

You're A – Z Guide to Arbitration

Arbitration is a viable Alternative to Litigation

I was in Court recently on the first Mention date of an application by the husband seeking Orders for the division of the net matrimonial assets of his relationship with my client.

Both parties sought Interim Orders relating to each obtaining certain items of furniture and chattels, prior to a final resolution of the division of their assets.

Extensive negotiations took place on the morning of the Court Hearing between myself and the solicitor acting for the Applicant. Finally, the parties were able to agree on the husband retaining certain items of property and my client retaining certain items as well. The parties were able to resolve their Interim Applications.

We appeared before the Judge when Interim Orders were made by the Court. In regard to the remaining substantive issues concerning the ownership of the former matrimonial home, retention of shareholdings and options of the husband in his employer company, the division of superannuation and the division of the remaining assets, the Application was put on the pending cases list for trial. **The parties had already attended a formal Mediation which they had paid for but without successfully negotiating a settlement.**

The Judge hearing the matter informed the parties that because of the under appointment of Judges to the Family Court which created a limited capacity for her to hear the matter, that the call-over of trial matters would not take place prior to 12 months and that it would be another 12 months before a trial date could be allocated to the matter. She further advised that Judges are required to list two matters for each Trial date being one children's matter and a property matter. She further advised that if the children's matter set down on the Trial date had not resolved then it would take preference over the property matter and the property matter would be adjourned back to a list of matters awaiting a Trial date, which could mean a further lengthy delay before a Trial date is appointed. The matter if it remains in Court may not be heard for a period of at least three (3) years.

Fortunately, my client, who was the wife in the proceedings, is able to reside comfortably in the former matrimonial home with the children. The mortgage secured over the property had been converted to an interest only loan at 4.24% for a period of five (5) years, which was imminently affordable for her. She maintained sound employment. She enjoyed the extensive gardens at the home.

The husband however was anxious to move on with his life. He had formed a new partnership and wished the matter to be resolved swiftly, which was not going to happen, if the matter remained in the Court. This put great pressure on him to resolve property issues to his disadvantage.

Arbitration — A voluntary process

A viable alternative to Litigation is Arbitration. This is extensively used in the building and construction industry. In the 1980s and 1990s, Arbitration was also used in family law matters. There were disadvantages under the legislation at that time in using Arbitration and its use diminished. The Family Law Regulations were amended in 2001 which overcame the earlier problems associated with Arbitration. The amendments to the regulations allowed the registrations of Awards, which meant that either party could registrar an Award without the consent of the other party and it would still be binding on both parties. Before the amendments were made if an Award was made by the Arbitrator and one party disagreed and did not give consent to the registration of the Award then the Award could not be registered and was not binding. After the amendments to the Regulations, the Awards now are binding even though one party may not give consent to the registration of the Award and the Awards become a binding Order of the Court.

There is now an obligation on solicitors to advise clients of the means of resolving their difficulties by way of Arbitration. There is a requirement to provide to clients a brochure titled, *Marriages Family's and Separation* which deals with this and provides details of Arbitration. The only limitation placed on Arbitration is that it cannot deal with child support issues and is unable to make binding Orders in regard to a child's welfare. Parenting matters can be discussed, during the course of Arbitration and an agreement may be reached by the parties in regard to such matters. The parties if they reach agreement on parenting issues during the course of Arbitration can have that agreement set out in a Parenting Agreement or can apply to the Court for Orders to be issued by way of Consent Orders. The Award of the Arbitrator if it is to be registered with the Court and to issue as a binding Agreement, is limited to property settlement and spousal/defacto maintenance issues.

Laurence Boulle, Professor of Law, Bond University QLD, in a newsletter published in January 2014 set out the following information in regard to Arbitration:

Features of Arbitration

The Arbitration procedure is underpinned by an agreement between the parties arbitrator. This arbitration agreement sets out and determines:

- Appointment of the arbitrator;
- Issues for determination;
- Form of the arbitration;
- A timetable;

- Procedure for the arbitration;
- Whether or not the rules of evidence will be applied;
- Receipt of evidence from other sources, e.g. experts and documents;
- Default procedures and the circumstances in which the arbitration can be terminated;
- Costs of the arbitration, including payment of disbursements and the responsibility for payment of those; and
- Any other matter the parties may feel is relevant.

