Family Law Section | Law Council of Australia

5 September 2024

Ms Rebecca Mills
Assistant Secretary, Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: familylawregs@ag.gov.au **&** rebecca.mills@ag.gov.au

Dear Ms Mills

Family Law Regulations 2024

The Family Law Section of the Law Council of Australia (**FLS**) welcomes the opportunity to respond to the Attorney-General's Department in relation to its Consultation Paper on the exposure draft of the Family Law Regulations 2024. The FLS seeks to address some matters raised in the proposed amendments to the arbitration regulations.

The FLS commends the Australian Government on continuing to advance reforms in the complex area of family law and making family law arbitration a more attractive option to family law litigants.

By way of general comment, the FLS makes the following observations:

1. The FLS notes that, contrary to previous iterations of the Family Law Regulations, internal references within this draft refer to 'sections' rather than 'regulations'.

2. The FLS submits that references to section and subsection should be amended to regulation and sub-regulation.

3. Furthermore, there is inconsistent usage throughout this draft instrument of 'this Act' and 'the Act'. Where 'the Act' is used, it is clear that reference is being made to the *Family Law Act 1975*. However, references to 'this Act' are ambiguous. It is expected that it is also a reference to the Family Law Act, however it may be meant to convey a reference to the instrument itself.

4. The FLS submits that all references to 'this Act' should be amended either to 'the Act' where the reference is intended to be the Family Law Act or 'this instrument' where the reference is intended to be to the Family Law Regulations.

Inconsistent heading in regulation 26

5. Proposed regulation 26 is headed as 'Action arbitrator must take before conducting arbitration conferences'. This heading is inconsistent with the body of the regulation

itself, which describes that an arbitrator can only arbitrate a dispute, proceeding, or a matter upon the making of certain action.

6. The phrase 'arbitration conference' is ambiguous and not found elsewhere in the Regulations or the Family Law Act. On one reading, it refers to the initial preliminary conference held between the parties and the arbitrator akin to a directions hearing to settle the arbitration agreement and any initial procedural matters. Alternatively, it could refer to the arbitration itself (which seems to be the wording of the provision itself).

7. The FLS submits that the heading to regulation 26 should be amended to 'Action arbitrator must take before conducting an arbitration of a dispute, proceeding, or a matter.'

Requirement for legal advice in arbitration agreements (regulations 26 and 27)

8. An amendment to sub-regulation 27(2)(e) now creates a requirement that parties to an arbitration agreement have each received legal advice prior to signing the Agreement. Paragraph (e) reads as follows:

> *(e) be signed by each party to the arbitration, but only after each party has separately obtained legal advice on a draft agreement that meets the requirements in paragraphs (a) to (d).*

9. Regulation 26(b) imports an obligation on the arbitrator to be satisfied that the parties have made an arbitration agreement in accordance regulation 27 prior to commencing the arbitration. The regulations are silent as to how or on what basis an arbitrator is to satisfy themself that such advice has been given. Realistically, an arbitrator faced with satisfying themself that such advice had been given would be able to only ask whether each party received advice of the kind contemplated by sub-regulation 27(2)(e). Client legal privilege likely would preclude any more detailed answer than a simple yes or no.

10. The FLS has a serious concern that the current draft of regulation 27 creates uncertainty as to the validity of an arbitration agreement such that family law arbitration could be rendered unworkable.

11. In the event a party did not receive legal advice prior to signing an arbitration agreement, the agreement would not be an 'arbitration agreement' for the purposes of regulation 22 having failed to meet the requirements of regulation 27. The arbitration agreement would be void. However, there would be no document or other indication which would put the other party on notice as to the deficiency in the agreement.

12. If the arbitrator incorrectly satisfied themselves that the agreement met the requirements of regulation 27, the arbitration would then proceed to award. Pursuant to regulation 37, that award would then be registered with the Court.

13. However, by operation of paragraph 13K(2)(b) of the Family Law Act, it would be open to a party to set aside the award on the basis that the arbitration agreement was void. Unlike binding financial agreements (see, eg, s 90G(1A)), there is no express remedial provision to correct a void arbitration agreement. It would be up to the largely unfettered discretion of the Court to determine whether to affirm, reverse or vary the award. This would most likely lead to the re-litigation of the matter which had just been determined by arbitration.

14. Based on the current draft, the other party would have no way of knowing whether their former partner had obtained the requisite advice, and therefore no way of knowing

whether their agreement was valid prior to undertaking the arbitration process. Moreover, in the absence of representations by a legal practitioner, they would have no recourse for damages to compensate for any loss incurred by the lack of such advice.

15. Arbitrations with this level of uncertainty likely would be unworkable and there could be no confidence in the finality of process. It undermines the overarching purpose of the updates, being to strengthen the arbitration framework.

