

## **NOTICE TO MEMBERS – ARBITRATION CHANGES**

**26 June 2024**

### **THE AMENDMENTS TO REGULATION 67B OF THE FAMILY LAW REGULATIONS**

AIFLAM has been working closely with the Attorney General's Department over the past three years with a view to introducing much needed reforms to the Family Law Arbitration Regulations, and to a lesser extent to the Family Law Act insofar as it deals with arbitration.

The first step in that process has now been completed with the repeal of regulation 67B and the enactment of a substituted regulation.

The amended regulation commences on 1 August 2024, and the link can be found here [\*Family Law Amendment \(Arbitration\) Regulations 2024 \(Cth\)\*](#).

The amendment strengthens the requirements that must be met for a person to be an arbitrator in family law matters. The regulation maintains the requirement that the person's name must be included in a list kept by the Law Council of Australia or by another body nominated by the Law Council of persons who are prepared to provide arbitration services under the Family Law Act (sub-regulation 67B(2)). The list continues to be held by AIFLAM as the nominee of the Law Council.

To be included in the list the person applying must provide a statutory declaration to the effect that the person meets the requirements set out in sub-regulation 67B(4) (sub-regulation 67B(3)).

In summary, sub-regulation 67B(4) requires that a person applying to be included in the list of arbitrators must have during the previous six years:

- Practiced as a legal practitioner, held office in a Court listed in sub-regulation 67B(5) as Judge or Magistrate, or a combination of both, for at least five of those years (paragraph 67B(4)(a)); and

- Spent at least 25% of their experience in practice or judicial office on family law matters for at least five of those years (paragraph 67B(4)(b)); and
- Gained the necessary experience in family law matters that is sufficient for the person to be an arbitrator (paragraph 67B(4)(c)); and
- Successfully completed a specialist arbitration training course provided by a tertiary institution or professional association of arbitrators (paragraph 67B(4)(d)).

For the purposes of paragraph 67B(4)(a), there is a definition of “legal practitioner” in regulation 3 of the Family Law Regulations. That definition has not been changed.

In relation to paragraph 67B(4)(c) the assessment will be made by AIFLAM of the person’s experience in family law matters to ensure that it is sufficient and relevant to enable the person to determine a family law financial matter.

Sub-regulations 67B(6), (7), (8) and (9) introduce requirements to be met to continue to be an arbitrator. Again, in summary, the person must, during each two-year period:

- Complete at least ten hours of professional development (CPD) (paragraph 67B(6)(a)); and
- Demonstrate that at least 25% of their practice as a legal practitioner in that period was in relation to family law matters (paragraph 67B(6)(b)); and
- Maintain the necessary experience in family law matters that is sufficient for them to be an arbitrator (paragraph 67B(6)(c)).

For those on the list as at 1 August 2024 the first two year period commences on that day, and for those not on the list at that time, the commencement of the first two year period will be the day the person’s name is included in the list.

A statutory declaration must be given to AIFLAM within a month of the end of each two year period to the effect that the person has met the requirements of sub-regulation

67B(6). Again, the assessment required under paragraph 67B(6)(c) will be undertaken by AIFLAM.

The CPD requirement is intended to be the same as the CPD requirements that practising legal practitioners are required to undertake as part of holding a practising certificate.

## **OTHER MATTERS**

You will all recall that in the exposure draft of the Family Law Amendment Bill (No.2) 2023, proposed amendments to some of the sections of the Family Law Act dealing with arbitration were included. Primarily those amendments removed the distinction between Court ordered and private arbitration in terms of what can be arbitrated, and provides a single list of such matters. Further, the amendments provided for an arbitrator rather than just the parties to apply to a Court for orders in relation to the arbitration. If those amendments ultimately see the light of day then there will need to be consequential amendments to the regulations such as for example to regulation 67D. All that is yet to come though.

Other matters that have been the subject of discussions between AIFLAM and the Attorney General's Department but which are yet to be dealt with include the following:

- Extending the scope of family law matters available for arbitration.
- Providing for parties to an arbitration to have the same rights of appeal as parties in the Court process.
- Removing the ability of a party to object to the registration of an award.
- Amending the regulations such that an arbitration agreement is mandatory in all cases.
- Providing a time limit, for example three months, for the filing of an application for review of an award under section 13J of the Family Law Act.

- Amending section 13K(1) of the Family Law Act by deleting the words “or an agreement made as a result of such arbitration”. This is a hangover from the ability to enter into a section 87 agreement, but that is no longer relevant today.
- Amending section 90 of the Family Law Act to put it beyond doubt that there will be relief from stamp duty on transfers of property pursuant to registered awards.
- Once an award is registered it then has effect as if it were an order or a decree made by a Court (section 13H(2)). However, where the award is as a result of a private arbitration, the concern is that a superannuation trustee may not recognise the registered award as an order made under section 90XT of the Family Law Act and refuse to implement the split. Consequential amendments to section 90XS and other sections in Division 3 of Part VIII B of the Family Law Act are recommended to remove doubt as to the status of a registered award containing a superannuation split.
- Amending regulation 67S to remove the reference to Part VIII of the Family Law Act. It just needs to refer to an order under the Family Law Act.

Finally, AIFLAM has been advised by the Attorney General’s Department that on 28 May 2024 Parliament passed the Attorney General’s Portfolio Miscellaneous Measures Act 2024 (Cth). The Act amends sections 13G and 13J of the Family Law Act to allow applications for the determination of a question of law in arbitration, and review of an arbitral award, to be made to both Divisions of the Federal Circuit and Family Court of Australia. The amendments commenced on 12 June 2024.

**The Honourable Steven Strickland KC**  
**Chair AIFLAM Arbitration Committee**