

1991

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COURTS (MEDIATION AND ARBITRATION) BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Honourable  
Michael Duffy, Attorney-General)

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**OUTLINE**

The Courts (Mediation and Arbitration) Bill 1991 gives effect to the Government's commitment to provide a legislative framework in which the Federal Court of Australia and the Family Court of Australia may develop appropriate methods of alternative dispute resolution.

Amendments of the Family Law Act 1975

The Bill will amend the Family Law Act so as to enable -

- (a) mediation of family law disputes, either before or after the commencement of proceedings;
- (b) court-referred arbitration, to be conducted by suitably qualified arbitrators and subject to supervision by the Family Court; and
- (c) private arbitration, to be conducted outside the court system by suitably qualified arbitrators and subject to review, on questions of law only, by the Full Court of the Family Court.

Amendments of the Federal Court Act 1976

The Bill will amend the Federal Court Act so as to enable the referral of proceedings in the Federal Court to mediation or arbitration.

**FINANCIAL IMPACT STATEMENT**

The amendments are considered to be revenue neutral. The establishment of mediation and arbitration programs will require a reallocation of resources. In the long term it is anticipated that mediation and arbitration will enable a more efficient allocation of court resources thereby relieving pressure for increased resourcing of the federal courts.

NOTES ON CLAUSES

PART 1 - INTRODUCTORY

Clause 1 - Short title

1. This clause sets out the short title to the Bill.

Clause 2 - Commencement

2. Sections 1 and 2 of the Act are to come into operation on Royal Assent while the rest of the Bill comes into operation on a day or days to be fixed by proclamation. In the event that all provisions are not proclaimed within 6 months of Royal Assent, sub-clause (3) provides for automatic commencement of any unproclaimed provisions on the first day after the end of that 6 month period.

PART 2 - AMENDMENTS OF THE FAMILY LAW ACT

Clause 3 - Principal Act

3. For the purposes of Part 2, the Principal Act is the Family Law Act 1975.

Clause 4 - Interpretation

4. This clause amends section 4 of the Family Law Act by inserting definitions for the purposes of Part 2 of the Bill -

- . 'Appropriate Officer' is defined in relation to the Family Court of Australia, as the Chief Executive Officer or his or her delegate. The 'appropriate officer' is the person who is required to deal with a request for mediation.
  
- . 'Approved arbitrator' is defined as an arbitrator approved under the regulations. The regulations will provide for the approval of suitably qualified individual arbitrators, or the approval of members of professional organisations of arbitrators, and for the approval of appropriately qualified officers and staff of the Family Court of Australia as persons who may conduct court-referred arbitration
  
- . 'Approved mediator' is a mediator approved under the regulations. The regulations will provide for the approval of suitably qualified individuals, or the members of professional organisations of mediators, and appropriately qualified officers and staff of the Family Court of Australia as persons who may conduct court-referred mediation.
  
- . 'Part VIII proceedings' are those proceedings which may be commenced under Part VIII of the Family Law Act in relation to spousal maintenance or matrimonial property other than proceedings specified in the regulations for the purposes of this definition. Regulations will be made to exclude proceedings such as proceedings for the approval of a maintenance agreement under section 87 of the Act.
  
- . 'Prescribed proceedings' are proceedings for, or in relation to, proceedings for principal relief. This provision ensures that arbitration, mediation or private arbitration may not be used in relation to proceedings for the dissolution of marriage, nullity of marriage, declarations as to the validity of a marriage, or for the dissolution or annulment of a marriage.

'Private arbitration' is arbitration conducted by an arbitrator specified in the regulations as a person who may conduct a private arbitration.

