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No. 124 2003–04

Family Law Amendment Bill 2004

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Bills Digest
No. 124 2003–04

Family Law Amendment Bill 2004

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Law and Bills Digest Section
22 April 2004

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Family Law Amendment Bill 2004

Date Introduced: 1 April 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions commence on the day when the proposed Act receives Royal Assent. Schedule 1 commences 28 days after the Act receives Royal Assent.

Purpose

The Bill seeks to amend the *Family Law Act 1975* ('the Act') for several purposes. Among other purposes, it amends existing provisions dealing with appeals, vexatious litigants, offers of settlement and transfer of matters from State courts. It also simplifies the language of the Act (for example, by replacing reference to 'dissolution of marriage' with 'divorce'), and gives effect to some of the recommendations contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002).¹

Background

The most significant amendment made by the Bill is to give effect to some of the recommendations contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002). According to the Attorney-General's website, the taskforce was formed 'by the [then] Attorney-General and the then Assistant Treasurer in March 2001 to consider the activities of some barristers who have repeatedly used bankruptcy as a means of avoiding payment of tax'.² The recommendations relate to the rights and standing of third-party creditors in family law proceedings and are contained in **items 20–22 and 143–147 of Schedule 1** to the Bill. The recommendations are of general application; they are not restricted to the activities of barristers.

Specifically, Recommendation 7 provided:

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It is recommended that s.106B of the Family Law Act be widened to allow third parties to apply to the court for an order or injunction preventing the disposition of property pending an application to set aside or overturn a s.79 order.

Paragraph (b) of Recommendation 8 provided:

(b) the Family Law Act be amended to include provision for notice to be provided to affected third parties in matters involving property orders.

Recommendation 10 was as follows:

It is recommended that there be a separation declaration for financial agreements generally not only for superannuation agreements, to ensure that financial agreements are not entered into by couples for the purposes of avoiding creditors.

While the Attorney-General stated that '[some] of the provisions in this Bill relate to matters raised by the House of Representatives Standing Committee on Family and Community Affairs in its *Every Picture tells a Story* report', the Bill does not implement the recommendations of that Committee.³ It can be said that the Bill does give effect to some of the themes raised by the Committee, in terms of simplifying language and providing litigants (particularly self-represented litigants) with greater access to justice. For example, the Bill extends the types of matters where arbitration is permitted under the Act (see **items 15–18**) and permits State courts of summary jurisdiction to transfer family law proceedings to the Federal Magistrates Court (as well as the Family Court of Australia and the Supreme Court of a State or Territory) (see **items 28–35**). It also extends the types of applications concerning the conduct of an appeal which may be heard by a single judge of the Appeal Division (see **item 24**) and deals more comprehensively with vexatious litigants than the present Act (see **item 137**).

Main Provisions

The Bill is organised by subject matter. There are therefore 19 parts to Schedule 1 to the Bill. Some provisions of the Act are dealt with in one or more of those parts to the Bill. For example, section 106B of the Act (which deals with transactions to defeat claims) is dealt with in Part 7 of the Bill (Definitions of disposition) and Part 19 (Interaction of family law and bankruptcy law).

Part 1—Parenting compliance regime

Part 1 (items 1-4) deals with contravention of parenting orders. **Item 1** amends section 65F of the Act to provide that the general power of the court to require parties to attend counselling before a parenting order is made extends to proceedings for the enforcement of a parenting order and proceedings where contravention of a parenting

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order is alleged. **Item 2** amends section 65LA to provide that the power of the court (in proceedings for a parenting order) to require parties to attend a post-separation parenting program extends to proceedings for the enforcement of a parenting order and proceedings where contravention of a parenting order is alleged.

Item 3 inserts **proposed Subdivision AA** of Division 13A of Part VII of the Act. Part VII deals with children. Division 13A sets out the consequences of failure to comply with orders and other obligations that affect children. **Proposed Subdivision AA** deals with the court's powers where contravention without reasonable excuse is not established. It comprises one provision: **proposed section 70NEB**. Where, in proceedings alleging contravention of a parenting order, either the court is not satisfied that contravention occurred or the court is satisfied that contravention occurred but the respondent had a reasonable excuse, **proposed subsection 70NEB** provides that the court may vary the parenting order. This seems to be a sensible provision, which may have the effect of providing the court with the opportunity of clarifying or varying an earlier, possible vague or unworkable, order. It may also eliminate the opportunity for further contraventions and court proceedings.

