

AIFLAM ARBITRATION PRACTICE AND APPROVAL STANDARDS (the AIFLAM Arbitration Standards)

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DEFINITIONS

AIFLAM Accredited Specialist Arbitrator	An Arbitrator who is a Regulation 67B Arbitrator and who has completed additional AIFLAM Specialist training
Regulation 67B List	The List held by AIFLAM pursuant to Regulation 67B of the Family Law Regulations 1984
Regulation 67B Arbitrator	Arbitrators who have completed the training conducted by AIFLAM and satisfy the further requirements set out in Regulation 67B of the Family Law Regulations 1984
AIFLAM Accredited Specialist Arbitrator List	The List held by AIFLAM of AIFLAM Accredited Specialist Arbitrators
The Court	A court exercising jurisdiction under the Family Law Act 1975 (Cth) or the Family Court Act 1997 (WA)

ACRONYMS

AIFLAM	Australian Institute of Family Law Arbitrators and Mediators
CPD	Continuing professional Development
Reg 67B	Refers to Regulation 67B of the Family Law Regulations 1984
AADRAS	AIFLAM ADR Accreditation System

Part I - Introduction

Preamble

Family law arbitrators facilitate a process that enables the parties *to agree upon the arbitration method* by which they would like their family law property dispute resolved. They use their knowledge, skills and arbitration abilities to ensure *the fair and final resolution of the dispute without unnecessary delay or expense*.

The **AIFLAM Arbitration Standards ensure** the quality, consistency and accountability of AIFLAM arbitrators. They inform participants in arbitration about what they can expect of a Regulation 67B Arbitrator, an AIFLAM Accredited Arbitrator, and of the arbitration process.

Purpose

AIFLAM holds and maintains The List of trained family law arbitrators pursuant to Regulation 67B of the Family Law Regulations 1984 (“the Regulation 67B List”).

AIFLAM also holds and maintains a list of AIFLAM Accredited Specialist Arbitrators (“the AIFLAM Accredited Specialist Arbitrators List”). It is essential to the function of AIFLAM as a nominating or appointing authority for arbitrators that it presents to the public persons who, by education, experience and competence are qualified to act as arbitrators and who also are specialists in the field.

These Standards provide the mechanisms for AIFLAM to:

1. provide the necessary specialist training, to enable arbitrators to be on the Regulation 67B List of trained family law arbitrators;
2. approve training by another training provider, provided that training program meets the standards for Regulation 67B Arbitrators as set out in these Standards.
3. maintain the Regulation 67B List;
4. provide advanced specialised family law arbitration training to accredit arbitrators as specialist family law arbitrators, i.e. be designated as *AIFLAM Accredited Specialist Arbitrators*;
5. maintain the Register of AIFLAM Accredited Specialist Arbitrators (the AIFLAM Accredited Specialist Arbitration List); and
6. develop a system of accreditation and reaccreditation of AIFLAM Arbitrators.

Structure

The AIFLAM Arbitration Standards comprise the following:

1. Approval Standards which specify the training and qualifications required of a Regulation 67B Arbitrator under the regulations and for renewal of their qualification
2. Approval Standards which specify the training, assessment, and experience required of an AIFLAM Accredited Specialist Arbitrator and for their renewal of accreditation
3. Practice Standards which specify the minimum practice and competency requirements for both Regulation 67B and AIFLAM accredited specialist arbitrators

4. The role and responsibilities of AIFLAM in undertaking the accreditation of specialist accredited arbitrators.

Part II – Approval Standards: Regulation 67B Arbitrator

Preamble

A Regulation 67B Arbitrator will have met the basic entry level requirements of Regulation 67B for a person qualified to act as a family law arbitrator. A Regulation 67B Arbitrator's name will be placed on the **Regulation 67B List**.

1. Application

These *Approval Standards*:

- a. specify the training and qualifications required of a person seeking qualification as an **Regulation 67B Arbitrator** and seeking to be on the **Regulation 67B List**; and
- b. are to be read in conjunction with the Practice Standards (Part IV of these Standards) with which AIFLAM Trained Arbitrators must comply.

