

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

(As read a first time)

COURTS (MEDIATION AND ARBITRATION) BILL 1991

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**PART 3—AMENDMENTS OF THE FEDERAL COURT OF AUSTRALIA
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- 10. Principal Act
- 11. Insertion of new sections:
 - 53A. Mediation and arbitration
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1990-91

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 31 May 1991

(Attorney-General)

A BILL

FOR

**An Act relating to mediation and arbitration under the
Family Law Act 1975 and the *Federal Court of Australia
Act 1976*, and for related purposes**

The Parliament of Australia enacts:

PART 1—INTRODUCTORY

Short title

5 1. This Act may be cited as the *Courts (Mediation and Arbitration)
Act 1991*.

Commencement

2. (1) Sections 1 and 2 commence on the day on which this Act
receives the Royal Assent.

10 (2) Subject to subsection (3), the remaining provisions of this Act
commence on a day or days to be fixed by Proclamation.

(3) If a provision referred to in subsection (2) does not commence within the period of 6 months starting on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

PART 2—AMENDMENTS OF THE FAMILY LAW ACT 1975 5

Principal Act

3. In this Part, “Principal Act” means the *Family Law Act 1975*¹.

Interpretation

4. Section 4 of the Principal Act is amended by inserting in subsection (1) the following definitions: 10

“‘appropriate officer’, when used in Part IIIA in relation to the Family Court, means:

- (a) the Chief Executive Officer of the Family Court; or
- (b) any other officer of the Family Court specified in writing by the Chief Executive Officer for the purposes of this definition; 15

‘approved arbitrator’ means an arbitrator approved under the regulations;

‘approved mediator’ means a mediator approved under the regulations;

‘Part VIII proceedings’ means proceedings under Part VIII for orders with respect to spousal maintenance or the property of parties to a marriage, but does not include any proceedings specified in the regulations for the purposes of this definition; 20

‘prescribed proceedings’ means:

- (a) proceedings for principal relief; or
- (b) proceedings in relation to concurrent, pending or completed proceedings for principal relief; 25

‘private arbitration’ means arbitration by an arbitrator specified by the regulations for the purposes of this definition, other than arbitration carried out as a result of an order made under section 19D;”.

5. After Part III of the Principal Act the following Part is inserted:

“PART IIIA—MEDIATION AND ARBITRATION 30

“Division 1—Mediation

Request for mediation

“19A. (1) A person who is:

- (a) the parent or adoptive parent of a child; or
- (b) a child; or 35
- (c) a party to a marriage;

and who is not a party to proceedings under this Act, may file in the Family Court, or in a Family Court of a State, a notice asking for the help of a mediator in settling a dispute to which the person is a party.

“(2) Where a notice is filed in a court:

- 5 (a) the notice must be dealt with in accordance with the Rules of Court; and
10 (b) if a mediation service is available at the Registry of the court and the dispute is one that, under the Rules of Court, may be mediated, the appropriate officer of the court must make arrangements for an approved mediator to mediate the dispute in accordance with the Rules of Court.

“(3) In this section:

15 ‘dispute’ means a dispute about a matter with respect to which proceedings (other than prescribed proceedings) could be instituted under this Act.

Court may refer matters for mediation

20 “19B. (1) Subject to the Rules of Court, the Family Court or a Family Court of a State, may, with the consent of the parties to any proceedings before it under this Act (other than prescribed proceedings), make an order referring any or all of the matters in dispute in the proceedings for mediation by an approved mediator.

25 “(2) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the mediation.

“(3) Where a court makes an order under subsection (1), the appropriate officer of the court must make arrangements for an approved mediator to mediate the relevant disputed matter in accordance with the Rules of Court.

30 “(4) Where:

- (a) a court makes an order under subsection (1) in relation to any matter in dispute in proceedings before it; and
35 (b) a party to the proceedings files a notice in the court that the mediation of the matter has ended;
the court may make such orders, or give such directions, as it thinks appropriate in relation to the proceedings.

