

# FAMILY COURT AMENDMENT BILL 2022

## EXPLANATORY MEMORANDUM

### OUTLINE

The Family Court Amendment Bill 2022 amends the *Family Court Act 1997 (WA)* to facilitate the exercise of federal jurisdiction in respect of the superannuation interests of separating de facto couples in family law proceedings in Western Australia.

The Bill also facilitates the exercise by the Family Court of Western Australia of federal bankruptcy jurisdiction to hear bankruptcy proceedings concurrently with family law proceedings, where appropriate<sup>1</sup>.

### Superannuation splitting

In 2001 the Commonwealth Parliament amended the *Family Law Act 1975 (Cth)* to allow for the superannuation interests of married parties to proceedings before the Family Court of Australia to be treated as property for distribution. The amendment was restricted to parties to the breakdown of a marriage. The WA Parliament endeavoured to secure that jurisdiction for separating de facto couples in WA by the passage of the *Commonwealth Powers (De Facto Relationships) Act 2006 (WA) (2006 Act)*.

By the 2006 Act the WA Parliament provided for a limited referral of State legislative power to the Commonwealth Parliament confined to the distribution of superannuation entitlements between separating de facto couples in Western Australia. All other de facto matters remain within the state jurisdiction of the Family Court of Western Australia. The Western Australian Parliament referred legislative power to ensure that separating de facto couples in Western Australia under the jurisdiction of the *Family Court Act 1997 (WA)* were not disadvantaged in comparison with married couples under the jurisdiction of the *Family Law Act 1975 (Cth)*.

The referral of legislative power was not accepted by the Commonwealth Parliament, at that time, on the basis that the referral was too narrow.

In 2008, following the referral of State legislative power by all States relating to all aspects of de facto relationships to the Commonwealth, the Commonwealth passed the *De Facto Financial Matters and Other Measures Act 2008 (Cth)* to give effect to the referrals of power. This Act enabled the Family Court of Australia to deal with the superannuation interests of separating de facto couples (other than in Western Australia).

The expectation of the Commonwealth Government was that WA would follow suit with a full subject referral and, until October 2018, refused to accept the WA narrow referral of legislative power.

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<sup>1</sup> Revised Explanatory Memorandum (2019-2020) for the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2020 (Cth) tabled in the Senate of the Parliament of Australia on 11 November 2020 (**Revised EM**), paragraph 2.

That federal jurisdiction to deal with the superannuation interests of separating de facto couples was vested in the Family Court of WA by passage of the *Family Court Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* (Cth) (**Commonwealth Act**). The Commonwealth Act gives effect to the Parliament of Western Australia's referral of legislative power set out in the *Commonwealth Powers (De Facto Relationships) Act 2006* (WA).

The result is that, unlike other States and Territories where all de facto matters come under federal jurisdiction, in WA, other than superannuation splitting and bankruptcy, all other matters concerning separating de facto couples will be adjudicated under State law according to the provisions of the *Family Court Act 1997* (WA).

The Commonwealth Act firstly, inserts a new Part VIII C in the *Family Law Act 1975* (Cth) which deals exclusively with separating de facto couples in WA.

The new Part VIII C provides for the distribution of superannuation entitlements between separating de facto couples before the Family Court of Western Australia and allows for superannuation matters under the *Family Law Act 1975* (Cth) to be heard concurrently with other matters under the property provisions of the *Family Court Act 1997* (WA).

### **Bankruptcy jurisdiction**

As outlined above, in 2008, following the referral of State legislative power by all States relating to all aspects of de facto relationships to the Commonwealth, the Commonwealth passed the *De Facto Financial Matters and Other Measures Act 2008* (Cth) to give effect to the referrals of power. This Act enabled the Family Court of Australia to exercise concurrent bankruptcy jurisdiction in respect of de facto couples but expressly excluded the Family Court of Western Australia from exercising bankruptcy jurisdiction in respect of a de facto financial cause.

The Commonwealth Act also amends the *Bankruptcy Act 1966* (Cth) to enable bankruptcy matters related to de facto couples to be heard now by the Family Court of Western Australia in conjunction with family law proceedings.

