

# Bruce W. Thiele

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## SCHEDULE OF ARBITRATION STEPS AND EXPECTATIONS OF THE PARTIES AND THEIR LEGAL REPRESENTATIVES

### THE OVERARCHING GOAL OF THIS SCHEDULE AND EXPECTATIONS

1. The overarching purpose of an arbitration is to ensure the just, safe, efficient and timely resolution of the dispute at a cost to the parties that is reasonable and proportionate in all the circumstances of the case, having regard to the significant impact of family law disputes on children and families.<sup>1</sup>
2. Understanding the purpose of arbitration and properly preparing for an arbitration increases the likelihood of an enforceable award being registered with a court. The following steps and expectations of each party and from me as arbitrator are therefore designed to achieve these goals.

### A SAFE PROCESS ENVIRONMENT

3. I am to be informed immediately as to the existence of any protection order concerning a party to the arbitration or of any allegation in the dispute of domestic or family violence.
4. I am to be informed immediately of any specific requirement for separate arrival of parties to the arbitration. A direction by me as to the time and manner of arrival of a party to the arbitration must be strictly adhered to. In the event a party cannot arrive at a directed time they will contact me by mobile telephone and await further instruction from me.

### THE ARBITRATION PROCESS

#### Preliminary Arbitration Conference

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<sup>1</sup> See Core Principal 2 - Joint Practice Direction 1 of 2020 - Core Principles in the Case Management of Family Law Matters

5. Within one to two weeks of the parties agreeing to the terms of the retainer email, the I will convene a Preliminary Arbitration Conference between the legal representatives for the parties.
6. The purpose of the Preliminary Arbitration Conference is to design the arbitration process and to reach agreement upon those matters forming Schedule A to the Arbitration Agreement. [A checklist of matters to consider is provided here.](#)
7. The Preliminary Arbitration Conference may be conducted with the lawyers and the clients together or separately as directed by me.
8. A party may have their legal representative present for the Preliminary Arbitration Conference but this is not required.
9. I expect the legal representatives to assist with the facilitation of the Preliminary Arbitration Conference and the development of the arbitration adopting a sensible and pragmatic approach proportionate to the issues that are genuinely in dispute.

#### Steps to be Undertaken Before and After the Preliminary Arbitration Conference

##### *Disclosure, Joint Experts and Narrowing of Issues*

10. Family law disputes are often complex involving consideration of many facts, matters or circumstances some of which may be very important whilst others may be of less importance.
11. Parties and their lawyers are expected to take a sensible and pragmatic approach to this arbitration process, and to incur costs only as are fair, reasonable and proportionate to the issues that are genuinely in dispute. Parties and their lawyers are expected to engage in cost budgeting, and regularly inform their clients and the arbitrator of the actual costs they have incurred and are likely to incur<sup>2</sup> (see also Part 19.2 of the Family Law Rules 2004).
12. Where this arbitration is as a result of a Court order, the parties are to provide me with a copy of same, particularly any order that directs parties to provide disclosure or to reach agreement about issues or retain experts to provide opinions upon issues (Court Directions).
13. It is expected that the parties and their legal practitioners will comply with such Court Directions and within such time frame to have permitted all parties to have satisfactory time to have considered any document produced or opinion provided.
14. In the absence of specific Court Directions, the parties should comply with their obligations of full and frank disclosure as required by the Federal Circuit Court Rules 24.03-5 and shall have agreed upon matters to be disclosed and documents to be produced as part of the Preliminary Arbitration Conference.
15. In seeking agreement about disclosure and experts the parties will ensure that any request they make about such a matter is;

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<sup>2</sup> See Core Principal 7 - Joint Practice Direction 1 of 2020 - Core Principles in the Case Management of Family Law Matters

- a. only made to ensure the just, safe, efficient and timely resolution of matters at a cost to the parties that is reasonable and proportionate in all the circumstances of the case; and
  - b. where regard is had to the significant impact of family law disputes on children and families; and
  - c. is narrowed to those issues genuinely in dispute and only to genuinely and justifiably assist that party in the negotiation and resolution of the dispute.
16. It is expected that parties will negotiate prior to the Preliminary Arbitration Conference date in order to narrow the issues in dispute.
17. It is an expectation of all parties that any single/joint expert or an assessor should be engaged sufficiently in advance of the arbitration date to assist the parties and the arbitrator to resolve disputes and that the parties will comply with all reasonable requests of such expert or assessor.
18. Save where a Court Direction specifically provides to the contrary, all disclosure, production and joint expert documents should be completed and exchanged no less than 14 days after the date of the Arbitration Agreement.

