirements in Regulation 67B of the Family Law Regulations 1984.
8. Notwithstanding any other provision in this agreement, the Arbitrator will ensure that each party is accorded procedural fairness and that the Arbitrator will not allow him/herself to knowingly be affected by bias.
9. The Arbitrator shall not;
 - (a) accept any other appointment in relation to any legal proceedings between the parties to the dispute except an appointment as an arbitrator to be made subsequent to the present arbitration and to be the subject of a separate agreement;

- (b) be called to give evidence by either party to the dispute in relation to any matter raised before or during the arbitration except to give evidence in any action where this agreement is sought to be enforced or interpreted or as otherwise he/she may lawfully be required by a court to give such evidence.
 - (c) discuss any aspect of the dispute or arbitration with the lawyer of either party without informing the other practitioner of the substance of such conversation, unless such conversation is for the purpose of making administrative arrangements PROVIDED THAT if the parties have agreed to adopt a mediation procedure as part of the arbitration, this sub-clause is not breached by the Arbitrator speaking about substantive issues to any party or their lawyer in the absence of the other during such mediation procedure.
 - (d) disclose to any person who is not a party to this agreement or a lawyer practitioner or other professional advisor or witness for any party to the arbitration any information about the arbitration, the dispute, the parties to the dispute or their business or private affairs which he/she learns in the course of acting as Arbitrator, unless specifically authorised in writing by the affected party or required to do so by the operation of the law.
10. The Arbitrator shall declare any known interest in the dispute or knowledge of any party to the dispute or a witness to be called or any other matter which may reasonably affect his/her appointment as arbitrator or give the impression to a reasonable person with a knowledge and understanding of legal proceedings that he/she is not an impartial arbitrator and in the event that no declaration is made, he/she warrants that he/she is not in possession of any knowledge or information which would disqualify him/her from acting as the Arbitrator PROVIDED THAT if the Arbitrator knows or has socialised with any professional or expert witness who customarily gives evidence in legal proceedings, the Arbitrator is relieved from the obligation to make such disclosure unless he/she is of the opinion that he/she cannot do justice between the parties if the evidence or credibility of such witness is to be challenged in the arbitration.
11. In the event that the Arbitrator makes the declaration referred to in the previous paragraph, the parties may, by agreement, waive their rights to object to the Arbitrator continuing in his/her role in which case the Arbitrator shall be entitled to enter upon or continue the arbitration.

THE COST OF ARBITRATION

12. The parties to the dispute shall be jointly and severally liable for the Arbitrator's fees and disbursements and the parties to the dispute may agree between themselves how those fees are to be paid.
13. If the arbitration is terminated without the delivery of an award the costs and disbursements paid to the Arbitrator shall be costs in the cause to be determined by the trial judge at the completion of any trial in relation to the dispute.
14. The Arbitrator shall be entitled to charge the following fees and disbursements (GST

inclusive) which are specified in Schedule A comprised of;

- (a) a Basic Composite Fee to cover [*here insert services covered by this fee*]
 - (b) a Daily Fee.
 - (c) Travel and/or accommodation
 - (d) Room Hire
15. The Arbitrator's fees and charges are due and payable;
- (a) 7 days from the date that the award is delivered to the parties or to the lawyers for each of the parties; or
 - (b) 7 days after the parties agree in writing, or apply to the court for orders by consent, to resolve the dispute; or
 - (c) Immediately upon the arbitration being suspended or terminated for any reason other than those stated in the previous two sub-paragraphs, or, the matter being referred to the court pursuant to Regulation 67K;
16. To better secure the payment of the Arbitrator's fees and disbursements each party shall pay into a nominated trust account described in Schedule A to be held upon trust for the Arbitrator in accordance with this agreement;
- (a) That party's share of the sum estimated for the Arbitrator's costs and disbursements in Schedule A; and
 - (b) That party's share of any additional costs and disbursements of the Arbitrator over and above that which has been estimated in the Arbitration Plan as and when the service giving rise to such costs or disbursements is performed.
17. In the event that no trust account is available for the purpose of the previous paragraph, the parties to the dispute and the Arbitrator shall make alternative appropriate arrangements to secure the Arbitrator's fees and disbursements, and such alternative arrangements shall be described in Schedule A.
18. If the parties to the dispute and the Arbitrator agree upon a venue which needs to be hired or a professionally produced transcript, the cost of the venue hire and the transcript shall form part of the total cost of the arbitration.
19. Whenever an estimate of costs or disbursements is given by the Arbitrator, such estimate shall not limit the ability of the Arbitrator to charge for actual work performed in accordance with this agreement even if the estimate turns out to be incorrect.
20. For the purpose of State Laws dealing with the disclosure and estimates of legal costs and Costs Agreements, this agreement is to be taken to be a costs disclosure and costs agreement (however those expressions may be described in the applicable legislation).