The Commonwealth Act confers jurisdiction in bankruptcy on the Family Court of Western Australia in two circumstances:

- (a) where a party to a marriage or de facto relationship is bankrupt and the trustee of the bankrupt's estate is a party or an applicant in relation to property settlement or spousal maintenance proceedings under the *Family Law Act 1975* (Cth) or the *Family Court Act 1997* (WA); or
- (b) when proceedings which are before the Federal Court or the Federal Circuit Court are transferred to the Family Court of Western Australia.<sup>2</sup>

The Commonwealth Act also provides that appeals in relation to concurrent family law and bankruptcy proceedings for Western Australian de facto couples will mirror existing appeal pathways for married and de facto couples in other jurisdictions.<sup>3</sup>

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<sup>2</sup> Revised EM, paragraph 16.

<sup>3</sup> Revised EM, paragraph 18.

This *Family Court Amendment Bill 2022* will facilitate the exercise of jurisdiction in bankruptcy by the Family Court of Western Australia as conferred by the Commonwealth Act. The Family Court of Western Australia will be able to determine family law and bankruptcy matters together for parties to a de facto relationship<sup>4</sup>. Presently, where bankruptcy is an issue, these proceedings must be held in the Federal Court of Australia or the Federal Circuit Court.

The Family Court Amendment Bill 2022 substantially replicates the unproclaimed provisions of Part 4 of the *Family Legislation Amendment Act 2006 (WA)* which were introduced to facilitate the exercise of bankruptcy jurisdiction in respect of separating de facto couples in Western Australia. As the Commonwealth Parliament did not extend the jurisdiction in bankruptcy of the Family Court of Western Australia at that time, the provisions were not proclaimed. Those unproclaimed provisions are substantially replicated in the Family Court Amendment Bill 2022 and deleted from the 2006 Act.

## **NOTES ON CLAUSES**

### **Part 1 – Preliminary**

#### **Clause 1: Short title**

This clause provides that, when enacted, the Bill is to be known as the *Family Court Amendment Bill 2022 (WA)*.

#### **Clause 2: Commencement**

This clause provides that the proposed Act is to come into operation as follows:

- (a) Part 1, comprising of the short title and commencement provisions, commences on the day the Act receives the Royal Assent;
- (b) Part 4 Divisions 1 and 2, which relate to consequential amendments to the *Duties Act 2008 (WA)*, commence the day after the Act receives the Royal Assent; and
- (c) the remainder of the Act commences on a day fixed by proclamation and different days may be fixed for different provisions. The date will accord with the commencement of the *Family Court Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020 (Cth)*.

#### **Clause 3: Act amended**

This clause provides that Part 2 of the *Family Court Amendment Bill 2022 (WA)*, once enacted, is to amend the *Family Court Act 1997 (WA)*.

#### **Clause 4: Section 5 amended**

This clause inserts new definitions required to facilitate the exercise of federal jurisdiction relating to superannuation splitting and bankruptcy. They replicate the corresponding definitions of those terms given in section 4 of the *Family Law Act 1975 (Cth)*.

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<sup>4</sup> Revised EM, paragraph 15.

In respect of the definition of 'bankrupt', it states that the term has the same meaning as in the *Family Law Act 1975 (Cth)*, which relies on the common law definition of bankrupt together with an expanded inclusive definition at section 4(6) of the *Family Law Act 1997 (Cth)*, which provides as follows:

A reference in this Act to a person, being a party to a marriage or a party to a de facto relationship, who is bankrupt includes a reference to a person:

- (a) who has been discharged from bankruptcy; and
- (b) whose property remains vested in the bankruptcy trustee under the *Bankruptcy Act 1966*.

The remaining terms defined are:

***Bankruptcy Act*** means the *Bankruptcy Act 1966 (Cth)*.

***bankruptcy trustee*** in relation to a bankrupt, means the trustee of a bankrupt's estate.

***debtor subject to a personal insolvency agreement*** is defined in new section 7B (refer below).

***personal insolvency agreement*** has the meaning given in the *Bankruptcy Act* section 5(1), which is an agreement executed under Part X of the *Bankruptcy Act* that meets the requirements set out in section 188A of the *Bankruptcy Act*.

***property*** - this definition was inserted as part of the amendments about the interaction between family law and bankruptcy law and, in respect to de facto couples, means property to which one or both are entitled either in possession or reversion.

***property settlement proceedings*** is defined to mean proceedings with respect to the property of de facto partners, or either of them, or the vested bankruptcy property in relation to a bankrupt de facto partner.

***trustee*** is defined, in relation to a personal insolvency agreement complying with Part X of the *Bankruptcy Act*, to mean the trustee of that agreement.