**Clause 5**

5. This clause inserts new Part IIIA into the Family Law Act.

**PART IIIA - MEDIATION AND ARBITRATION**  
**DIVISION 1 - MEDIATION**

**New Section 19A - Request for mediation**

6. New subsection 19A(1) provides that a parent, a child, or a party to a marriage may, before proceedings have been commenced, request the assistance of a court approved mediator to help them resolve a dispute. New subsection 19A(2) provides that the request is to be dealt with by the court in accordance with Rules of Court. The Rules of Court will establish guidelines to assist in determining whether a dispute is suitable for mediation, or would be more effectively resolved by another dispute resolution mechanism. New subsection 19A(3) is definitional. It provides that any proceedings other than proceedings for or in relation to principal relief may be a dispute which is the subject of mediation. After a notice is filed, and it has been determined that the dispute is suitable for mediation, arrangements must be made by an appropriate Officer of the court for mediation to occur, provided that there is a mediation service at the Registry in which the notice is filed. The Rules of Court will specify procedures which may be followed in relation to the conduct of a mediation.

New Section 19B - Court may refer matters for mediation

7. New subsection 19B(1) gives the Family Court of Australia and the Family Court of Western Australia the power to refer any proceedings, other than proceedings for or in relation to proceedings for principal relief, to mediation. The consent of the parties is required. Mediation is a process which requires continued consent and co-operation by the parties. Court-referred mediation is to be conducted by an approved mediator.
8. New subsection 19B(2) provides that when a court refers a dispute to mediation the court may make an order adjourning the proceedings and make any other appropriate orders.
9. New subsection 19B(3) provides that where a court has made an order that a matter be referred to mediation the appropriate officer of the court must make arrangements for the mediation of the dispute. Court ordered mediation is not subject to the availability of mediation at the Registry in which the order is made. It may be provided at another Registry where mediation is available.
10. New subsection 19B(4) provides that when mediation has been concluded, and one of the parties files a notice to that effect, the court may make appropriate orders to finalise proceedings or for the further conduct of the proceedings.

New Section 19C - Admissions made to mediators

11. New section 19C ensures that anything said in a mediation, whether court-referred or provided at the request of a person, remains confidential and cannot be used in any court proceedings. It is essential that parties to a mediation feel free to speak openly and to explore all possibilities for settlement. This provision makes it clear that no admissions made in a mediation can be used against a person in further or later proceedings.

**DIVISION 2 - ARBITRATION**

**New Section 19D - Court may refer proceedings to arbitration**

12. New subsection 19D(1) allows the court to refer proceedings, in whole or part, or any matter arising out of those proceedings, to an approved arbitrator for arbitration. The proceedings which may be referred to arbitration are proceedings in relation to spousal maintenance or matrimonial property.
13. New subsection 19D(2) provides that a matter may be referred to arbitration whether or not the parties consent.
14. New subsection 19D(3) provides that the court may adjourn proceedings to allow arbitration to occur, and may make such additional orders as it thinks appropriate to facilitate the arbitration. New subsection 19D(4) provides that an arbitration ordered by a court under subsection 19D(1) must be conducted by an approved arbitrator.
15. New subsection 19D(5) provides that an arbitral award may be registered. On registration, in the court that made the order referring a matter to arbitration, the award has the same effect as if it were decree made by that court and all provisions of the Family Law Act and common law for the variation, rescission or enforcement of a decree of that court apply to the arbitration award. Review of the award can only be made in accordance with new section 19G.

**New Section 19E - Private arbitration**

16. This section allows a person to apply to the court for orders to facilitate the private arbitration of a dispute and to register an award resulting from that arbitration for the purpose of enforcement.

17. New subsection 19E(1) provides that a court may make an order to facilitate the conduct of a private arbitration. A private arbitration is an arbitration that is not court-referred under subsection 19D(1) and is conducted by a person prescribed by the regulations for that purpose. A party need not have proceedings pending in the court to apply to the court for orders to facilitate the arbitration or to register the award, but must demonstrate that the arbitration is being conducted by a person prescribed by the Regulations for that purpose. Only those Part VIII matters that are not excluded by the Regulations may be the subject of a private arbitration.
18. New subsection 19E(2) provides that the court may make Rules of Court for the registration of arbitral awards. When registered the award has the same effect as a decree made by the court.
19. An award made in a private arbitration may be registered in any court having jurisdiction under the Family Law Act.
20. New subsection 19E(3) provides a definition of "dispute" for the purposes of new section 19E. A dispute which may be the subject of private arbitration is the whole or any part of, any matter arising in, or any dispute about a matter which could be subject of "Part VIII proceedings". Part VIII proceedings are separately defined in section 4 of the Principal Act.