2. Approval requirements

a. Qualifications and Professional Experience

A person seeking qualification as an Regulation 67B Arbitrator must meet the requirements set out in Regulation 67B of the Family Law Regulations 1984 (s 10M Family Law Act 1975), namely:

- (a) the person is a legal practitioner; and
- (b) either:
 - (i) the person is accredited as a family law specialist by a State or Territory legal professional body; or
 - (ii) the person has practised as a legal practitioner for at least 5 years and at least 25% of the work done by the person in that time was in relation to family law matters.

b. Training

A person seeking qualification as an Regulation 67B Arbitrator must complete the **AIFLAM Regulation 67B Arbitration Course** (or equivalent). This course covers the knowledge, skills and abilities as outlined in Part IV of these Standards. The focus of the Course will be on transferring technical knowledge to participants facilitating high level competencies relating to the family law arbitration process.

c. Assessment

The content of the Regulation 67B Arbitration Course will not be assessed. Completion of the training will be confirmed by means of a Certificate of Completion of either the AIFLAM Arbitration Course or an equivalent.

3. Training renewal requirements

For Regulation 67B Arbitrators to remain on the Regulation 67B List of Arbitrators (but not the AIFLAM Accredited Specialist Arbitrators List), practitioners are encouraged to become accredited in accordance with the Standards.

An AIFLAM Trained Arbitrator must also notify AIFLAM if, for some reason, they are no longer qualified to act as a Regulation 67B Arbitrator. Such disclosure would include:

- a. disqualification or suspension by any professional body from practice or the refusal of mediation or arbitration qualifications or accreditation
- b. any criminal conviction
- c. any impairment that could influence their capacity to discharge their obligations as an Arbitrator in a competent, honest and professional manner

Regulation 67B Arbitrators must become and remain a member of AIFLAM and pay the AIFLAM registration fee in accordance with AIFLAM's practices

4. Waiver by AIFLAM

If AIFLAM deems it appropriate to do so then, without reasons, it may, conditionally or otherwise, waive compliance with any provision of the *AIFLAM Trained Approval Standards* on application by an applicant.

5. Suspension

Where a Regulation 67B Arbitrator is non-compliant with the *Approval and Practice Standards*, AIFLAM may remove the Arbitrator from the Regulation 67B List of Arbitrators and specify any conditions that the Arbitrator must meet before seeking re-instatement.

Part III - Approval Standards: AIFLAM Accredited Specialist Arbitrator

Preamble

An **AIFLAM Accredited Specialist Arbitrator** will have a higher level of qualification than a Regulation 67B Arbitrator and will be required to pass a rigorous and practical assessment regime. An AIFLAM Accredited Specialist Arbitrator's name will be placed on the **AIFLAM Accredited Specialist Arbitration List**.

1. Application

These *Approval Standards*:

- a. specify the training and qualifications required of a person seeking accreditation as a specialist family law **AIFLAM Accredited Arbitrator** and seeking to be on the **AIFLAM Accredited Specialist Arbitrators List**; and

- b. are to be read in conjunction with the Practice Standards (Part IV of these Standards) with which AIFLAM Accredited Arbitrators must comply.

2. Approval requirements

a. Qualifications and Professional Experience

AIFLAM Accredited Specialist Arbitrators require a higher level of qualifications than AIFLAM Trained Arbitrators (see Part II, section 2a above). An AIFLAM Accredited Specialist Arbitrator must:

- i. Be on the Regulation 67B List of Arbitrators; and
- ii. Have substantial family law experience (10 years post-admission practice, 50% in family law); or
- iii. Be a retired Judicial Officer who has served on a court which exercised jurisdiction under the Family Law Act.

b. Good character

An applicant must:

- i. disclose any disqualification or suspension by any professional body from practice or the refusal of mediation or arbitration qualifications or accreditation
- ii. disclose any criminal conviction
- iii. disclose any impairment that could influence their capacity to discharge their obligations as an arbitrator in a competent, honest and professional manner

c. Training

A person seeking to be an AIFLAM Specialist Accredited Arbitrator must have completed the Regulation 67B Arbitration Course and the AIFLAM Specialist Accreditation Arbitration Course.

The AIFLAM Specialist Arbitration Course covers the knowledge, skills and abilities as outlined in Part IV of these Standards. The focus of the AIFLAM Specialists Accreditation Arbitration Course will be on strengthening the competencies developed in the Regulation 67B Course.

d. Assessment

Successful completion of the AIFLAM Specialist Arbitration Course will depend on participants evidencing competence in the knowledge, skills and abilities as outlined in Part IV of these Standards. Competence will be determined using a predetermined regime of assessment. Assessment will include both technical and practical measures. Examples of these measures are:

- iv. A live or recorded role-play of the management of the Preliminary Conference, including agreement of process options.