Forms of Arbitration

- 'papers' only arbitration;
- Representation of parties;
- Oral evidence or affidavit only;
- No, limited or full cross-examination;
- No, limited or full disclosure;
- No, limited or full pleadings; and
- Opening and closing addresses.

Procedures in Aid

There are a number of circumstances where the Court can be called upon to assist in the conduct of an Arbitration — apart from the general power to make Orders to facilitate the Arbitration.

One instance is the ability of the Arbitrator to refer a question of law arising in the Arbitration to a judge for determination. Another example arises in circumstances where, in the course of a Court-referred Arbitration under s19D, a party does not comply with a procedural direction or, in the view of the Arbitrator, does not have capacity to participate in the Arbitration.

A third example of assistance provided by the Court relates to the ability of a party to apply to the Court for the issue of subpoena to attend and/or produce documents at the Arbitration. This subpoena has the same validity and effect as any other subpoena issued by the Court.

Registration, Enforcement and Review of Awards

Once an Award has been handed down in the prescribed form, either party can apply to the Court for registration of the Award. The other party then has twenty-eight (28) days to object to its registration. Upon registration, the Award has the same effect as if it were an Order of the Court and can be enforced in the same way.

Pursuant to the provisions of the Family Law Act and the Family Court Act, the Family Court can:

1. Review an award on questions of law; and/or
2. Set aside an Award on the grounds that:
 - The Award was obtained by fraud (which included the non-disclosure of a material matter);
 - The Award or agreement is void voidable or unenforceable;
 - Since the making of the Award, circumstances have arisen which make it impracticable for the Award or parts of it to be carried out;
 - The Arbitrator was affected by bias or there was a lack of procedural fairness in the Arbitration.

Professor Boule states in his newsletter; *"By limiting a review to a question of law only, the legislation arguable gives Arbitration Awards less potential to be overturned than a judge's decision."* Not all matters will be suitable for Arbitration. Solicitors acting for the parties would need to determine if the matter would be suitable for Arbitration and whether the parties would accept an award made by the Arbitrator which then becomes binding if registered with the Court. However, the costs saving of proceeding by way of Arbitration are considerable.

Peter Baston a respected Barrister, who is a qualified Arbitrator, recently published an Article and gave details of his costs for conducting an Arbitration.

These costs are published below:

Schedule of Fees 2016 (as at 1 March 2016)

No	Service Details	Fee GST inclusive
1	<p>Arbitration on the Papers</p> <p>Where the asset pool is less than \$750,000 including superannuation</p> <p>Subject to agreement — award within 7 days of law written submission</p>	\$2,980.00
2	<p>Arbitration — Short Form</p> <p>Negotiate agreement & terms of mediation, Telephone Directions hearing, 2 hour hearing with award delivered within 7 days</p>	\$8,000.00
3	<p>Arbitration — 1 Day Hearing</p> <p>By negotiation (based on a daily fee of \$4,000.00 per day including days for pre-arbitration hearing, reading & award writing)</p>	\$10,000.00
4	<p>Arbitration — 2 Day Hearing</p> <p>By negotiation (based on a daily fee of \$4,000.00 per day including days for pre-arbitration hearing, reading & award writing)</p>	\$12,250.00
5	<p>Travel Time within 2 hours</p> <p>driving time of Brisbane</p> <p>(Such as: Coolangatta, Toowoomba & Noosa Heads)</p>	NO fee
6	<p>Travel Time greater than 2 hours driving time of Brisbane (Such Daily fee as: Byron Bay, Warwick & Gympie)</p>	Daily fee \$250.00
7	Room Hire	At Cost

The comparison in fees is significant, in litigation the matter could take up to 2 years or even longer for a matter to go before the Judge and for a decision and Judgement to be delivered by the Judge hearing the matter. The costs to each party could exceed \$50,000.00 and more likely more for the conduct of a matter to the stage of Trial and for the Trial. This creates a great deal of emotional and financial stress for the clients.