Notably, by **item 4**, the amendments made by **Part 1** have retrospective application. In other contexts, retrospectivity tends to be seen as an infringement on rights. Here, however, the reason for retrospectivity is to extend the application of **proposed section 70NEB** to existing parenting orders, and thus to extend the benefits conferred by the provision (by permitting a judge to vary an order rather than simply dismissing the application for alleged contravention of a court order).

Part 2—Costs and offers of settlement

Item 5 amends subsection 117(2A) which sets out the matters relevant to the making of a costs order. **Item 5** removes the phrase 'in accordance with section 117C or otherwise' from paragraph 117(2A)(f), but the meaning of the paragraph seems to be unchanged. The Explanatory Memorandum states that 'there is no longer a requirement for [judges] to consider whether the parties have made an offer of settlement in accordance with section 117C'.⁴ However, the words 'or otherwise' in the current provision already mean that judges do not have to consider whether any offer of settlement is in accordance with section 117C.

Item 6 amends section 117C, which deals with offers of settlement. It repeals the whole section and replaces it with a similar provision written in clearer language. It removes reference to the filing of notice of offers of settlement and notices of withdrawal of offers of settlement. Such matters are now contained in Chapter 10 of the *Family Law Rules 2004*, which came into effect on 29 March 2004. Chapter 10 is entitled 'Ending a case without a trial'.

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Part 3—Suspension of sentences of imprisonment

Items 8 and 9 amend sections 70NO and 112AE to provide that where a person breaches a court order without reasonable excuse and the court sentences the person to imprisonment, the court may suspend the sentence ‘upon the terms and conditions determined by the court’ and also terminate a suspension. Section 70NO deals with sentences of imprisonment where a person fails to comply with a parenting order or a compliance regime. Section 112AE is the general section dealing with sentences of imprisonment for failure to comply with court orders. The amendments seem to complement existing sentencing provisions (such as good behaviour bonds). They also seem to reduce the need for appeals or the bringing of further court proceedings (if, for example, the person complies with the order or obligation during the period of imprisonment).

Part 4—Enforcement (removal of information procedure)

Items 10 and 11 amend section 70NN, which deals with the procedure for enforcing community service orders or bonds which have been made where a person has failed to comply with a parenting order. The amendments remove the need for an information alleging contravention to be laid before a magistrate and the need to issue a summons for the ‘defendant’ to attend court or to issue a warrant for the person’s arrest. While the amendments simplify the procedure, it is not clear how the defendant becomes aware of the court proceedings (assuming the person is not arrested and brought before the court) and/or whether the enforcement proceedings can occur in the person’s absence (which raises issues of natural justice, particularly the right to be heard). Such matters are currently covered in subsections 70NN(2)–(7) and (10) but are the subject of repeal by **items 10 and 11**. The Explanatory Memorandum offers no assistance on this point.

Items 12 and 13 make similar amendments to section 112AH, which is the general provision relating to failure to comply with a sentence or order made under section 112AD. Section 112AD provides for sanctions for failure to comply with orders.

Part 5—Private arbitration

Item 15 inserts a definition of ‘Part VIIIA proceedings’ into section 4, which is the interpretation section of the Act. Part VIIIA deals with financial agreements. The term ‘Part VIIIA proceedings’ is therefore defined as ‘proceedings in relation to a financial agreement’.

Item 16 inserts a definition of ‘Part VIIIB proceedings’ into section 4. Part VIIIB deals with superannuation interests.

(Note that the Explanatory Memorandum has erroneously reversed the commentary for **items 15 and 16**.)⁵

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Item 17 inserts a definition of ‘section 106A proceedings’ in section 4. Section 106A deals with the execution of deeds or instruments to assist in the enforcement of court orders. Such instruments include those required to transfer real estate.