CONDUCT OF THE ARBITRATION

21. The parties to the dispute shall by themselves their servants or agents comply with any direction, interim award or a reasonable request of the Arbitrator. The manner in which an arbitration may be conducted is set out in **Schedule B**.
22. Each of the parties to the dispute will cause the Arbitrator to be provided with such material as is determined by the Arbitrator to be relevant to the arbitration.
23. The parties to the dispute will behave in a civil manner towards each other and towards every other person involved in the arbitration process.
24. In the event that a procedural direction of the Arbitrator is not complied with the Arbitrator;
 - (a) may suspend the arbitration; and
 - (b) if the failure to comply exceeds 28 days, must, in the case of a Court Ordered arbitration, refer the matter to the Court that ordered the arbitration; and;
 - (c) if the failure to comply exceeds 28 days, must, in the case of a Private Arbitration, terminate the arbitration.
25. The parties to the dispute shall, unless otherwise agreed or excused by the Arbitrator, attend at the arbitration venue and remain there during the course of the arbitration hearing, including any adjourned or re-convened arbitration hearing.
26. If any party to the dispute is a body corporate it shall be represented at the arbitration hearing by an officer or other person who is authorised to compromise the dispute without reference to superior authority.
27. Each party to the arbitration may be represented by a lawyer who shall attend at and participate in the arbitration hearing. In the event of the lawyer being a barrister, that practitioner shall be bound by the terms of this agreement to the same extent as the solicitor instructing him or her is so bound.
28. The parties to the dispute (or their lawyers) shall in consultation with the Arbitrator arrange a venue for the arbitration hearing, such venue being suitable for the type of arbitration hearing which is contemplated. The cost of such venue and any ancillary services provided thereat shall be borne equally between the parties to the dispute unless otherwise agreed in writing and the venue and its cost are described in Schedule A.
29. Each party to the dispute hereby binds their legal personal representatives, legal practitioners, servants or agents to adhere to the terms of this agreement and to comply with any lawful direction given by the Arbitrator.
30. All communications with the Arbitrator may take place at his/her business address or by email at his/her email address. All communications with the parties to the dispute shall be via their lawyers' business addresses or via their email.

CONFIDENTIALITY OF ARBITRATION

31. The parties to this agreement agree that the arbitration is confidential and no evidence shall be called or given by any party to the dispute of anything which took place in the course of the arbitration other than for the purpose of registering, reviewing or enforcing the award or as required by law.
32. The Arbitrator's notes, working papers, computer files and records and audio recording of any proceeding are private to the Arbitrator and no party to the dispute, their servants or agents shall be entitled to inspect, examine, copy or subpoena for production in any legal proceedings any such notes working papers computer files or recordings.
33. The parties to the dispute or their lawyers or their servants or agents shall not disclose to any person not involved in the arbitration any communication information or document flowing from the arbitration process unless such disclosure is made with the written consent of the parties to the dispute or because of the operation of the law.
34. Notwithstanding any confidentiality provisions in this agreement any party to this agreement may give such evidence with respect to the agreement, the conduct of the arbitration and any statement made in the course of the arbitration as may be necessary in any action to;
 - (a) conduct any litigation about the validity of the award;
 - (b) enforce or interpret this agreement; or
 - (c) recover any fees due to the Arbitrator
35. Each party to the dispute and the Arbitrator shall be entitled to make an audio recording of the arbitration hearing upon the following terms and conditions;
 - (a) Recordings shall not be made in secret. Each party to the dispute is entitled to make a private recording only upon revealing to the other parties and the Arbitrator their intention to do so;
 - (b) Any party wishing to make a recording shall be limited to the use of a dictation machine or similar device using an internal microphone. No microphones or other recording equipment are to be set up in the hearing room without consent of all parties and the Arbitrator;
 - (c) The audio recording shall be for the use of the party making it and shall only be used for the purpose of the arbitration or any legal challenge thereto and for no other purpose;
 - (d) Any audio recording made by the Arbitrator shall form part of the Arbitrator's private notes.
36. Upon agreement the parties to the dispute may arrange for a transcript of the proceedings to be made by a commercial transcript provider. In the event that the parties agree upon a transcript being made;