- v. A written examination including identification of ethical and practical issues and the writing of an award.

AIFLAM will assess all applicants according to the **AIFLAM Arbitration Accreditation Assessment Policy** and notify the applicant of the results.

6. Accreditation renewal requirements

- a. For AIFLAM Accredited Specialist Arbitrators to remain on the AIFLAM Accredited Specialist List, they must renew their accreditation every three (3) years by participating in two or more of the following continuing professional development options:
 - i. Advanced family law ADR conference
 - ii. Advanced family law ADR workshops, training, or AIFLAM state chapter events
 - iii. Peer review of your arbitration practice (process and awards) by another AIFLAM Accredited Specialist Arbitrator.

7. Waiver by AIFLAM

AIFLAM may, conditionally or otherwise, waive compliance with any provision of the *AIFLAM Arbitration Accreditation Approval Standards* on application by an applicant.

8. Suspension

Where an AIFLAM Accredited Arbitrator is non-compliant with the *Approval and Practice Standards*, AIFLAM may suspend the arbitrator's accreditation and specify any conditions that the arbitrator must meet before seeking re-instatement of accreditation.

Part IV - Practice Standards

1. Application

- a. The *Practice Standards* apply to Regulation 67B Arbitrators and AIFLAM Accredited Specialist Arbitrators.
- b. The *Practice Standards*:
 - iv. specify the minimum practice and competency requirements of AIFLAM Trained Arbitrators and AIFLAM Accredited Specialist Arbitrators;
 - v. inform participants and others about what they can expect of the arbitration process and of AIFLAM Trained Arbitrators and AIFLAM Accredited Specialist Arbitrators; and

- vi. are read in conjunction with the *Approval Standards* (Part II and II of these Standards).

2. Role of arbitrators in an arbitration process

An arbitrator uses the knowledge, skills and abilities referred to in these Practice Standards to 'facilitate the **fair and final resolution** of family law disputes **without unnecessary delay or expense**'.

The arbitrator makes it clear to parties from the outset that in the absence of a settlement agreement between the parties, the arbitrator will make a final and binding decision.

3. Arbitration definition and principles

- a. **Practice definition** (please note this complements the definition at Section 10L(1) of the Act)

Arbitration is a process in which parties to a dispute present evidence (either formally or informally) to an arbitrator, who facilitates a resolution of the dispute, which includes the making of an award.

- b. **Paramount principles**

*The arbitration process **enables parties to agree the process by which their dispute will be resolved**. The arbitrator is to provide arbitration procedures that enable the dispute to be resolved in a **cost-effective manner, informally and quickly**.¹*

4. The Arbitration Process

The arbitration process is set out below and consists of a 9-step process. The arbitrator is to conduct the process with the required level of formality or informality *as agreed by the parties* at the Preliminary Conference and as set out in the Arbitration Agreement.

¹ Commercial Arbitration Act 2012 – Section 1C

1. Engage

Procedural Fairness (see *Practice Standards* below) begins at the first step of engagement in the process. The arbitrator must ensure that the parties are provided with the following:

- a letter explaining the process options, the costs of arbitration, the fees and rate for preparation for arbitration, confidentiality, and the binding nature of arbitration.
- a Preliminary Conference agreement, addressing process and costs and the draft Arbitration Agreement.

2. Preliminary Conference/ Planning Meeting

The Preliminary Conference consists of one or more meeting/s with all parties and their lawyers to discuss the arbitration process options. At the Preliminary Conference, the arbitrator:

- provides a description of arbitration and the steps involved, including the events that could give rise to a termination of the arbitration;
- facilitates a short exploration of the parties' dispute resolution experience and understanding of arbitration (determinative process) to establish informed consent and trust, and to identify if there are any safety or violence issues;
- makes it clear to the parties that in the absence of agreement between the parties, the arbitrator will be making a final and binding decision;
- facilitates the parties' agreement about process options including:
 - identifying who will be participating in the arbitration
 - the level of formality of the arbitration, including what type of arbitration
 - how the arbitrator will gather evidence, including:
 - the application or the non-application of the rules of evidence
 - the method (in person, by video, by phone)
 - the type of questions/cross-examination
 - subpoenas
- the recording of the arbitration
- the issues the parties want determined
- time frames
- what document and preparation do the parties and arbitrator require/need?
- venue, dates, timing and other practical issues

- clarifies the format of submissions
- detailing the costs of the arbitration, including what orders for costs can be made, and costs in the event of termination
- identifies the circumstances in which the arbitration can be terminated or suspended by the Arbitrator

3. Finalising and signing the Arbitration Agreement

After the Preliminary Conference, the arbitrator will:

- distribute the Arbitration Agreement (the agreement to submit to arbitration and be bound by the Arbitrator's award) to the parties for settling and signing and specify a date for the return of the signed agreement whether in counterparts or not;
- ensure the parties' compliance with the agreed preparation; and
- confirm each parties' agreement to continue to the Arbitration Hearing.

