

## Family Law Arbitration

Family law matters can place serious financial and emotional stress on all those involved in the related court cases. It is therefore no surprise that the long delays and under-resourcing of the Family Court system has placed a significant strain on parties and their families. This stark reality has led to a recent 'blitz' in the Family Court, which has placed emphasis on finalising matters through Alternate Dispute Resolution ('ADR') processes, such as Family Arbitration, in order to tackle the immense backlog in Australia's Family Court system.

This Plain English Guide takes a closer look at the ADR process known as 'Family Arbitration', and how Family Arbitration can help resolve Family Law disputes.

### What is Family Arbitration?

Family Arbitration is a process in which parties to a dispute present arguments and evidence to a Family Arbitrator, who then makes a determination to resolve the dispute. The Family Arbitrator will issue their decision (or 'award') within 28 days, which is drastically quicker than the courts, which can take up to 3 months to deliver a decision. Family Arbitration is voluntary, and can be undertaken either by agreement between the parties or by direct court referral. When a decision is made, it is registered with the courts, and has the effect of a court order.

Whilst Family Arbitration has been available since its inception in 1991, it has not been utilised as much as it should have been, or at least as much as it has been in other areas of law. For example, Arbitration is relied on more so in the Commercial Law arena, as it is confidential, and key players often wish to avoid the potential ramifications of their dispute going public. Also, commercial contracts often specify that where a dispute does arise, the parties will attend Arbitration.

However, with its voluntary nature, Arbitration has been far less common within Family Law matters. With this said, considering the growing backlog and sheer workload hitting the Family Law Courts, the need for Family Arbitration is growing exponentially.

### What can be arbitrated?

It is important to note that Family Arbitration can only be used for property disputes within Family Law matters, and does not cover parenting issues (although as mentioned, these can be discussed in Family Mediation).

Matters that can be referred to Family Arbitration include:

- Property matters;
- Spousal maintenance and maintenance agreements;
- Financial agreements made pre, post or during marriage;
- Superannuation agreements; and
- Execution and compliance with court orders.

Matters that are excluded:

- Where there is negative equity;
- Where there is a connected dispute about where a child of the marriage will live;
- Where there is an unvalued business;
- Where there is an unsecured third party claim; and
- Single issues in a property hearing.

### Who is the Arbitrator?

To be an Arbitrator, you must:

1. Be a legal practitioner; and
2. Either:
  - a. Be an accredited Family Law Specialist; or
  - b. Have practised as a legal practitioner for at least 5 years, with at least 25% of the work undertaken in that time having been within Family Law; and
3. Must have completed specialist Arbitration training.

The person's name must also be 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 Family Law Act 1975.

As an agent of the court, an Arbitrator has the responsibility to conduct an Arbitration with procedural fairness (for example, giving each party a reasonable opportunity to be heard and to respond to matters raised by the other party), and they must inform each party of anything that could lead to any potential bias.

### Why do I need Arbitration?

The Family Law Courts are at maximum capacity across all jurisdictions. With property matters taking a backseat to parenting matters, there is a significant backlog of unresolved disputes, the wait times are excessive, and parties can wait up to 2 years for a final hearing date. In that time, parties often expend copious amounts of money to fund their lawyers, often depleting the asset pool.

Family Arbitration, when conducted by experienced Family Law Arbitrators, can result in very similar outcomes to those of judgements handed down in court proceedings. Whilst Family Arbitration differs to Family Mediation in that the parties do not have control over the outcome, it does allow the parties more control over the overall process, even with regard to points as simple as agreeing on a date for the Family Arbitration to take place (which, in the context of court proceedings, is merely assigned to you).

Overall, Family Arbitration is a cost-effective solution that reduces the daunting and adversarial nature of litigation.

### What if I don't feel comfortable leaving my Family Law matter up to Arbitration?

An Arbitrator need not decide the entire matter, so even where Family Arbitration does not replace litigation entirely, the overall benefits are still clear. For example, in a complex asset pool where the parties are disputing particular facts or values (such as the value of a business), Family Arbitration could be utilised to resolve those issues independently. If those facts are determined, it could then facilitate meaningful discussion and settlement proposals, or if the matter still proceeds to court, there is less to dispute.

Family Arbitration is particularly helpful in this circumstance, as even though the entire matter may not be arbitrated, if the values for the balance sheet are no longer an issue, the process is simplified, not only for the parties, but for the lawyers and the Judges, if it does proceed to court.

Also, parties often seek both final and interim orders. This means that the parties have a proposal for how they want their property dealt with on a final basis, although this may differ from how they want it dealt with in the short term. Family Arbitration can be particularly useful in this instance, as the parties may be able to resolve the interim issues in Family Arbitration while they wait for their final proposals to be heard, which as discussed, can take up to 2 years.

### What if I am not happy with the Arbitrator's award?

In performing their functions, the Family Arbitrator has the same immunity and protections that a Judge of the court would. If though, an error of law has been made, the decision (known as an 'award') can be reviewed by the court, which is then able to determine questions of law, and can either affirm, reverse or vary the award.

Reviews of awards are usually only for errors of law. However, where no error of law exists, the court may still rectify visibly unreasonable or prejudiced awards.

The court will consider:

- Whether the award was obtained by fraud;
- Whether the award is void, voidable or unenforceable;
- Whether any circumstances have arisen since the award was made that make it impracticable for either some, or all of the award to be carried out;
- Whether the Family Arbitration was affected by bias; and
- Whether there was a lack of procedural fairness in the way the arbitration process, as agreed between the parties and the Family Arbitrator, was conducted.

If you have any questions, please contact:

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### How can Coleman Greig's Family Arbitration team help you?

Coleman Greig provides a professional and accessible Arbitration service, specifically catering for family law matters. Our Family Law Arbitrators are all fully accredited through the Australian Institute of Family Law Arbitrators and Mediators as well as being Accredited Specialists in Family Law through the Law Society of New South Wales.

By also practising as lawyers exclusively in the area of family law, each of our Family Arbitrators is highly skilled and experienced in family law, and is therefore well equipped to arbitrate in this area of law.

### Where does the Family Arbitration take place?

Coleman Greig's offices in Parramatta, Norwest and Penrith each have spaces to accommodate for Family Arbitration sessions. These spaces can be reconfigured to suit all occasions, ensuring that parties are equipped for a day of Family Arbitration. Our offices also have rooms for parties to break-out into during the Arbitration to allow for private discussions. Our Family Law Arbitrators are also happy to travel to other locations if required, or can alternatively organise facilities in Sydney CBD.