**New Section 19F - Review of awards made in private arbitration**

21. New subsection 19F(1) provides that a party to a registered award may seek a review of the award by the Full Court of the Family Court. A review is available only on a question of law. The question of law may arise from the law applied by the arbitrator to arrive at the



award, or any other question of law in relation to the conduct of the arbitration; such as whether a party to an award, or an arbitrator, acted fraudulently or that a party was denied natural justice.

22. New subsection 19F(2) provides that on review the Full Court of the Family Court may determine the question or questions of law arising in relation to the arbitration and make such decrees as it thinks appropriate, including a decree affirming, reversing or varying the award.

**New Section 19G - Review of other awards**

23. New subsection 19G(1) provides for the review of a registered award resulting from court-referred arbitration by a single judge of the Family Court.
24. New subsection 19G(2) provides that a judge reviewing a registered award resulting from a court-referred arbitration must rehear the matters to which the award relates, and must determine, as if for the first time, all questions of law and fact in relation to the arbitration. The effect of this section is to give all parties to a court-referred arbitration, whether the referral was made with or without their consent, the right to a full rehearing of the matter or matters referred to arbitration. The judge who reviews an award under this section may affirm the award or may make such other decree as he or she thinks appropriate.

DIVISION 3 - MISCELLANEOUS

New Section 19H - Assessors

25. New section 19H allows the Court to call in the aid of an assessor in any proceedings other than proceedings for, or in relation to, proceedings for principal relief. The role of the assessor is to assist in the hearing and determination of proceedings or parts of proceedings or any matter arising under proceedings, as requested by the court and to make a report to the Court.

New Section 19J - Advice about mediation and arbitration

26. New subsection 19J(1) requires the appropriate officer of the Family Court or of a Family Court of a State to furnish information about any mediation or arbitration facilities in the court and how those facilities are made available when a request is made by a party to a marriage or proceedings under the Family Law Act.
27. New subsection 19J(2) requires the court to make Rules of Court to ensure that information about mediation and arbitration facilities is given to persons who propose to institute proceedings, their spouses and other interested persons.
28. New section 19J is similar to section 17 of the Family Law Act which provides for advice to be given about the counselling services of the Court.

**New Sections 19K - Oath or Affirmation by approved mediator**

**New Section 19L - Oath or Affirmation by approved arbitrator**

29. These new sections provide that mediators and arbitrators must make an oath or affirmation before they can conduct a court-referred mediation or arbitration. Mediators are required to take an oath or affirmation of secrecy to ensure that they do not divulge the matters heard before them. New section 19K is similar to subsection 19(1) of the Family Law Act which applies to counsellors of the Family Court. New Section 19L does not limit the oath or affirmation required to be taken by arbitrators to one of secrecy. The oath or affirmation may also cover such matters as a requirement to hear the matter referred without bias and to hear matters in accordance with the law.

**New Section 19M - Protection of mediators and arbitrators**

30. This section gives all mediators and arbitrators, when operating as a mediator or arbitrator under this Part, the same protection and immunity as a Judge has when performing the duties of a Judge.

**Clause 6 - Personnel other than the Chief Executive Officer**

31. This clause amends Section 38N of Family Law Act by providing for a Principal Director of Mediation to be included in the list of officers of the Court. The court may appoint such a person, with such duties and functions as are provided for by the Family Law Act. It is envisaged that the Principal Director of Mediation would co-ordinate any mediation service that the court provides.