4. Arbitration Hearing/Gathering Evidence

At the Arbitration Hearing, the arbitrator will:

- conduct the hearing in a fair and just manner and in such a way as agreed by the parties in the Preliminary Conference and recorded in the Arbitration Agreement;
- facilitate the narrowing of the issues in the preliminary stages of the arbitration;
- facilitate the formal or informal gathering of evidence to ensure that the arbitrator has enough information for evaluation and award making;
- receive submissions;
- be open to the parties' negotiating a settlement of the matter and facilitating the writing of a 'consent' award if that occurs; and
- manage the arbitration process in a procedurally fair manner (see principles of Procedural Justice below).

5. Break

After the Arbitration Hearing and when the arbitrator is satisfied that the parties have presented all the required evidence (or at any other time in the proceedings that the arbitrator thinks fit), the arbitrator may call a break in the proceedings for the parties and their lawyers to meet separately to:

- check-in with each other;
- discuss any possible further narrowing of issues or settlement; and
- draft a possible award (consent or otherwise).

6. Case Analysis and Discussion

The arbitrator will:

- check whether further evidence is required;
- check whether the parties are still pursuing parts of or all of the issues in dispute or whether there is consent/settlement on some matters; and
- seek further submissions on the issues if required.

7. Drafting the award

In drafting the award, the arbitrator will comply with the regulations and the law and use Plain English, being as clear and concise as possible.

8. Delivering the award

In keeping with the paramount principles, the arbitrator will deliver the award in the time frame as agreed. Before delivering the award, the arbitrator will give notice to the parties that the award is ready for delivery.

The arbitrator will provide a copy of the award to each party in accordance with the Arbitration Agreement and in the manner provided for in the Regulations.

9. Registering the award

After delivery of the award, if there are no further indications of a settlement or agreed amendment to the award, the parties can choose to register the award with the Court.

5. Safety

An Arbitrator must:

- a. have regard to child abuse and serious danger to a child (Sections 67ZA and 111CV of the Family Law Act 1975 (Cth))
- b. consider the safety of the parties and where necessary take steps, which may include:
 - i. agreeing guidelines to encourage appropriate conduct;
 - ii. activating appropriate security protocols;
 - iii. using communication technology or other protective arrangements;
 - iv. having a party's support person attend the arbitration; and/or
 - v. suspending or terminating the arbitration with appropriate steps to protect the safety of the parties.

6. Procedural fairness and impartiality

- a. An arbitrator must conduct the arbitration in a fair, even-handed and impartial way, without favouritism or bias in any act or omission.
- b. An arbitrator must apply the principles of procedural fairness giving each party the right to be heard and to respond.
- c. An arbitrator must identify and disclose any potential grounds of bias or conflict of interest before the arbitration, or that emerge at any time during the process.
- d. An arbitrator must not arbitrate in cases involving a conflict of interest unless there is clear consent from the parties to proceed.
- e. An arbitrator must ensure, as far as practicable, that participants have had sufficient time and opportunity to make an informed decision about engaging in arbitration and its consequences (especially being cognisant to the fact that in the absence of agreement between the parties, the arbitrator will make a final and binding decision).
- f. An arbitrator must encourage and support negotiations during the arbitration and up until registering of the award and encourage parties to assess any proposed settlement agreements with reference to their mutual acceptance, fairness and long-term viability.

7. Ethical conduct and professional relations

- a. An arbitrator must not use information obtained in the arbitration for personal gain or advantage.
- b. An arbitrator must adhere to the ethical code or standards prescribed by the professional organisation or association of which they are a member or by whom they are employed, and to those provided in these *Standards*.
- c. An arbitrator should encourage parties to consider the interests of any vulnerable stakeholders, especially children, when:
 - i. agreeing to enter into arbitration, and
 - ii. when discussing any possible settlement.
- d. An arbitrator should encourage parties to obtain professional support when appropriate but should refrain from recommending the services of a particular individual or firm.
- e. An arbitrator must conduct the process in a respectful, polite and dignified manner.