Admissions made to mediators

40 “19C. Evidence of anything said, or of any admission made, at a conference conducted by an approved mediator, acting as such a mediator, is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or

- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

“Division 2—Arbitration

Court may refer proceedings to arbitration

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“19D. (1) In any Part VIII proceedings the court may, subject to the Rules of Court, make an order referring the proceedings, or any part of them, or any matter arising in them, to an approved arbitrator for arbitration in accordance with the Rules of Court.

“(2) A court may make an order under subsection (1) with or without the consent of the parties.

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“(3) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

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“(4) Where a court makes an order under subsection (1), the arbitration must be carried out by the approved arbitrator in accordance with the Rules of Court.

“(5) A party to an award in an arbitration carried out as a result of an order under this section may register the award, in accordance with the Rules of Court, in the court that made that order and the award, when so registered, has effect as if it were a decree made by that court.

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Private arbitration

“19E. (1) A court having jurisdiction under this Act may, on application by a party to the private arbitration of a dispute, make such orders as the court thinks appropriate to facilitate the effective conduct of the arbitration.

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“(2) A party to an award made in a private arbitration of a dispute may register the award, in accordance with the Rules of Court, in a court having jurisdiction under this Act and the award, when so registered, has effect as if it were a decree made by that court.

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“(3) In this section:

‘dispute’ means:

- (a) Part VIII proceedings; or
- (b) any part of such proceedings; or
- (c) any matter arising in such proceedings; or
- (d) a dispute about a matter with respect to which such proceedings could be instituted.

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Review of awards made in private arbitration

“19F. (1) A party to a registered award made in private arbitration may apply to a Full Court of the Family Court for review of the award on questions of law.

- 5 “(2) On a review of an award under this section, the court may:
- (a) determine all questions of law arising in relation to the arbitration; and
 - (b) make such decrees as it thinks appropriate, including a decree affirming, reversing or varying the award.

10 **Review of other awards**

“19G. (1) A party to a registered award made in arbitration carried out as a result of an order made under subsection 19D (1) may apply to a single Judge of the Family Court for review of the award.

- 15 “(2) A Judge who reviews an award under this section must do so by rehearing the matters to which the award relates and:
- (a) must determine, as if for the first time, all questions of fact and law arising in relation to the arbitration; and
 - (b) may, by decree, either confirm the award or make such other award as the Judge thinks appropriate.

20 **“Division 3—Miscellaneous**

Assessors

“19H. In any proceedings under this Act (other than prescribed proceedings), the court may, in accordance with the Rules of Court, call in the aid of an assessor to assist it in the hearing and determination of the proceedings, or any part of them or any matter arising under them.

Advice about mediation and arbitration

30 “19J. (1) The appropriate officer of the Family Court or of a Family Court of a State must, as far as practicable, on request by a party to a marriage or to proceedings under this Act, advise the party about any mediation or arbitration facilities available in the court and how those facilities are made available.

35 “(2) The Rules of Court must provide for persons who propose to institute proceedings under this Act, and (in appropriate cases) their spouses, and other interested persons, to be given a document setting out particulars of any mediation and arbitration facilities available in the Family Court and elsewhere.

Oath or affirmation by approved mediator

40 “19K. An approved mediator must, before starting to perform the functions of such a mediator, make an oath or affirmation of secrecy in accordance with the prescribed form before a person authorised

under a law of the Commonwealth, or of a State or Territory, to take affidavits.

Oath or affirmation by approved arbitrator

“19L. An approved arbitrator must, before starting to perform the functions of such an arbitrator, make an oath or affirmation in accordance with the prescribed form before a person authorised under a law of the Commonwealth, or of a State or Territory, to take affidavits.

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Protection of mediators and arbitrators

“19M. An approved mediator, an approved arbitrator, or an arbitrator who carries out a private arbitration, has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge.”.

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Personnel other than the Chief Executive Officer

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6. Section 38N of the Principal Act is amended by inserting after paragraph (1) (d) the following paragraph:

“(da) a Principal Director of Mediation;”.

Interpretation

7. Section 60 of the Principal Act is amended by inserting after paragraph (a) of the definition of “member of the Court personnel” the following paragraphs:

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“(aa) an approved mediator; or

(ab) an approved arbitrator; or”.