*Arbitrator Intervention Where Parties Fail to Comply or Agree*

19. The Arbitration Agreement enables me to reasonably direct the parties in the conduct of the Arbitration including at;
- a. Paragraph 21 to make any direction, interim award or reasonable request and to conduct the arbitration in the manner as provided in Schedule B; and
  - b. Paragraph 22 determine the material to be provided to me; and
  - c. Paragraph 24, suspend, refer the dispute to court or terminate the arbitration; and
  - d. Schedule B para 5 exercise a range of powers including adjournment, suspend the dispute for the purpose of mediation, continue on an undefended basis and make costs awards at any stage.

*Joint Brief and Exchange of Outline, Proposed Order and Position*

20. The Arbitration Agreement provides that;
- a. Unilateral communications with the Arbitrator are to be avoided and may be deleted and ignored by the arbitrator save for the provision of documents specifically contemplated in Schedule A;
  - b. Any joint brief/exhibit bundle is to be prepared for the Arbitrator and sent **10 business days** prior to the arbitration date or as provided for in Schedule A;

- c. Parties are to exchange a brief outline of the agreed and disputed facts, matters and circumstances (all disputes), contended for assets, liabilities and position table (property matters), income, expense and contention table (maintenance matters) **5 business days** prior to the arbitration date or as provided for in Schedule A ; and
- d. Parties are to exchange in PDF and Word format) a position statement, the proposed outcome and a short outline of the contentions that support such outcome, a complete draft proposed final award, **48 hours** prior to the arbitration date or as provided for in Schedule A .

## EXPECTATIONS AT ALL TIMES

### 21. Expectations of Parties and Their Lawyer

- a. To allow the arbitrator to conduct the arbitration process and to provide support to the arbitrator where appropriate
- b. To participate fully, genuinely and directly in the arbitration process
- c. To make a genuine attempt to resolve their dispute at appropriate intervals prior to the arbitration and when invited to do so by the arbitrator
- d. To perform agreed arbitration steps punctually
- e. To ensure that sufficient time is allotted for the arbitration process to take more than 7 hours
- f. To reflect at all relevant times that arbitration is a form of dispute resolution where the purpose of arbitration is not to win but to resolve the dispute
- g. To at all times during the arbitration process behave in a respectful, courteous and professional manner and to that end avoid combative, derogatory, demeaning, generalised and/or unsubstantiated accusatory communications

### Expectations of Lawyers<sup>3</sup>

#### 22. In advising and attending upon the arbitration process;

- a. Have explained the terms of the Letter of Engagement, Arbitration Agreement, Costs Disclosure Notice and this Schedule;
- b. Have had the client signed the Arbitration Agreement;
- c. Ensured that the client's share of any expected fee is retained irrevocably in a solicitor's trust account;

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<sup>3</sup> These expectations are drawn from the checklists provided by Lexon Insurance as at May 2018 and are otherwise considered to be best practice when representing the parties in the arbitration process

- d. Have explained that the purpose of arbitration is not to win but to resolve disputes, provide a party with a degree of control over the process and outcomes and to save significant time, cost, risk and stress to the party;
- e. During the arbitration;
  - i. Assist the parties communicate punctually, accurately and comprehensively;
  - ii. Negotiate constructively, productively, proportionately and pragmatically;
- f. Attend upon those matters or things in the Arbitration Agreement punctually.
- g. Obtain complete instructions from a party concerning the subject matter of the dispute
- h. Provide a party with a preliminary written assessment of their position upon the dispute
- i. Provide realistic alternative predictions about likely outcomes in the arbitration or other non-arbitration processes and their relative advantage or disadvantages including a BATNA / WATNA, costs to achieve an outcome through court, possibility of costs orders, time delay to trial, lost opportunity pending trial risk of appeal
- j. Obtain instructions from a party concerning
  - i. Best outcome offer
  - ii. Target offer
  - iii. Bottom line offer
- k. Advise the client that despite your preliminary advices, and the clients instructed Bottom line offer, that their personal and commercial interests may require them to consider a lesser offer
- l. Prepare a detailed final agreement or proposed order **well in advance** of any Final Arbitration and **have had the client read and understand such draft**
- m. Attend to all of those matters or things specified in the Lexon Insurance “Consent Orders – Family Law” and “Financial Agreements – Family Law” checklists
- n. Assist in the drafting of complete and final draft awards and the formalisation of the arbitration in an appropriate manner.

As at 20 February 2020

Bruce W. Thiele LLB

Barrister-at-Law

Nationally Accredited Mediator

Family Dispute Resolution Practitioner

Member of the Australian Institute of Family Law Arbitrators and Mediators

**Notice: Liability limited by a scheme approved under Professional Standards Legislation.**