16. If there is to be a requirement for legal advice to be provided prior to the signing of an arbitration agreement, it is the FLS's view that such advice be evidenced by statements of independent legal advice signed by relevant legal practitioners.

17. It is also recommended that the validity of the arbitration agreement be dependent upon the provision of such written statements of independent legal advice to the arbitrator, with neither the arbitrator nor the Court required or able to look behind such a statement to determine the nature or the quality of the advice. It should not be open to a party to seek to set aside an arbitral award on the basis of an absence or inadequate advice as to the nature of the agreement. If there is to be any recourse, it ought to arise from an action against the legal practitioner. In this way, the FLS proposes a legislative scheme similar to binding child support agreements, where a Child Support Registrar will register an agreement without looking behind a statement of independent legal advice, as opposed to binding financial agreements, where the Court can look behind statements of independent legal advice to ensure that the requisite advice was given.

18. For a description of the operation of the relevant provisions with respect to binding child support agreements, see *Child Support Registrar v AFS19* (2021) 287 FCR 52.

19. The FLS therefore submits that the wording used in binding child support agreements should be adapted for these arbitration regulations. Regulation 27(2) could therefore be amended to read as follows:

> *(2) An arbitration agreement must:*
>
> *…*
>
> *(e) be signed by the parties; and*
>
> *<u>(f) contain, in relation to each party to the agreement, a statement to the effect that before the agreement was signed by them, the party to whom the statement relates was provided with independent legal advice as to the agreement from a legal practitioner as certified in an annexure to the agreement.</u>*

20. Once an arbitration agreement contains such statements and annexes such certificates of independent legal advice, the process to be undertaken by the arbitrator under regulation 26 to satisfy themselves as to the requirements of regulation 27 can be undertaken solely on the documentation provided. Consideration could be given to expressly stating that in regulation 26. This could again be based on the requirements for registration of a binding child support agreement, adapted from the requirements of the Child Support Registrar in section 91 of the *Child Support (Assessment) Act 1989*. Regulation 26(2) could read as follows:

> *<u>(2) In determining whether the parties have made an arbitration agreement in accordance with the requirements of section 27 of this instrument, the arbitrator</u>*

may act on the basis of the agreement itself together with any annexures to the agreement, and is not required to conduct any inquiries or investigations as to their correctness.

Relevant time period in regulation 31

21. Regulation 31 currently requires an arbitrator to refer a suspended section 13E arbitration back to the Court after a period of 28 days.

22. In light of the desire to ensure that arbitrations remain a quick alternative to the Court process, the FLS proposes that a period of 14 days may be more appropriate in sub-regulation 31(b).

23. Alternatively, the FLS submits that it may be appropriate to provide the arbitrator with the discretion to refer the matter after a short period. For example, regulation 31(b) could read as follows:

> *(b) if the failure to comply exceeds 28 days must (or earlier if determined appropriate by the arbitrator, may) for an arbitration under section 13E of the Act, refer the matter to the court that ordered the arbitration.*

Use of the word 'considers' in regulation 32

24. Regulation 32 uses the language of 'If an arbitrator considers…'.

25. FLS submits that the appropriate word to be used in regulation 32 is 'determine': 'If an arbitrator determines that …'.

26. The use of the word 'determines' would then be consistent with use of the same word in addressing the arbitrator's duties at sub-regulation 29(1).

27. The FLS therefore recommends that the word 'considers' in sub-regulation 32(1) be amended to 'determines'.

Provision of award electronically (regulation 36)

28. Sub-regulation 36(3) provides that an award must be 'printed clearly or typewritten'. This is a change from the existing regulation 67P, which provides that an award must be 'mechanically or electronically printed'.

29. By reference to the Consultation Paper, the intention is to clarify the requirement for the arbitral award to be 'printed'.

30. The FLS submits that the proposed sub-regulation 36(3) provides no such clarity. As now drafted, it would seem to be sufficient for a handwritten award, provided it was handwritten clearly.

31. The reference in the Consultation Paper to clarifying that the arbitral award be 'printed' also makes it unclear whether it is intended for an arbitral award to be able to be provided electronically (such as via email), or whether hard copies must be 'printed' and provided to the parties and the Court.

32. The FLS therefore submits that further amendments to regulation 36 may be appropriate. It proposes the following:

> *(3) The award must:*
>
> *(a) be typewritten; and*

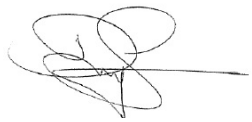
(b) be contained in a single document.

(4) The arbitrator must:

(a) give a copy (whether in electronic format or hard copy) of the award to each party to the award; and …

Contact

Thank you once again for the opportunity to comment. If you wish to discuss this feedback further, please do not hesitate to contact Susan Cox, Director of the FLS, [redacted]



Di Simpson
Chair, Family Law Section