The new National Family Law Property Arbitration List

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On 16 April this year, the Family Court of Australia and the Federal Circuit Court of Australia announced the creation of a new specialist National Arbitration List. Chief Justice Alstergren said: 'The Courts have long supported the use of alternative dispute resolution as a quicker and more affordable option for litigants to resolve their disputes, rather than continuing to trial' and went on to declare that 'the introduction of the Arbitration List will ensure consistency and timeliness and the determination of such applications will be given considered priority'. His Honour also noted that, while 'arbitration has traditionally and commonly been used in commercial litigation, [the Family and Federal Circuit courts] are very keen to support the wider use of arbitration in family law for property matters.'

Snapshot

- In April the Family Court and Federal Circuit Court announced the establishment of a new specialist National Arbitration List.
- The Courts support the wider use of arbitration in family property matters as a quicker and more affordable alternative to continuing to trial.
- Family lawyers have an obligation to discuss dispute resolution options with their clients. This article provides number of suggestions about how best to frame such a conversation.

As best as can be ascertained, not less than 141 cases had been referred to arbitration by the Judges of the Federal Circuit Court as at 31 January this year.

The National Arbitration list in a nutshell

The new list will be managed by dedicated National Arbitration Judges - Justice Wilson in the Family Court, Judge Harman in the Federal Circuit Court and Justice Strickland is the coordinating Appeals Judge for Arbitration Appeals. All matters referred to arbitration will be placed in this National Arbitration List. Any application for interim orders sought to facilitate the arbitration by arbitrators or parties will be dealt with by the relevant National Arbitration Judge electronically. Applications for registration of arbitral awards issued by arbitrators will be dealt with by the same National Arbitration Judge. Similarly, applications for review of an arbitral award will be conducted by the relevant National Arbitration Judge.

Arbitration – a flexible dispute resolution option

Arbitration is private and confidential, it occurs away from court and is closed to the public. Arbitral awards are not published. Arbitration happens as quickly as the diaries of clients, lawyers and the arbitrator allow. Time from the commencement of the arbitration process to issue of the award is significantly less than the waiting time for final hearings in court. Parties can fix a date for an arbitral hearing and know it will proceed on that day, as they avoid the risk of a Court hearing being deferred due to other priority matters such as parenting matters.

Arbitration hearings can be flexibly designed. This can include options which range from: 'off the papers' without a hearing; a short hearing for submissions; or a full hearing with cross-examination which might be limited to agreed issues and duration. Parties can also agree on some matters and seek an arbitral award in respect of discrete issues. The flexibility and speed of arbitration can result in lower costs for clients. Costs of updating pleadings or valuations due to court delays and adjournments are avoided.

CGT and stamp duty

In New South Wales, stamp duty is exempted on transfers of property between married spouses pursuant to arbitral awards but only on transfers between de facto partners pursuant to registered awards. Capital gains tax roll-over relief applies to 'something done under an award made in an arbitration referred to in s 13H' (*Income Tax Assessment Act*, s 126.6(e)).

Starting an arbitration

Arbitration can be conducted with or without court proceedings being underway. Both parties must consent. Parties can choose the arbitrator from the list on the Australian Institute of Family Law Arbitrators and Mediators ('**AIFLAM**') website, or they can ask AIFLAM to appoint the arbitrator.

If proceedings have been commenced, parties enter into consent orders referring the matter to arbitration. The matter will then be placed in the National Arbitration List for assistance if needed. The order for arbitration is provided to the agreed arbitrator who will conduct an Arbitration Planning Meeting to clarify the arbitration model to be used, documents to be relied on, fees, dates etc. These matters comprise the 'arbitration agreement' (which should, ideally, be in writing, and define the arbitrator's powers and the manner in which those powers will be discharged). The AIFLAM website provides a useful template agreement. If proceedings have not yet been commenced, parties simply enter into an Arbitration Participation Agreement and the arbitration proceeds as agreed between the parties and the arbitrator.

At the conclusion of the arbitration, the arbitrator will issue the arbitral award and their reasons on the agreed date. Either party may then proceed to register the arbitral award. Both authors have previously written at length on the ability to seek review of arbitral awards (including in the December 2018 and June 2019 editions of the *LSJ*). In short, review can only be sought on questions of law, lack of procedural fairness, or bias. One of the attractions of arbitration (compared to negotiations or mediation) is therefore the certainty and finality of an outcome.

Discussing dispute resolution options with clients

Approximately 95 per cent of family law cases are settled through a dispute resolution process other than a final defended hearing (See ALRC Issues Paper (IP 48) 'Review of the Family Law System' 13.03.2018). From a judicial perspective, the matters which should be before the Court are those which involve a matter of public interest. Whilst the community has a general interest in the care and wellbeing of children, the financial affairs of individuals are not generally matters in which there is a public interest. Public interest might arise from allegations such as fraud, criminal conduct or impact upon the rights of third parties.

Family lawyers have an obligation to discuss dispute resolution with clients (*Family Law Act 1975,* ss 12A, B & E). This involves advising clients about arbitration both before proceedings are commenced and, once commenced, as an alternative to judicial determination. Given the frequent court room disclosure - 'I don't have instructions with respect to arbitration' - it would appear that lawyers often fail to comply with such obligations.

Merely providing a list of process choices does not assist clients in making the best choice. Lawyers should avoid beginning the discussion about process with what they believe the advantages of various processes are, as these may have no relevance to the parties' experience of the dispute. If lawyers are too directive, clients might feel obliged to go along with the lawyer's perceived preferences without real motivation, reducing engagement in the process. A better approach to process selection is to ask the client about how they are experiencing the dispute, and the dispute resolution processes tried to date. Clients will often respond with complaints, however, through 'double listening' these complaints can be flipped into a positive aspiration or course of action, for example:

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- 'It's been so slow' can be reframed by asking 'So you would like a process that will be quick and resolve the dispute now?'
- 'She doesn't listen to what I think' or 'I don't know what she really thinks about all this' can be reframed by asking 'Would you like a process by which we all get to sit in the same room and she listens to what we say, and you hear what she and her lawyer have to say?'
- 'I don't know how much this is all going to cost and how I am going to pay' becomes 'Would you like to hear about other processes where the two of you decide the steps involved and therefore the cost?'
- 'I hate those court appearances, all that sitting around, not knowing how much time to take off work' can become 'Would you like to discuss some other confidential processes that happen privately at times agreed by us?'
- 'How do I know what judge I will get?' can become 'Would you like to have a say in the choice of the decision maker?'

The client's answers give the lawyer permission to explain the range of processes in a way that will resonate with the client. The inquiry into the client's experience of the dispute should start from the first consultation and continue throughout.

On receiving an award at the end of a well-run arbitration, the parties should not only have saved time and money, the clients should also feel heard and respected. Parties who have their needs met in terms of procedural fairness and psychological recognition will have a high level of satisfaction even if their substantive needs are not met as much as they may have liked. **LSJ**

Want to learn more?

Judge Harman and Mr Shepherd will be conducting a live webinar CPD on 'The New National Arbitration List' on Friday 5 June at 10 to 11am.

To register, visit: **www.lawinform.com.au**