***vested bankruptcy property*** is defined to mean any property (as that term is defined in the *Bankruptcy Act*) of the bankrupt that has vested in the bankruptcy trustee under the *Bankruptcy Act*. The *Bankruptcy Act* defines "property" as: "*real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property*".

#### **Clause 5: Section 7B inserted**

This clause inserts a provision to define the term ***debtor subject to a personal solvency agreement***. Proposed section 7B provides that for the purposes of the Act a ***debtor subject to a personal solvency agreement*** means a debtor (within the meaning of Part X of the *Bankruptcy Act*) who has executed a personal solvency agreement and the agreement has not come to an end (as defined in s 5(1) of the *Bankruptcy Act*).

### **Clause 6: Section 36 amended**

Section 36 describes the non-federal jurisdiction of the Family Court.

Clause 6 amends section 36 to recognise that the Family Court of Western Australia will now also has jurisdiction under Part 5A of the *Family Court Act 1997 (WA)* to hear and decide applications for orders under the *Family Court Act 1997 (WA)* with respect to vested bankruptcy property of de facto couples.

### **Clause 7: Section 45 amended**

Existing section 45 of the *Family Court Act 1997 (WA)* empowers a court to dismiss or stay proceedings when it appears to the court that there are “related proceedings” pending in another court.

Clause 7 inserts a new subsection (2) which extends the court's power to stay or dismiss proceedings where a bankruptcy trustee applies for an order under section 139A of the Bankruptcy Act, being orders to secure property of an entity controlled by the bankrupt or from which the bankrupt derived benefit which the trustee claims is properly divisible amongst creditors. Proceedings relating to that application are taken to be related proceedings.

### **Clause 8: Section 205T amended**

Clause 8 amends section 205T to delete the definition of “property”. The definition has been moved to section 5 and amended slightly to refer to partners and partner instead of parties and party.

### **Clause 9: Section 205W amended**

Section 205W is part of Division 2 of Part 5A – **property adjustment orders and maintenance orders**. Subsections (1) and (2) of section 205W state that the Division does not apply to financial matters nor financial resources that form part of a financial agreement or a former financial agreement that is binding between the parties.

Clause 9 inserts subsection (3) to section 205W to ensure it is not possible for parties to use a binding financial agreement relating to property or financial resources that is subject of those proceedings to prevent a court dealing with that property or financial resource in accordance with those amendments.

### **Clause 10: Section 205X amended**

Clause 10 amends section 205X to provide that before making certain orders the court must be satisfied that the de facto couple, or one of them, has a sufficient connection to WA.

The proposed amendment to section 205X(a) replaces the reference to “this Division” with “section 205ZCA, 205ZE or 205ZG, or a declaration under 205ZA(1)” to be more specific about what provisions within Part 5A Division 2 require the relevant connection with WA.

This means that before making any orders under those provisions, summarised below, the court is required to be satisfied that it has jurisdiction:

- (a) proposed section 205ZCA is a new section inserted by clause 14 which provides for the powers of the court in maintenance proceedings;

- (b) section 205ZE relates to urgent de facto maintenance cases and allows the court to make orders for interim payments pending the disposal of the proceedings;
- (c) section 205ZG relates to the alteration of property interests of de facto couples; and
- (d) section 205ZA allows the court to make a declaration in proceedings between de facto couples as to the title or rights if any a partner has in respect to property and make any consequential orders necessary to give effect to the declaration.

The remainder of the proposed amendments to s 205X make the drafting clearer by deleting “parties to the application” and inserting “de facto partners to whom the application relates”, and by deleting “parties” and inserting “de facto partners”. The drafting clarifies that, following the vesting of bankruptcy jurisdiction, there may be more parties involved in the proceedings than just the de facto partners.

#### **Clause 11: Section 205Y amended**

Clause 11 amends section 205Y to clarify that where a Court is satisfied that one or other of the de facto partners has a connection with WA, the Court may make a declaration as well as an order under Part 5A, Division 2 (property adjustment orders and maintenance orders relating to de facto couples).

#### **Clause 12: Section 205ZA amended**

Existing section 205ZA enables the court to make a declaration as to property interests and consequential orders to give effect to the declaration.

Clause 12 amends section 205ZA to delete subsection (3): “A declaration or order under this section is binding on the de facto partners but no one else”. The purpose of this proposed amendment is to align the provision with the comparable section of the *Family Law Act 1975* (Cth): section 78.