On the other hand, Arbitrations can be dealt with speedily and within a matter of weeks or months with considerable cost saving and less emotionally stress. The matter can be dealt with speedily.

In view of the amendments which have now been made Arbitration is a highly effective way of reaching a quick and satisfactory resolution of family law matters.

Short Form Arbitration: or in other words engaging a very experienced Accredited Specialist Family Lawyer to make a determination for both parties to a separation as to what they are entitled to following the breakdown of their relationship in the form of a written opinion.

Avoid court altogether. A cost effective resolution delivered speedily.

Instead of waiting years and going through a very expensive and stressful Court process, why not have a decision given to both parties to the relationship by one very experienced family lawyer?

If you need children and financial matters within a short time frame and in a cost-effective manner, then this may be a suitable process for you.

Firstly, engage an Accredited Specialist Family Lawyer and secondly engage a specialist who is highly regarded in the industry.

What some people don't realise is that a select few solicitors have been practicing in the Family Law field for longer than most judges who make well informed and consistent decisions to the standard of a Judge's decision. This decision can be provided to both parties without the years of torture and financial stress that is often experienced through the Federal Circuit and Family Courts of Australia where you wait in line with other applicants for a decision which may not be handed down for a period of 2 to 3 years.

An Accredited Specialist Family Lawyer and a respected family lawyer, Mr James Noble, has had 40 years practicing in Family Law. James has undertaken the following training:

- Marriage Guidance Queensland – Divorce Mediation Course July 1990
- Advanced Arbitration Training November 2006
- Collaborative Law Workshop July 2007
- Collaborative Law Training Program March and April 2008
- Bond University – Advanced Mediation Course August 2008
- Collaborating Down Under March 2009

- Advanced Collaborative Practice Training March 2009
- Dispute Resolution Training June 2009
- Developing Collaborative Practice June 2010
- Advanced Workshop Collaborative Practice November 2010
- Interdisciplinary Collaborative Training August 2011
- Elevating Your Collaborative Practice Skills August 2013
- Comprehensive Collaborative Practice Workshops 2014 and 2015

The process follows the lines that once a separated couple approach James to make an Arbitrary decision the following steps are required by James Noble:

1. James requires both parties to sign an agreement that they are entering into the process in good faith; James will be acting for both parties and cannot provide individual advice to either party.
2. Both parties are required to disclose in detailed statements the history of the relationship and what their future lives will be. This will include who contributed financially at the beginning of the relationship, who contributed financially and non-financially during the relationship (including the contribution of care of the children of the relationship, if any) and what the future holds for each party including details of their future financial security.
3. The parties and James will review each party's disclosure. The parties will be required to complete a detailed instruction statement setting out this information. For their information may be required including financial documents. If the parties cannot agree values or financial details, documentation and/or valuations may be required. James will consider this information provided and deliver a written opinion.

The advantage of engaging a very experienced lawyer to determine the issues presented by both parties is that if the parties engage their separate representation, the lawyers engaged only see one side of the picture as presented by their client. The engagement of an experienced lawyer by both parties enables any differing instructions to be viewed and discussed by both parties and the lawyer. Any differences hopefully can be resolved and if not the lawyer engaged can determine such issues in the written opinion he delivers.

What Happens when the lawyer engaged makes a decision. Is it binding on the parties?

Legally the answer is no. It must be formalised by a consent order by the court or the terms set out in a binding financial agreement.

If the parties do not accept the opinion delivered by the engaged lawyer, the matter will be well prepared for taking the matter to court or to Arbitration and the matter remaining undecided may be limited to only a small number of issues which with the assistance or further legal advice may be readily resolved.

The parties can refer the matter back to the experienced lawyer for further advice if they so wish or clarification.

If you require a quick decision regarding children's and / or financial matters following the breakdown of your relationship (and even before your divorce) form a resolution may well be your best option. The Courts respect the decisions of Arbitrators and most in the Family Law

community in Australia, from practicing solicitors to Judges alike now believe that competent Arbitrators can help the backlog of cases in the Family Courts of Australia.

At Noble & Noble we have been accurately dealing with people's matters for over 40 years.