Currently section 19E provides that only Part VIII proceedings are amenable to private arbitration. Part VIII deals with property, spousal maintenance and maintenance agreements. **Item 18** amends section 19E to provide that Part VIII proceedings, Part VIIIA proceedings, Part VIIB proceedings or section 106A proceedings are all amendable to private arbitration. Section 19D provides that the court may only order arbitration with the consent of all parties to the proceedings. Arbitration may be cheaper and less formal than court proceedings (for example, if the parties agree, the rules of evidence do not apply). It may prevent the need for a final court hearing (trial) and/or reduce delays in the resolution of the dispute. It may therefore also reduce costs.

Part 6—Change of venue

Item 19 inserts **proposed section 27A** into the Act. It empowers the court or a judge to change the venue for the conduct of proceedings. Historically, Order 27 of the *Family Law Rules 1984* dealt with applications for change of venue and the matters which the court should consider in determining any application. The provisions of former Order 27 were more detailed than **proposed section 27A**. The current (2004) Rules make no reference to change of venue.

Part 7—Definition of disposition

As noted in the **Background** section to this Digest, **Part 7** (being **items 20–22**) incorporates one of the recommendations in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002). **Item 20** amends subsection 106B(5) to replace the current definition of ‘disposition’ (which is currently defined to include ‘a sale and a gift’) with a more expansive definition which includes reference to the ‘issue, grant, creation, transfer or cancellation of ... an interest in a company or a trust’. **Item 21** inserts a comprehensive definition of ‘interest’ into subsection 106B(5). It is defined to include shares or debentures in a company; options over shares or debentures; a beneficial interest in a trust; and any interest in a trust that is ‘conditional, contingent or deferred’.

Part 8—Appeals

As mentioned earlier, **Part 8** amends the Act to extend the situations where a single judge can hear an application of a procedural nature in an appeal. Such applications will include (for example) an application to extend time in which to file an application for leave to appeal, and an application to vacate the hearing date of an appeal. **Items 23 and 24** amend section 94, which deals with appeals to the Family Court from courts other than the

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Federal Magistrates Court (but including appeals from a decision of a single judge of the Family Court). **Items 25 and 26** amend section 94AAA, which deals with appeals to the Family Court from the Federal Magistrates Court. **Item 27** inserts **proposed section 94AAB**, which provides for the hearing of appeals under section 94 or 94AAA, or applications under section 94AA for leave to appeal, without an oral hearing if all parties consent to the appeal or application being dealt with in that way. These provisions seem to reduce the need for court hearings and attendance at court, and thereby to reduce costs to the parties.

Part 9—Transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court

As mentioned earlier, **Part 9** (being **items 28–35**) amends section 46 to provide for the transfer of property proceedings from a State court of summary jurisdiction to the Federal Magistrates Court (in addition to the Family Court and the State Supreme Courts). It also amends section 69N to provide for the transfer of proceedings for a parenting order. The amendments may have the effect of reducing delay in having a matter heard (by removing the need for the State court to transfer the proceedings to the Family Court, which could then transfer it to the Federal Magistrates Court). The amendments may therefore also reduce costs (but it may depend on the type of case and the particular facts of the case).

Part 10—Terminology

As mentioned earlier, **Part 10** amends various provisions in the Act (particularly sections 4, 48, 55 and 55A) to replace references to ‘dissolution of marriage’ with the shorter, and perhaps better known, expression ‘divorce’. It also replaces the term ‘decree nisi’ (meaning an order which does not take effect until the happening of a specified event) with the more common term ‘order’.

Part 11—Leave to appeal

Item 130 amends section 94AA to provide a comprehensive table of the requirements for leave to appeal (particularly whether the Full Court of the Family Court or a single judge of the Family Court determines the application for leave to appeal). The amendment does not alter the requirements currently set out in subsections 94AA(1)–(2C), but provides the same information in tabular form, which may be more readily understood.

Part 12—Power to dismiss appeal

Item 132 inserts **proposed section 96AA** to empower a court hearing an appeal to order the stay or dismissal of the appeal if the notice of appeal does not disclose proper grounds of appeal ‘(whether generally, or in relation to a particular ground of appeal)’.