- (a) The cost of such transcript will be borne in accordance with the agreement of the parties to the dispute;
 - (b) The parties to the dispute will arrange for the Arbitrator to be provided with a copy of the transcript (including a running transcript and copy audio or video recordings, where available) in both electronic and hard copy form as soon as one is reasonably available, whereupon that material becomes the property of the Arbitrator;
 - (c) The transcript shall be confidential and shall not be used for any purpose other than to facilitate the expeditious conduct of the arbitration or any review of the award or other process in the court associated with the arbitration;
 - (d) Unless the parties to the dispute otherwise agree, the transcript and all recordings used in the making of the transcript shall be destroyed when the award is handed down.
37. Any information or document disclosed by a party to the other party or to their servants or agents pursuant to the duty of disclosure shall only be used for the purpose of the arbitration and upon the expiration of 28 days from the registration of the award each party will either;
- (a) Return all documents (including copies) belonging to or sourced from the other party or from any person who produced documents under subpoena to the owner; or;
 - (b) With the consent of the owner of the documents, destroy all copies of the documents.
38. All documents provided to the Arbitrator shall upon the expiration of 28 days from the registration of the award either;
- (a) Be returned to the party tendering the document; or
 - (b) With the consent of the owner of the documents be destroyed; or
 - (c) Be dealt with in a way which is agreed by the parties.

SETTLEMENT OF DISPUTE AND TERMINATION OF THE ARBITRATION

39. In the event that the parties to the dispute reach agreement, they may apply to the Arbitrator for a consent award or, at their election, they may apply to the court for orders to be made by consent or enter into a Binding Financial Agreement pursuant to Part VIIIA or Part VIIIAB of the Family Law Act.
40. The arbitration will come to an end when;
- (a) The Arbitrator delivers the final award;
 - (b) The parties to the dispute by written agreement terminate the arbitration;

- (c) The parties to the dispute apply to the court for consent orders dealing with the totality of the dispute and such order is made;
 - (d) The parties inform the Arbitrator that they have entered into a binding financial agreement pursuant to Part VIIIA or VIIIAB of the Family Law Act which deals with all matters in dispute;
 - (e) The Arbitrator determines that he/she must disqualify himself/herself from any further participation in the arbitration;
 - (f) The Arbitrator is incapable of continuing with the arbitration by reason of ill health, mental or physical impairment or death;
 - (g) A party to the dispute dies or becomes incapable of managing their own affairs by reason of physical or mental impairment;
 - (h) A lawyer certifies in writing that, based upon medical evidence, that lawyer's client (being a party to the dispute) has lost the capacity to give instructions to any legal practitioner.
41. The Arbitrator shall deliver an award within 28 days after the conclusion of the last day of the arbitration hearing.
42. When the arbitration is terminated by the delivery of a final award, if either party identifies a minor mathematical or other mistake in the award which can be cured under the "slip rule" which is applied to legal proceedings, such party may bring the matter to the attention of the Arbitrator and all other parties to the dispute. If the Arbitrator agrees that an award can be so rectified, he/she may deliver a supplementary award by which the final award is varied.
43. To facilitate the making of a supplementary award, the terms of this agreement are revived to permit the Arbitrator to discharge his/her responsibilities.
44. Any supplementary award delivered under the previous paragraph shall be so marked by the Arbitrator as to identify the changes made and shall contain reasons for the decision. A supplementary award will stand in the place of the original award as if it were the final award.

EXCLUSION OF LIABILITY AND INDEMNITY

45. The Arbitrator and his/her servants or agents shall not be liable to any party to the dispute for any act or omission in the performance of the Arbitrator's obligations under this agreement.
46. The parties to the dispute hereby jointly and severally indemnify the Arbitrator against any claim for any act or omission in the performance of his/her duties under this agreement howsoever arising. Without limiting the generality of the foregoing, the parties to the dispute will jointly and severally indemnify the Arbitrator for any costs and legal expenses incurred by him/her in appointing solicitors and counsel to act on his/her behalf in any proceedings arising from the arbitration or from the terms of this

agreement where it is prudent or necessary for the Arbitrator to be legally represented.