Rules of Court

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8. Section 123 of the Principal Act is amended by inserting after paragraph (1) (s) the following paragraphs:

“(sa) prescribing the functions and duties of assessors and of approved mediators and approved arbitrators;

(sb) providing for and in relation to the making of applications under this Act for mediation or arbitration and for orders under section 19E;

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(sc) prescribing the disputes, proceedings or matters that may or may not be mediated or arbitrated under this Act;

(sd) providing for and in relation to:

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(i) the procedures to be followed by an approved mediator or an approved arbitrator in mediating or arbitrating a dispute, proceeding or matter under this Act; and

(ii) the attendance by persons at conferences conducted by approved mediators and approved arbitrators for the

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purposes of mediating or arbitrating a dispute, proceeding or matter under this Act; and

(iii) the procedure to be followed when a mediation or arbitration ends, both where it has resulted in an agreement or award and where it has not;

(se) prescribing matters relating to the costs of mediation and arbitration by approved mediators and approved arbitrators and the assessment or taxation of those costs;

(sf) providing for and in relation to:

(i) the registration of awards under section 19D or 19E; and

(ii) the time and manner of making applications for review of registered awards under section 19F or 19G;”.

Regulations

9. Section 125 of the Principal Act is amended by omitting paragraph (1) (c) and substituting the following paragraphs:

“(ba) providing for and in relation to the approval of mediators and arbitrators;

(c) prescribing court fees to be payable in respect of:

(i) proceedings under this Act; and

(ii) the arbitration by an approved arbitrator of a dispute, proceeding or matter carried out as a result of an order made under subsection 19D (1);”.

PART 3—AMENDMENTS OF THE FEDERAL COURT OF AUSTRALIA ACT 1976

Principal Act

10. In this Part, “Principal Act” means the *Federal Court of Australia Act 1976*².

11. After section 53 of the Principal Act the following sections are inserted:

Mediation and arbitration

“53A. Subject to the Rules of Court, the Court may, with the consent of the parties to proceedings in the Court, by order refer the proceedings, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration, as the case may be, in accordance with the Rules of Court.

Admissions made to mediators

“53B. Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Protection of mediators and arbitrators

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“53C. A mediator or an arbitrator has, in mediating or arbitrating anything referred under section 53A, the same protection and immunity as a Judge has in performing the functions of a Judge.”.

Arbitration awards

12. Section 54 of the Principal Act is amended by inserting in subsection (1) “(whether carried out under an order made under section 53A or otherwise)” after “arbitration”.

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Rules of Court

13. Section 59 of the Principal Act is amended by adding at the end of subsection (2) the following word and paragraphs:

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“; and (zf) the referral of any proceedings in the Court, or any part of such proceedings or any matters arising out of such proceedings, to a mediator or an arbitrator for mediation or arbitration, as the case may be; and

(zg) the procedures to be followed by a mediator or an arbitrator in mediating or arbitrating anything referred for mediation or arbitration under this Act; and

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(zh) the attendance by persons at conferences conducted by mediators or arbitrators for the purposes of mediating or arbitrating anything so referred; and

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(zi) the procedure when any such mediation or arbitration ends, both where it has resulted in an agreement or award and where it has not.”.

NOTES

1. No. 53, 1975, as amended. For previous amendments see Nos. 63, 95 and 209, 1976; No. 102, 1977; No. 23, 1979; No. 2 1982; Nos. 67 and 72, 1983; Nos. 63, 72 and 165, 1984; Nos. 65, 166 and 193 of 1985; Nos. 76 and 168, 1986; Nos. 141 and 181, 1987; Nos. 8, 99 and 120, 1988; Nos. 124, 157 and 182, 1989; and Nos. 115 and 138, 1990.
2. No. 156, 1976, as amended. For previous amendments see Nos. 19 and 87, 1979; No. 61, 1981; No. 26, 1982; No. 91, 1983; Nos. 11, 72 and 165, 1984; Nos. 65 and 193, 1985; No. 76, 1986; No. 141, 1987; Nos. 8, 99 and 120, 1988; No. 157, 1989; and Nos. 11, 70 and 115, 1990.



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