



## NOTICE TO MEMBERS

### IMPORTANT CHANGES TO THE FAMILY LAW REGULATIONS 1984 AND THE FAMILY LAW ACT 1975 OF RELEVANCE TO ARBITRATORS AND ARBITRATIONS

#### The prescribed requirements to practice as a Family Law Arbitrator

On 28 June 2024 a notice was sent to all members advising of the amendment to Regulation 67B of the *Family Law Regulations* 1984, and which amendment commenced on 1 August 2024. This amendment was significant in that they made substantial changes to the prescribed requirements to become a family law arbitrator and to continue to be a family law arbitrator. They were of such significance that AIFLAM considers it appropriate to repeat the detail of the same as follows:

#### To Become an Arbitrator

To be an Arbitrator, a person's name must be included in the list that is currently kept by AIFLAM as the nominee of the Law Council of Australia.

When applying to be included in the list, the applicant **must give** a statutory declaration to the effect that he or she meets certain requirements. Those requirements are:

- (1) During the 6 year period ending immediately before the time the person applies to be included in the list;
  - (a) The person must have, for at least 5 of those years:
    - (i) Practised as a legal practitioner; or
    - (ii) Held office as a judge or magistrate in one or more of;
      - (a) The FCFCoA (Div 1);
      - (b) The FCFCoA (Div 2);
      - (c) The Family Court of WA;
      - (d) The Magistrates Court of WA constituted by a magistrate who is not a Family Law Magistrate of Western Australia, sitting at a place outside the metropolitan region;
      - (e) The Magistrates Court of WA constituted by a Family Law

Magistrate of Western Australia, sitting at any place in WA;

(f) The former Family Court of Australia;

(g) The former Federal Circuit Court of Australia; or

(iii) Either practised as a legal practitioner or held such office; and

- (2) The person must have, for least 5 of those years, spent at least 25% of their time in such practice or office on family law matters; and
- (3) The person must have gained the necessary experience in family law matters that is sufficient for the person to be an arbitrator; and
- (4) The person must have successfully completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators.

### **To Continue to be an Arbitrator**

Every person who was on the list of arbitrators at the 1st August 2024, must within one month of the 1st August, 2026 and within one month of the 1st August every two years thereafter, complete and give to AIFLAM a Statutory Declaration to the effect that the person has met certain requirements within the previous two-year period. Every person who first is put on the list of arbitrators after 1st August 2024 must complete and submit the Statutory Declaration within one month of the second anniversary of the date they were put on the list and every two years thereafter. Those requirements that must be met in that 2 year period are;

- (1) That he or she has completed at least 10 hours of continuing professional development;
- (2) At least 25% of the person's practice as a legal practitioner must be in relation to family law matters;
- (3) The person must have maintained the necessary experience in family law matters sufficient for the person to be an arbitrator.

The continuing professional development undertaken in a State or Territory by a person who does not hold a practising certificate must be of at least a similar standard to the CPD required to be undertaken in that State or Territory as a condition of a legal practitioner's practising certificate.

### **AMENDMENTS TO THE *FAMILY LAW ACT 1975***

The *Family Law Amendment Act 2024* made some important changes to some of the provisions in the *Family Law Act 1975* relating to arbitration. They will come into effect on 10 June this year, 2025.

The distinction between "s. 13E arbitration" and "relevant property or financial arbitration" (commonly called "private arbitration") has been removed, although arbitration can still be either court ordered (s.13(1)) or private.

These changes also remove any doubt that superannuation splitting can be dealt with in arbitration, whether it be court ordered or private arbitration.

Arbitration of any of the following will be “family law arbitration” from that 10 June date, whether ordered by a court or not;

- (1) Proceedings that are referable to arbitration within the meaning of subsection 13E(1A);
- (2) Any part of such proceedings;
- (3) Any matter arising in such proceedings;
- (4) A dispute about a matter with respect to which such proceedings could be instituted.