47. A minor or technical breach of the obligations imposed by this agreement upon the Arbitrator shall not render the agreement voidable by any party.
48. The parties acknowledge that pursuant to Section 10P of the Family Law Act an Arbitrator has, in performing the functions of an arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.
49. Any mediation conducted in the course of the arbitration shall be part of the arbitration and this agreement shall apply to such mediation and all things done and said during such mediation as if they had been done or said during the arbitration.

LAW TO BE APPLIED

50. This agreement shall be interpreted and construed in accordance with the Family Law Act and the Family Law Regulations 1984 and the Family Law Rules 2004
51. If any doubt arises about procedural matters the Arbitrator shall apply the Family Law Rules 2004 to resolve the issue in doubt (so long as the applications of the said Rules is not inconsistent with this agreement) and for that purpose, the Arbitrator is taken to have the same power as a Judge of the Family Court applying the said Rules.
52. The parties to the dispute acknowledge and confirm that the power granted to the Arbitrator to resolve the dispute includes a power to award costs under Section 117 (2) of the Family Law Act including;
 - (a) The costs of that part of the proceedings which were dealt with by the court before the matter was referred to arbitration where no costs order was made or the question of costs was expressed to be reserved to the trial Judge or generally;
 - (b) The costs of each party in relation to the arbitration including the Arbitrator's fees and disbursements;
 - (c) The costs of each party's legal representation (whether fixed on a party-party, solicitor own client or indemnity basis) which are properly recoverable when a costs order is made by a court.
53. Any indulgence or forbearance granted by the Arbitrator to either party to the dispute shall not render any part of this agreement void or voidable.
54. Any substantial alterations to this agreement shall be evidenced in writing signed by all the parties to the agreement.
55. All Schedules to this agreement are incorporated herein and form a part of this agreement.

LEGAL ADVICE

- 56. The parties to the dispute acknowledge that prior to entering into this agreement they received independent legal advice from their own lawyers about the terms and effect of this agreement and about the nature and extent of their rights and obligations hereunder, or, one or both of the parties to the dispute were advised by the Arbitrator to seek such independent legal advice and have decided not to do so.
- 57. Where any act under this agreement or in the arbitration is to be performed by a lawyer for a party to the dispute that party warrants and acknowledges that they have authorised their lawyer to carry out such act and they will be bound thereby.
- 58. The parties to this agreement have signed this agreement and agreed to be bound by its terms.

SIGNED by the said **Arbitrator**)

In the presence of)

.....

SIGNED by the said **Party 1**)

In the presence of)

.....

SIGNED by the said **Party 2**)

In the presence of)

.....

ARBITRATION AGREEMENT SCHEDULE A

<u>Paragraph Number</u>	<u>Description</u>	
	Date of Agreement	
	Party 1's Name	
	Party 1's Address	
	Party 1's Lawyer	
	Party 1's Lawyer's Address/Contact Details	
	Party 2's name	
	Party 2's Address	
	Party 2's Lawyer	
	Party 2's Lawyer's Address/Contact Details	
	Arbitrator's Name	
	Arbitrator's Address	
	Type of Arbitration	Court Ordered or Relevant Property or Financial Arbitration <i>(delete whichever is not applicable)</i>
14(a)	Basic Composite Fee	
14(b)	Daily Fee	
14(c)	Any travel or accommodation specifically agreed between the parties.	
14(d)	Room Hire	
16	Nominated Trust Account	
17	Alternative arrangement to secure Arbitrator's fees	

.....
Party 1

.....
Party 2

.....
Arbitrator

ARBITRATION PLAN

Outline of Issues in Dispute	
Type of arbitration <i>(on the papers full hearing etc)</i>	
Date of Arbitration Hearing	
Venue	
Daily Cost of Venue	
Application of rules of evidence (Reg 67O)	
Transcript	
Cost of Transcript	
Date for Compliance with all directions	
Estimated Time Needed for the Arbitration	
Estimated Total Arbitrator's Costs and Disbursements	

PRELIMINARY DIRECTIONS

(Suggested Only – Change to Fit Each Case)