Clause 7 - Interpretation

32. This clause includes approved mediators and approved arbitrators in the definition of "member of the Court personnel" in section 60 of the Family Law Act 1975, and thereby ensures that mediators and arbitrators who conduct a mediation or arbitration pursuant to a reference from a court have the same duties to report instances of child abuse as other members of court personnel.

Clause 8 - Rules of Court

33. This clause amends section 123 of the Family Law Act. It adds the following matters as matters in relation to which the Court may make Rules -

- the functions and duties of assessors and of approved mediators and arbitrators;
- the making of applications for mediation and arbitration and for orders to facilitate the effective conduct of private arbitration;
- the disputes, proceedings or matters that may or may not be mediated or arbitrated under this Act;
- the procedures to be followed by an approved mediator or an approved arbitrator in mediating or arbitrating a dispute, proceeding or matter;
- the attendance by persons at conferences conducted by approved mediators and approved arbitrators for the purposes of mediating or arbitrating a dispute, proceeding or matter;

- the procedure to be followed when a mediation or arbitration ends, both where it has resulted in a agreement or award and where it has not;
- matters relating to the cost of mediation and arbitration by approved mediators and approved arbitrators and the assessment or taxation of costs;
- the registration of awards made in court-referred arbitration or in private arbitration; and
- the time and manner of making applications for review of registered awards.

**Clause 9 - Regulations**

34. This clause amends section 125 of the Family Law Act by omitting existing paragraph (c) and inserting new paragraphs (b) and (c) which describe matters in relation to which regulations may be made. New paragraph (ba) provides that regulations may be made in relation to the approval of mediators and arbitrators referred to in the Act. Amended paragraph 125(1)(c) now provides for the regulations to fix the fees which may be paid in respect of proceedings under this Act and the arbitration by an approved arbitrator of a dispute, proceeding on matter carried out as a result of a court order.

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

Clause 10 - Principal Act

35. This clause provides that any reference to "Principal Act" in Part 3 of the Bill is a reference to the Federal Court of Australia Act 1976

Clause 11

New Section 53A - Mediation and Arbitration

36. New section 53A gives the Federal Court the power, by order, to refer proceedings or any part of them, or any matter arising out of them, to mediation or arbitration. The court may only refer proceedings to mediation or arbitration with the consent of the parties, and in accordance with and subject to any Rules of Court made for this purpose.
37. The court may make Rules of Court regarding the reference of proceedings to mediation and the procedure to be followed in a mediation or arbitration. Such Rules of Court may also include rules governing and prescribing the review of awards, registration of mediation agreements, the persons who may conduct a mediation or arbitration, and those matters that are suitable for referral to mediation or arbitration.

New Section 53B - Admissions made to mediators

38. New section 53B is similar to new section 19C of the Family Law Act 1975 (see paragraph 11, above). The provision ensures the confidentiality of information divulged in a mediation conducted pursuant to an order made under new section 53A.

**New Section 53C - Protection of mediators and arbitrators**

39. New section 53C is similar to new section 19M of the Family Law Act 1975 (see paragraph 30, above). The section provides immunity and protection to mediators and arbitrators in the performance of the functions of a mediator or arbitrator.

**Clause 12 - Arbitration Awards**

40. This clause amends section 54 of the Federal Court of Australia Act to include awards resulting from court - referred arbitrations in that provision. Section 54 provides for registration of arbitration awards.

**Clause 13 - Rules of Court**

41. This clause amends section 59 of the Federal Court of Australia Act. It adds the following matters as matters in relation to which the court may make Rules -

- 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
- the procedures to be followed by a mediator or an arbitrator in mediating or arbitrating anything referred for mediation or arbitration under the Act
- the attendance by persons at conferences conducted by mediators or arbitrators for the purposes of mediating or arbitrating anything so referred
- the procedure when any such mediation or arbitration ends, both where it has resulted in an agreement or award and where it has not.