#### **Clause 13: Section 205ZB amended**

Existing subsection 205ZB(1) provides that an application for property adjustment orders and maintenance orders must be made within 2 years after the de facto relationship ended. Under existing section 205ZB(2), the Court has discretion to grant a de facto partner leave to apply after the application period if satisfied that hardship would be caused to a de facto partner if leave were not granted.

Clause 13 will delete subsections 205ZB(1) and (2) and introduce new provisions to align with new subsections 44(7), 44(8) and 44(9) of the *Family Law Act 1975* (Cth) inserted by Schedule 1 item 2 to the Commonwealth Act (which concern superannuation splitting matters).

Proposed subsection 205ZB(1) will be inserted to specify when applications can be made for orders under new section 205ZCA (maintenance proceedings), section 205ZE (urgent maintenance cases), section 205ZG (alteration of property proceedings) or a declaration of property interests under subsection 205ZA(1).

A party to a de facto relationship that has ended may apply for an order within the 'standard application period' or if both parties to the de facto relationship consent to the application. The 'standard application period' is two years after the end of the de facto relationship (paragraph (i)), or 12 months after a Western Australian financial agreement, or former financial agreement, between the parties was set aside, or found

to be invalid. Proposed subsection 205ZB(2) would allow the court discretion to grant leave for a party to apply after the end of the 'standard application period' in subsection (1), if satisfied that hardship would be caused to the de facto partner or child if leave were not granted<sup>5</sup>.

Proposed subsection 205ZB(1A) will provide the court with discretion to dismiss proceedings instituted by an application made with the consent of both de facto partners, if it is satisfied that the consent was not genuine consent – that is, it was obtained by fraud, duress or unconscionable conduct – and the continuation of the proceedings would amount to a miscarriage of justice<sup>6</sup>.

#### **Clause 14: Section 205ZC amended**

Existing section 205ZC provides for the right of a de facto partner to maintenance in certain circumstances. Clause 14:

- (a) creates a subsection (1) and makes drafting clearer by deleting 'party' and inserting 'partner' instead; and
- (b) adds a new subsection (2) providing that the liability of a bankrupt de facto partner to maintain the other de facto partner may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt partner if the court makes an order under this Part for the transfer.

#### **Clause 15: Section 205ZCA inserted**

Clause 15 proposes to insert section 205ZCA which provides a court with the power to make de facto partner maintenance orders (and that power, that currently exists in a more summary form in subsection 205ZD(1), is deleted by clause 16 – refer below).

The proposed new subsections (2) and (3) provide that the bankruptcy trustee must be joined as a party to the proceedings where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the application for de facto maintenance was made whilst the partner was a bankrupt or the partner became a bankrupt after the application was made but before the proceedings were finally determined. The bankruptcy trustee must apply to become a party before the court can join the trustee as a party.

Proposed new subsection (4) provides that if the bankruptcy trustee is joined as a party under subsection (3) then, except with the leave of the court, the bankrupt de facto partner is not entitled to make submissions to the court in connection with any vested bankruptcy property. Proposed subsection (5) provides that the court must not grant leave unless satisfied there are exceptional circumstances, which would typically arise when the bankrupt has exclusive knowledge of facts or matters that are relevant to the proceedings.

Proposed new subsections (6) and (7) deal with a situation in which one of the de facto partners to maintenance proceedings is a debtor subject to a personal insolvency agreement. These subsections provide that a court must join the trustee of the agreement as a party to the proceedings where the trustee applies to be joined and where the court is satisfied that the interests of debtor party's creditors may be affected and: (a) when the application was made for an order, the party was a debtor subject to

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<sup>5</sup> Revised EM. paragraph 19.

<sup>6</sup> Revised EM, paragraph 20.

a personal insolvency agreement or (b) the party became a debtor after application was made but before it was finally determined. The new subsections (8) and (9) mirror the effect of subsections (4) and (5) in relation to debtors who are subject to personal insolvency agreements.

Proposed new subsection (10) states that an application for an order for de facto partner maintenance is taken to be finally determined for the purposes of subsections (2) and (6) when: (a) the application is withdrawn or dismissed or (b) an order (other than an interim order) is made as a result of the application.

#### **Clause 16: Section 205ZD amended**

Existing section 205ZD gives the Court the power to make maintenance orders (in subsection (1)) and prescribes the matters the court must consider (and not consider) when making maintenance orders.