1. That the parties exchange lists of documents required to be provided by(insert date).....
2. That the documents on the lists so exchanged;
 - (a) Be provided for inspection and copying; or
 - (b) If not available, an explanation be provided for the unavailability; by.....(insert date).....
3. That by(insert date)..... the parties;
 - (a) Agree on the value of any asset;
 - (b) Agree on a single expert to value such asset;
 - (c) In the absence of agreement, obtain their own valuation of any asset in dispute.
4. That the applicant deliver to the arbitrator and the responded by(insert date).....;
 - (a) all affidavits, a statement of financial circumstances or a statement of evidence in chief upon which he/she relies; and
 - (b) a memorandum including an outline of what award he/she seeks, what findings should be made by the arbitrator, a brief chronology and a list of assets and liabilities;
5. That the respondent deliver to the arbitrator and the applicant by(insert date).....:-
 - (a) all affidavits or statements of evidence in chief a statement of financial circumstances upon which he/she relies; and;
 - (b) a memorandum including an outline of what award he/she seeks, what findings should be made by the arbitrator, a brief chronology and a list of assets and liabilities;
6. That the legal practitioners for each of the parties communicate with each other before the arbitration hearing with a view to preparing a joint list of assets and liabilities indicating clearly where the differences lie.
7. That an arbitration hearing take place at the (Venue) on a date convenient to all of the parties as soon as practicable after the(insert date)..... at which any evidence or cross-examination which may be necessary can be heard.

(Please delete or amend directions as applicable)

.....

Party 1

.....

Party 2

.....

Arbitrator

SCHEDULE B

Manner in which the Arbitration May be Conducted

1. **A fully contested hearing** at which the arbitrator acts as if he/she were a Judge of the court and the hearing is conducted as if it was a hearing in court with the application of the applicable Rules of Court (with the arbitrator having the right to vary or dispense with the operation of such rules); or
2. **A modified fully contested hearing** where the procedure is modified so that the arbitrator may;
 - (a) actively direct, control and manage the conduct of the arbitration;
 - (b) seek to limit the issues by suggesting to the parties to the dispute that concessions on the evidence or matters of practice and procedure may be appropriately made;
 - (c) conduct a hearing and deliver an award on a single issue with such award forming a part of the final award, if necessary;
 - (d) give directions about the matters in relation to which the parties are to present evidence;
 - (e) give directions about who is to give evidence in relation to each issue in dispute;
 - (f) give directions about how evidence is to be given and in particular;
 - (g) that particular evidence is to be given orally;
 - (h) that particular evidence is to be given by affidavit or a sworn statement;
 - (i) the order in which evidence is to be given including any evidence in reply;
 - (j) that evidence in relation to a particular matter not be presented by a party to the dispute;
 - (k) that evidence of a particular kind not be presented by a party to the dispute;
 - (l) limiting the time for the giving of evidence;
 - (m) limiting cross-examination of a particular witness or all witnesses in general;
 - (n) limiting the number of witnesses who are to give evidence in the arbitration.
 - (o) if the arbitrator considers that expert evidence is required—give directions about:
 - (i) the matters in relation to which an expert is to provide evidence; and
 - (ii) the number of experts who may provide evidence in relation to a matter; and

- (iii) how an expert is to provide the expert's evidence;
 - (p) ask questions of, and seek information or the production of evidence from, parties, witnesses and experts (whether they are formally giving evidence or not) on matters relevant to the arbitration;
 - (q) give general directions about practice and procedure with a view to ensuring that the proceedings are not protracted and the costs to the parties to the dispute are minimised and are proportional to the matters in issue;
 - (r) with the consent of both parties (which consent is signified by the inclusion of this sub-clause in this schedule) dispense with the operation of the rules of evidence, the Evidence Act 1995 (Commonwealth) and inform himself/herself of matters relevant to the dispute by such means as he/she considers appropriate;
 - (s) seek answers to questions (whether orally or in writing) at any time from either or both parties on any issue which appears relevant to the arbitrator;
 - (t) give directions about the use of written submissions including directions about:
 - (i) length of written submissions;
 - (ii) limiting the time for oral argument;
 - (iii) time allowed for written submissions
 - (iv) the order in which submissions will be prepared
 - (u) with the consent of all parties, suspend the arbitration at any time and conduct a mediation of the dispute in accordance with paragraph 12 m. of this agreement without thereafter being disqualified from continuing with the arbitration if the mediation does not result in a settlement; or;
3. **An arbitration on the papers** where;
- (a) The parties agree upon all relevant facts; and
 - (b) The arbitrator is asked to prepare an award upon the acceptance of the agreed facts; or;
4. **A combination of the above, with the parties agreeing upon the elements of the practice and procedure in the arbitration plan.**