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According to the Explanatory Memorandum, **item 132** ‘complements amendments sought to be made under Part 15 of this Bill in relation to the commencement and continuation of vexatious proceedings’.⁶ However, the amendment seems also to be directed at non-vexatious litigants (and their legal representatives) by requiring that grounds of appeal be drafted clearly and concisely; with particularity and precision; and with an eye to long-established appellate principles and the law.⁷ Seen in this light, the effect of the amendment may be to reduce court hearing and preparation time, and thereby costs, not only for litigants but for the court too. If a notice of appeal discloses proper grounds of appeal, the respondent is in a better position to know what arguments will be raised and the case he or she has to meet. Further, the court is in a better position to assess whether the evidence presented by the parties (including matters contained in the transcript of the trial at first instance) establishes the ground or grounds of appeal.

Item 133 provides that the amendments made by Part 12 have retrospective operation insofar as they apply to appeals that have already been initiated.

Part 13—Appeals to High Court

Item 134 amends section 95 of the Act to provide that an appeal only lies to the High Court from the Full Court of the Family Court with special leave of the High Court. Currently section 95 provides that an appeal also lies to the High Court ‘upon a certificate of a Full Court of the Family Court that an important question of law or public interest is involved’. According to the second reading speech, the amendment is made in response to a recommendation by the Australian Law Reform Commission with the agreement of the High Court and the Family Court.⁸ In practice, the Full Court rarely issued a certificate under the existing provision. Among other things, one reason for this fact is the view that it for the High Court to determine what matters it will hear, rather than the Full Court of the Family Court usurping that role and determining that an important question of law or public interest is involved. **Item 135** provides that **item 134** applies retrospectively.

Part 14—Recovery of amounts paid under maintenance orders

Item 136 inserts **proposed Subdivision G** of Division 7 of Part VII. Division 7 deals with child maintenance orders. **Proposed Subdivision G** deals with the recovery of amounts paid under maintenance orders. **Proposed section 66X** provides that where a court has made an order that a person pay maintenance, and the person has paid that maintenance, but the court later determines that the person is not a parent or step-parent of the child (and therefore not a person whom the court can order to pay maintenance), the amount paid may be recovered in a court having jurisdiction under Part VII of the Act (which deals with children). There is a similar provision for the recovery of child support in the *Child Support (Assessment) Act 1989*. The amendment enables the person to recover the amount in the Family Court, Federal Magistrates Court or State court of summary jurisdiction, instead of taking debt recovery action under State laws.

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Part 15—Frivolous or vexatious proceedings

Item 137 replaces section 118 with a revised, more detailed, **proposed section 118**. Section 118 deals with frivolous or vexatious proceedings. **Proposed subsection 118(1)** includes reference to proceedings which may be an abuse of process, as well as proceedings which are frivolous or vexatious. **Proposed subsection 118(2)** provides that if a court is satisfied that a person has ‘instituted or conducted vexatious proceedings frequently’, a court may restrain the person from filing further proceedings without leave of the court. The term ‘frequently’ is not defined. **Proposed subsection 118(3)** provides that the court must give a person ‘reasonable notice of, and a reasonable opportunity to make submissions’ in relation to the proposed exercise of the power under subsection 118(2). **Proposed subsection 118(4)** provides that the court may exercise its powers under subsection 118(1) or (2) on its own motion or on application by a party or a specified senior court official. **Proposed subsection 118(5)** sets out the matters to which a court may have regard in determining if proceedings are vexatious. **Proposed subsection 118(6)** provides that the court may discharge or vary an order under subsection 118(2). There is no equivalent to **proposed subsections 118(3)–(5)** in the current provision, but the amendments seem to add useful guidance and requirements to the process.

Part 16—Rules as to costs

Items 138 and 139 amend section 117 to insert reference to **proposed subsection 117(1A)**, which provides that the Rules may provide ‘in the circumstances specified in the Rules’ that a party to proceedings under the Act must bear the costs of another party to those proceedings unless the court otherwise orders. This amendment departs from the general rule that each party bears his or her own costs in proceedings under the Act (see subsection 117(1)—although it should be noted that there are already some exceptions to this general rule in subsection 117(2)).

Part 17—Civil penalties for contravention of Rules

Item 140 amends section 123, which provides that the judges (or a majority of them) may make Rules of Court which are not inconsistent with the Act. **Item 140** inserts **proposed paragraph 123(1)(ta)** to provide that the judges may make Rules ‘providing for civil penalties for failures to comply with the standard Rules of Court’. Any such Rules would be subject to disallowance by Parliament.

