

Proposing arbitration

What to check before you raise it, and the points that bear on a proposal. The correspondence is yours; this is the material specific to the jurisdiction.

BEFORE YOU PROPOSE

- ☐ **Within scope.** Property, spousal and de facto maintenance, superannuation splitting, financial agreements, s 106A and s 106B proceedings. Not parenting, not child support, not an approved s 87 maintenance agreement.
- ☐ **Pre-action procedures.** Genuine steps to resolve are required before proceedings, and the Court encourages the same before a private arbitration.
- ☐ **Suitability.** Not where a power imbalance cannot be managed, a party cannot properly participate, or a third party's rights are genuinely in issue.
- ☐ **Conflicts.** Run a check before putting a name to the other side, so a proposal is not made that has to be withdrawn.

POINTS RELEVANT TO A PROPOSAL

The same law, and the same force

The arbitrator determines the dispute according to the Family Law Act. The award is registered with the court and, once registered, is enforceable as an order.

It cannot be imposed

Both parties must agree, and must agree on the arbitrator. A court referral also requires the consent of all parties, and the application is made jointly.

Costs, and the 28-day undertaking

Shared equally unless the parties agree in writing otherwise. The agreement must contain each party's undertaking to pay their share within 28 days of the award.

Review is narrow

A registered award can be reviewed only on a question of law, or set aside for fraud, unenforceability, impracticability, bias or want of procedural fairness. No rehearing on the merits.

The agreement is settled at the conference

It must record the hearing details before signature, so it is executed afterwards — and it must contain a statement of the advice each party received, signed by the practitioner who gave it.

The model is agreed, not imposed

On the papers, on documents with submissions, or a full hearing. It can be narrowed to particular issues or witnesses.

OTHER MATTERS TO CONSIDER

Choosing the arbitrator

Arbitrators must be on the national list, have practised five of the preceding six years with a substantial family law practice, and completed specialist arbitration training. The list is at aiflam.org.au. Consider each side nominating two or three names.

The Court's supervisory role

The Court case manages applications relating to arbitrations and awards through its National Arbitration List. An arbitrator may refer a question of law, and either party may seek orders to facilitate the arbitration.

Settling during the arbitration

The parties can settle at any point. Terms can be recorded in a consent award and registered. A registered agreement made in an arbitration is open to being set aside on the same grounds as an award.

If a party stops engaging

The arbitrator may suspend for non-compliance with a direction, and must refer a court-ordered arbitration back if non-compliance runs beyond a fortnight. Termination is mandatory where a party cannot take part.

IF IT IS AGREED

Privately. Appoint the arbitrator, exchange disclosure, and list a preliminary conference. A private arbitration is not commenced in a court. Around twenty weeks from agreement to award is a realistic working figure.

On referral. Before the first court event, the parties must give the Court the identity of the proposed arbitrator or the mechanics for nominating one, the end date by which the arbitration is to be concluded — **not more than six months from referral** — the anticipated date of the first preliminary conference, and, where available, an executed copy of the arbitration agreement. The application is made jointly, on Form 6, with a Financial Statement from each party.