Powers of the Arbitrator

5. The Arbitrator may do any of the following things;
- (a) meet with the parties to the dispute in the presence of their legal practitioners;
 - (b) adjourn any arbitration hearing and set a date for the resumption of the hearing;

- (c) meet with the legal practitioners for the parties in the absence of the parties for the purpose of making administrative arrangements and making procedural directions;
- (d) pursuant to section 34 of the Acts Interpretation Act (1901), administer the oath to any witness who gives evidence in the arbitration and to accept any evidence contained in an affidavit or statement sworn for the purpose of the arbitration or any court proceedings;
- (e) make interim awards in relation to any matter of practice and procedure including but not limited to;
 - (i) production of documents;
 - (ii) interim costs including security for costs;
 - (iii) arbitration funding awards;
- (f) with the consent of the legal practitioners, speak with either party during a hearing otherwise than in the course of that party giving evidence;
- (g) take into account anything said by either party during the arbitration (whether that party was under oath or not and whether the statement is made in the course of giving evidence or otherwise) or any conduct witnessed by the arbitrator which is relevant to the determination of the dispute;
- (h) meet or otherwise communicate with the parties' legal practitioners at any time in order to;
 - (i) make administrative arrangements for the effective conduct of the arbitration;
 - (ii) deal with applications for adjournment, extension of time or other minor procedural matters;
 - (iii) vary the manner in which the arbitration is to be conducted;
- (i) direct who can be present from time to time at the venue where the arbitration is conducted and who can be present in the arbitration hearing room from time to time (provided that nothing in this sub-paragraph shall authorize the exclusion of any party to the dispute or their legal practitioners without their consent);
- (j) inspect any documents forming part of the court record in proceedings commenced in any court by the parties to the dispute or either of them provided that he/she shall identify all documents so inspected to both parties and afford them an opportunity of inspecting same;
- (k) conduct any view as may be agreed to be necessary by the parties to the dispute or which the arbitrator determines to be necessary after hearing submissions from each party to the dispute on that issue;

- (l) express a preliminary opinion or view about the likely outcome of the arbitration or a part thereof without thereafter having to disqualify himself/herself from further hearing the arbitration;
- (m) with the consent of the parties to the dispute, suspend the arbitration for the purpose of permitting the parties to the dispute to resolve the dispute or any part thereof by consent through mediation or otherwise and in particular the arbitrator is entitled (without entering into a separate mediation agreement);
 - (i) act as a mediator when the arbitration is suspended to assist the parties in reaching an agreement on how the dispute or any part thereof should be resolved;
 - (ii) to conduct private discussions with each party in the presence of their legal practitioners and seek from each party their best offer of compromise;
 - (iii) if the issue to be resolved involves two witnesses compromising a question of valuation or other such expert evidence, to conduct private discussions with each witness in the presence of the legal practitioner for the party calling such witness and seek to attain a compromise of the conflict;
 - (iv) inform the parties of any preliminary views he/she has formed about the possible outcome of the arbitration or any part thereof;
 - (v) to resume the arbitration if a resolution does not appear possible or likely without being called upon to disqualify himself/herself for any alleged bias;
 - (vi) hear and determine any application for him to disqualify himself/herself from further acting as the arbitrator;
 - (vii) terminate the arbitration if he/she is of the opinion that notwithstanding his/her ability to put matters out of his/her mind it is not possible for him/her to continue with the arbitration unaffected by bias.
- (n) invite the parties at any time during the arbitration to modify in writing the terms of this agreement or enter into an arbitration agreement with any other person pursuant to the Commercial Arbitration legislation of the State where the arbitration is taking place in order to better facilitate the efficient conduct of the arbitration and resolve all issues raised by the dispute;
- (o) conduct a hearing and make an interim award on any specific issue which can be decided before the making of a final award;
- (p) continue with the arbitration on an undefended basis and proceed to make an award if, after a mediation pursuant to sub paragraph m. hereof, one party decides not to participate further in the hearing;

- (q) continue with the arbitration on an undefended basis and proceed to make an award if a court confronted with similar facts and circumstances would proceed on an undefended basis.
- (r) make a costs award at any stage of the proceedings upon such terms and conditions as he/she considers appropriate having regard to the matters contained in Section 117 of the Family Law Act.