Part 18—Powers of judicial registrars

Part 18 (being **item 142**) extends the powers of judicial registrars to include the power (in **proposed section 70NEB**) to vary an order in contravention proceedings where contravention without reasonable excuse is not proved (see **item 3** above).

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Part 19—Interaction of family law and bankruptcy law

As mentioned in the **Background** section to this Digest, **Part 19** gives effect to at least two recommendations contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax (2002). **Part 19** entitles a third party creditor to become a party to proceedings ‘if the creditor may not be able to recover his or her debt’ if the order for property settlement were made (**proposed subsection 79(10)**). It also entitles any other person ‘whose interests would be affected by the making of the order’ to become a party to proceedings for an order for property settlement (also **proposed subsection 79(10)**). It also provides that a third party creditor who may not be able to recover his or her debt because an order for property settlement was made under section 79 may become a party to proceedings under section 79A to set aside the property settlement order.

It inserts **proposed section 79F** to provide that the Rules of Court may make provision for a person applying for an order under Part VIII of the Act to give notice of the application to third-party creditors (**item 145**). It also inserts **proposed section 90DA** to provide for the need for a separation declaration to be made in order for certain provisions of a financial agreement to take effect (**item 146**). **Proposed subsection 90DA(3)** provides that the declaration must be signed by at least one of the parties to the financial agreement. **Proposed subsection 90DA(4)** provides that the declaration must state that the parties have separated and are living separately and apart at the time of the declaration, and that in the opinion of the party making the declaration, ‘there is no reasonable likelihood of cohabitation being resumed’.

Finally, **Part 19** amends section 106B to permit a third-party creditor or a person whose interest would be affected by the making of a disposition, to apply to the court to restrain the making of (or to set aside) an instrument or disposition made to defeat claims under the Act (**item 147**).

While the amendments in **Part 19** may also have other purposes, they seem to be directed to protecting the rights of third party creditors by preventing debtors (who are otherwise in ongoing marriages) from transferring assets to their spouses by way of sham transactions designed to defeat the interests of genuine creditors.

Concluding Comments

The Bill amends various provisions in the Act, either to insert new provisions where there have been gaps or to clarify or improve existing provisions. The most substantial amendments relate to the interrelationship between bankruptcy and family law; vexatious litigants and appeals. None of the amendments seems controversial.

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Endnotes

- 1 The report is available electronically at:
[http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/\\$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf](http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/1A2C7BFEEC7AB954CA256D1900822B9D/$file/2FINAL%20REPORT%2002.02%20FOIXXX.pdf).
- 2 <http://www.ag.gov.au/www/legalservicesHome.nsf/Alldocs/0746790ADC20FB5ECA256C770004A5E4?OpenDocument&highlight=use%20of%20bankruptcy>.
- 3 Philip Ruddock MP, Attorney-General, 'Second reading speech: Family Law Amendment Bill 2004', House of Representatives, *Debates*, 1 April 2004, p. 26 644. The report by the House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation* is available electronically at:
<http://www.aph.gov.au/house/committee/fca/childcustody/report/fullreport.pdf>.
- 4 Explanatory Memorandum to the Family Law Amendment Bill 2004, p. 5.
- 5 Explanatory Memorandum to the Family Law Amendment Bill 2004, pp. 6–7.
- 6 Explanatory Memorandum to the Family Law Amendment Bill 2004, p. 23.
- 7 For a discussion of appellate principles, see, for example, the decision of the High Court of Australia in *House v The King* (1936) 55 CLR 499 at 504-505, available electronically at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/55clr499.html?query=title+%28+%22house+v+the+king%22+%29>.
- 8 Philip Ruddock, Attorney-General, 'Second reading speech: Family Law Amendment Bill 2004', House of Representatives, *Debates*, 1 April 2004, p. 26 645. See also Australian Law Reform Commission, *Report 92: The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Chapter 19: Appellate Jurisdiction of the High Court at paragraphs 19.30–19.54. The report is available electronically at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/92/ch19.html#Heading9>.

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