S.13E(1A) makes the following proceedings referable to arbitration:

- (a) Part VIII proceedings;
- (b) Part VIII B proceedings;
- (c) Part VIII AB proceedings;
- (d) Part VIII B proceedings
- (e) Part VIII C proceedings;
- (f) Section 106A proceedings;
- (g) Section 106B proceedings.

Any person who is a party to, or an arbitrator of, family law arbitration may apply to a court with jurisdiction under the FLA for an order (whether the arbitration was ordered by the court or not) that is appropriate to facilitate the effective conduct of family law arbitration or to terminate it if arbitration is no longer appropriate.

### **The Power to make Costs Orders**

Finally, arbitrators and parties to arbitrations can take comfort from the reasoning in the Appeal Court decision in *Vida and Vida [2023] FedCFamC1A 175* that appears to open the way for acceptance that the power to order costs under s. 117 (2) of the FLA is a matter within the power of an arbitrator in a family law arbitration.

### **The Family Law Regulations**

On 12 and 13 December 2024 respectively, the Family Law Legislation amendment (consequential amendments) Regulations 2024 and the Family Law Regulations 2024 came in force, with the provisions to take effect from 1 April 2025.

The Family Law Regulations 1984 are scheduled to sunset on 1 April 2025 and will be replaced and updated by the 2024 Regulations.

The consequential Regulations will repeal the 1984 Regulations.

In relation to family law arbitration, the new Regulations comprise some significant changes as well as a renumbering. An issue to also be aware of is that given the new

Regulations coming to force on 1 April 2025 they do not take account of the amendments to the *Family Law Act* which will come into force on 10 June 2025.

I set out the following comparative table identifying not only the renumbering but any changes:

<b>Current Regulation</b>	<b>New Regulation</b>	<b>Comment</b>
67A	22	The new regulation does not contain a definition of “arbitration” and just provides a definition for “arbitration agreement”.
67B	21	The previous regulation 67B was repealed and a new regulation substituted as on and from 1 August 2024. No further changes are being made.
67C	23	The wording of the new regulation is changed but the effect is the same.
67D	24	The wording of the new regulation is changed but the effect is the same.
67E	25	There is no change to this regulation but it is one of the regulations that will need to be amended once the Family Law Act amendments come into force on 10 June 2025.
	26	This is an entirely new regulation and provides for the action the arbitrator must take before arbitrating a dispute, proceeding or matter. It specifies that an arbitrator can only arbitrate if the arbitrator has given the parties certain information and is satisfied that the parties have made an arbitration agreement in accordance with the requirements of new regulation 27.
67F	27	There are some significant changes here. First, as requested by AIFAM, it is mandatory to have an arbitration agreement. Secondly, there is a provision for legal advice to be obtained. The agreement must include a statement in relation to each party that that party has been provided with legal advice from a legal practitioner before the agreement was signed and the statement must be signed by the legal practitioner who provided the advice. Curiously there is no specification as to

		the required content of the legal advice. The insertion of this provision was opposed by AIFLAM.
67G		Given that it is mandatory to have an arbitration agreement there is no longer any basis for a regulation such as regulation 67G.
67H	28	Only sub-regulation (1) has been replicated because sub-regulations (2) and (3) only applied where there is no arbitration agreement.
67I	29	
67J	30	
67K	31	The new regulation reduces the period of time before the arbitrator can refer the matter to Court from twenty eight days to fourteen days. This was requested by AIFLAM.
67L	32	
67M	33	
67N	34	This is another regulation that will need to be amended once the amendments to the Family Law Act come into force on 10 June 2025.
67O	35	The wording has been changed but the effect is the same.
67P	36	There is a minor change here where instead of the award having to be mechanically or electronically printed, it just needs to be typewritten.
67Q & 67R	37	The important change here is that the ability to object to the registration of an award has been removed, again at our request.
67S	38	There is a word change here but the effect is the same. This was requested by AIFLAM.
67T	39	

The Hon Steven Strickland KC

Chair

Arbitration Sub-Committee

12 March 2025

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