.....

Party 1

.....

Party 2

.....

Arbitrator

F. Act, Regulations and Rules

The legislation governing arbitration is contained in the *Family Law Act 1975*, Part 5 of the *Family Law Regulations 1984* and Chapter 26B of the *Family Law Rules 2004*.

Family Law Act

Sections 10L, 13A, 13E, 13F, 13H, 13J, 13K,

[Family Law Act 1975](#)

Family Law Regulations

Part 5 – regulations 67A to 67T

[Family Law Regulations 1984](#)

Family Law Rules

Chapter 26B - Family Law Rules

[Family Law Rules 2004](#)

Chapter 26B which commenced 1st April 2016, sets out rules relating to arbitration. Chapter 26B rules are additional to the requirements relating to arbitration in Part 5 of the Family Law Regulations.

In particular Chapter 26B contains rules about:

- (a) Disclosure and production of documents (**Part 26B.1**).
- (b) Subpoenas in arbitration and the mode of compliance and access by parties to subpoenaed documents (**Part 26B.2**).
- (c) Procedural requirements for referring matters to court, registration of awards, service of court applications and methods of responding to applications (**Part 26B.3**).

A table of the contents of Chapter 26B follows.

PART 26B.1 DISCLOSURE RELATING TO ARBITRATION

- 26B.01 General duty of disclosure
- 26B.02 Duty of disclosure-documents
- 26B.03 Use of documents
- 26B.04 Party may require production of documents
- 26B.05 Documents that need not be produced
- 26B.06 Objection to production
- 26B.07 Disclosure by giving a list of documents
- 26B.08 Disclosure by inspection of documents
- 26B.09 Applications for orders relating to disclosure
- 26B.10 Costs of compliance
- 26B.11 Electronic disclosure

PART 26B.2 SUBPOENAS

DIVISION 26B.2.1 GENERAL

- 26B.12 Application of this Part
- 26B.13 Interpretation
- 26B.14 Issuing a subpoena
- 26B.15 Subpoena not to issue in certain circumstances
- 26B.16 Amendment of subpoena
- 26B.17 Service
- 26B.18 Conduct money and witness fees
- 26B.19 When compliance is not required
- 26B.20 Duration of subpoena
- 26B.21 Objection to subpoena

DIVISION 26B.2.2 PRODUCTION OF DOCUMENTS AND ACCESS BY PARTIES

- 26B.22 Application of Division 26B.2.2
- 26B.23 Compliance with subpoena
- 26B.24 Right to inspect and copy documents
- 26B.25 Objections relating to production of documents

- 26B.26 Court permission to inspect documents
- 26B.27 Production of document from a court
- 26B.28 Return or destruction of documents produced

DIVISION 26B.2.3 NON-COMPLIANCE WITH SUBPOENA

- 26B.29 Non-compliance with subpoena

PART 26B.3 OTHER RULES RELATING TO ARBITRATION

- 26B.30 Referral of question of law by an arbitrator
- 26B.31 Referral of other matters to the court by the arbitrator
- 26B.32 Informing the court about awards made in arbitration
- 26B.33 Registration of awards made in arbitration
- 26B.34 Response to applications in relation to arbitration
- 26B.35 Arbitrator to notify court when certain arbitrations end

G. Forms

There are 2 sets of forms relating to arbitration, those made under the **Family Law Regulations 1984** and those made under chapter 26B of the **Family Law Rules**.

A link to the forms is found on the AIFLAM homepage.

Forms under the Family Law Regulations

Form 6	Application for Arbitration	Regulation 67D
Form 7	Application relating to relevant Property or Financial Arbitration	Regulation 67E
Form 8	Application to register arbitration Award	Regulation 67Q
Form 9	Application to register decree affecting registered arbitration award	Regulation 67T

Forms under the Family Law Rules (Chapter 26B)

Application in an arbitration

Response to an Application in an Arbitration

Subpoena in an Arbitration

Notice of request to Inspect – Arbitration