8. Confidentiality

- a. An arbitrator must respect the confidentiality of the information provided during the arbitration, except:
 - i. with the consent of the participant to whom the confidentiality is owed; or

- ii. when required to do otherwise by law;
 - iii. where permitted to do otherwise by ethical guidelines or obligations;
 - iv. where reasonably considered necessary to prevent an actual or potential threat to human life or safety.
- b. An arbitrator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the arbitration.

9. Knowledge, skills and abilities

An arbitrator must have the knowledge, skills, and abilities in relation to the family law arbitration process. These include:

Knowledge

- the history, purpose and nature of arbitration
- understanding arbitration as an ADR process
- the jurisdictional foundation of arbitration
 - The Act
 - The Regulations
 - The Rules
 - The Arbitration Agreement
- the law relevant to arbitrators and to the arbitration process
- the circumstances in which arbitration may or may not be appropriate
- the principles, stages and functions of the arbitration process
- the roles and functions of the Arbitrator
- the roles and functions of representatives, support persons, and other professionals in arbitration

Skills

- suitability for arbitration
- conducting and managing the arbitration process in a procedurally fair, timely and cost-efficient manner
- communication skills, including listening, questioning and summarising, as required for the conduct of arbitration
- techniques and interventions in facilitating the gathering and evaluation of evidence
- award writing and decision-making skills

Abilities

- competence, integrity and accountability
- professional conduct, including the avoidance of conflicts of interest
- maintaining confidentiality

10. Charging for services

- a. An arbitrator must obtain agreement from the parties about the fees and charges payable for the arbitration, and about how those fees and charges are to be apportioned between the parties.
- b. An arbitrator must not charge fees based on the outcome of the arbitration or calculated in a way that could influence the manner in which the arbitrator conducts the arbitration.
- c. If any fees or charges paid in advance exceed fees or charges payable for the arbitration, the arbitrator must return the excess promptly upon conclusion or termination of the arbitration.

11. Provision of information and promotion of services

- a. An arbitrator must accurately portray their arbitration qualifications and experience.
- b. An arbitrator must not guarantee results or outcomes from the arbitration process or make statements likely to create false expectations about favourable results.
- c. An arbitrator may use de-identified information in any evaluation of their arbitration practice that could assist participants to better understand the arbitration services offered.
- d. An arbitrator accredited under the AIFLAM Arbitrator Accreditation System can use the following descriptor and post-nominal: **AIFLAM Accredited Specialist Arbitrator.**

Part V - The Regulation 67B List and the AIFLAM Accredited Specialist Arbitrators List

1 The Regulation 67B List

The Regulation 67B List is the authoritative list of all arbitrators who have met the *Approval Standards for Arbitrators*. This list enables consumers, advisers and referrers to check whether arbitrators are trained as an Arbitrator, and if so the date of the training.

2 The AIFLAM Accredited Specialist Arbitrators List

The AIFLAM Accredited Specialist Arbitrators List is the authoritative list of all arbitrators who have met the *Approval Standards for AIFLAM Accredited Specialist Arbitrators* and are accredited to practice as accredited specialised Family Law arbitrators. This list enables consumers, advisers and referring agents to check whether arbitrators are AIFLAM accredited, and if so the date of accreditation.

Part VI – AIFLAM’s role

AIFLAM is responsible for the ongoing development, maintenance and review of the AIFLAM Arbitration Standards, the Regulation 67B List and the AIFLAM Accredited Specialist Arbitrator List.

AIFLAM will:

- a. undertake the necessary training and accreditation of Arbitrators;
- b. amend the Arbitration Approval and Practice Standards (*the AIFLAM Arbitration Standards*) as required;
- c. oversee the application of the *AIFLAM Arbitration Standards* with a view to achieving consistency, quality and public protection regarding AIFLAM arbitration services and AIFLAM arbitration qualification and accreditation;
- d. support, complement and encourage AIFLAM members in their efforts to meet their responsibilities in relation to the *AIFLAM Arbitration Standards*;
- e. promote progressive development in the training and accreditation of arbitrators and the quality of arbitration services;
- f. maintain the records that pertain to the Regulation 67B List and the AIFLAM Accredited Specialist Arbitration List i.e. those arbitrators who are trained and accredited under the *AIFLAM Arbitration Standards*;
- g. carry out other functions and activities that are necessary or incidental to the above