Clause 16:

- (a) clarifies that when making maintenance orders the court is exercising jurisdiction under the new s 205ZCA, and not the current subsection 205ZD(1).
- (b) makes several minor amendments to delete the word “party” and instead insert “partner” or “de facto partner” to make clear that the subsections apply to de facto relationships; and
- (c) inserts additional matters to be taken into account by a court when making a maintenance order, including:
  - (i) new subsection (ha) to consider, where relevant, the ability of a creditor of a de facto partner to recover the debt;
  - (ii) the amendment of subsection (m) to include in addition to the property of the de facto partners, any vested bankruptcy property in relation to a bankrupt de facto partner;
  - (iii) the insertion of (ma) to include the terms of any superannuation splitting order or declaration made or proposed to be made under Part VIIC of the *Family Law Act 1975* (Cth) in relation to a de facto partner; and
  - (iv) the insertion of (q) to include the terms of any superannuation agreement between the de facto partners that is in force. .

#### **Clause 17: Section 205ZG amended**

Existing section 205ZG sets out the powers of the court to make orders altering the interests of the de facto partners in property. The proposed amendments are required to facilitate the exercise of bankruptcy jurisdiction.

Clause 17(1) repeals s 205ZG(1). New subsection (1)(a) replicates the existing law. Subsection (1)(b) provides for where a de facto partner is bankrupt and allows the court to make an order altering the interests of the bankruptcy trustee in the vested bankruptcy property.

New subsection (1A) largely replicates the existing law although new subsection (1A)(b) provides that a court can make an order against the relevant bankruptcy trustee (if any) to make such settlement or transfer of property as the court determines for the benefit of either or both de facto partners, or child of the de facto relationship.

Clause 17(2) amends subsection 205ZG(2) to refer to the new definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property. It also amends section 205ZG(2) to make clear that an order made under subsection (1) may be enforced after the death of one of the de facto partners. It is

appropriate to omit 'a partner to the proceedings' because, under these amendments, a bankruptcy trustee could be a party. The Bankruptcy Act deals with the position of a bankruptcy trustee who dies.

Clause 17(3) amends subsection 205ZG(4) to refer to the expanded definition of property settlement proceedings which includes proceedings with respect to vested bankruptcy property.

Clause 17(4) repeals subsection 205ZG(5) and inserts new subsections 205ZG(5) and (5A). The new subsections are a restructured version of existing section 205ZG(5) but contain new references to the expanded definition of property settlement proceedings, which includes proceedings with respect to vested bankruptcy property, and new references to the vested bankruptcy property in relation to a bankrupt de facto partner.

The new sub-sections provide for the court to grant an adjournment where there may be a significant change in financial circumstances of the de facto partners, or either of them, and where it is more likely to do justice between the de facto partners than any immediate order the court could make.

Clauses 17(5) to (7) further clarify the concepts discussed above.

Clause 17(8) comprising of proposed new subsections (10)-(18), provides the circumstances for the bankruptcy trustee or the trustee of a personal insolvency agreement to be made a party to proceedings to alter property interests under the *Family Court Act 1997 (WA)* where a party to the de facto relationship is bankrupt. The effect is that the bankruptcy trustee or trustee of a personal insolvency agreement steps into the shoes of the bankrupt de facto partner in making submissions to the court about vested bankruptcy property. Where the bankrupt trustee has become a party, the bankrupt de facto partner can only make submissions in relation to this property in exceptional circumstances. This reflects the reality that the bankrupt de facto partner no longer has ownership of property that has vested in the bankruptcy trustee or trustee of a personal insolvency agreement.

Proposed subsection 205ZG(10) provides that a creditor is entitled to become a party to proceedings if the creditor's debt may not be able to be recovered if the order altering property interests were made, and any other person whose interests would be affected by the making of the order.

Proposed subsection 205ZG(11) provides that subsection 205ZG(10) does not apply to a creditor of a party to the proceedings, if the party is a bankrupt, to the extent to which the debt is a provable debt, or if the party is a debtor subject to a personal insolvency agreement, to the extent to which the debt is covered by the personal insolvency agreement.

Proposed subsections 205ZG(12) and (13) provide that the bankruptcy trustee must be joined as a party to the proceedings upon application by the bankruptcy trustee where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order and the application was made whilst the party was a bankrupt or the party became a bankrupt after the application was made but before the proceedings are finally determined.

Proposed subsection 205ZG(14) provides that if the bankruptcy trustee is joined as a party under subsection 205ZG(13), then the bankrupt is not entitled to make submissions to the court in the course of the property proceedings in connection with any of the vested bankruptcy property, except with the leave of the court. The reason

for this is that the property that used to belong to the bankrupt has vested in the bankruptcy trustee in accordance with the Bankruptcy Act. It is therefore appropriate that the bankruptcy trustee make submissions to the court rather than the bankrupt.

Proposed subsection 205ZG(15) provides that the court may only grant leave under subsection 205ZG(14) where there are exceptional circumstances, which would typically arise when the bankrupt has exclusive knowledge of the facts or matters that are relevant to the proceedings.

Proposed subsections 205ZG(16) to (19) mirror the provisions described above in relation to debtors who are subject to personal insolvency agreements.

Proposed new subsection 205ZG(20) provides a meaning of what is an application which is finally determined for the purposes of new subsections 205ZG(12) and (16).

### **Clause 18: Section 205ZH amended**

Existing section 205ZH relates to the setting aside of orders altering property interests between separating de facto couples.

The amendments proposed by clause 18 facilitate the exercise of bankruptcy jurisdiction and enable the court to take into account, where a de facto partner is a bankrupt or a debtor subject to a personal insolvency agreement, the interests of a creditor or bankruptcy trustee where appropriate.

Clause 18(1) amends subsection 205ZH(1) so that it refers to the concept of property settlement proceedings. This change acknowledges that there may be parties to the proceedings other than the de facto partners.

Clause 18(2) amends subsection 205ZH(2) so that it also refers to the concept of property settlement proceedings.

Clause 18(3) amends subsection 205ZH(5) to make clear that the reference to the death of a party to the proceedings is a reference only to the de facto partner and does not include a reference to the bankruptcy trustee.

Clause 18(4) proposes to insert new subsections 205ZH(7) to 205ZH(10). Proposed subsection 205ZH(7) provides that a creditor of a party to the proceedings is taken to be a person whose interests are affected by the order, if the creditor may not be able to recover their debt because the order has been made.

Proposed subsection 205ZH(8) clarifies that a bankruptcy trustee is a person whose interests are affected by an order where either a party to the de facto relationship was bankrupt at the time the order was made, or the party became a bankrupt after the order was made. On establishing this, proposed subsection 205ZH(9) provides that the bankruptcy trustee will have standing to make an application to the court to vary the order, set aside the order or make another order.

Proposed subsection 205ZH(10) clarifies that a bankruptcy trustee is a person whose interests are affected by an order (a) where a party is bankrupt and (b) the order was made with respect to vested bankruptcy property. On establishing this, proposed subsection 205ZH(11) provides that the bankruptcy trustee will have standing to make an application to the court to vary the order, set aside the order or make another order..

Proposed subsection 205ZH(12) replicate the effect of the previous subsections in relation to a debtor subject to a personal insolvency agreement. Proposed section 205ZH(13) gives the trustee standing to make an application to the court to vary the order, set aside the order or make another order.

#### **Clause 19: Section 205ZHC amended**

The heading to existing section 205ZHC is “Lifting a stay”. Currently the section contemplates only two parties to the relevant proceedings when there may be more. Thus, the amendment deletes the reference to “either” party and inserts “a party”.

#### **Clause 20: Sections 205ZHE to 205HH inserted**

Clause 20 proposes to insert 4 new notification sections.

Proposed section 205ZHE provides that the Rules of Court may specify the circumstances in which a person who applies for an order or is a party to proceedings for an order under Part 5A Division 2 (Property adjustment orders and maintenance orders) is to give notice of the application to a person who is not a party to the proceedings. For example, the Rules of Court may require notice to be given to a person referred to in section 205ZG(10) whose interests could be affected by proceedings for an order under section 205ZG.

Proposed section 205ZHF provides that the Rules of Court exercising jurisdiction under these provisions may make provision for a bankrupt who becomes a party to a proceeding for an application to give notice of the application to the bankruptcy trustee. Similarly, proposed subsection (2) provides that the applicable Rules of Court may also make provision for a debtor subject to a personal insolvency agreement who becomes party to a proceeding for an application to give notice of the application to the trustee of the agreement.

Proposed subsections 205ZHG(1) and (2) provide that the applicable Rules of Court may make provision to notify a court exercising jurisdiction under the *Family Court Act 1997* (WA) that a person has become a bankrupt where that person:

- (a) is a de facto partner, and
- (b) is a party to a proceeding for an application under section 205ZA, 205ZCA 205ZG or 205ZH, and
- (c) becomes a debtor subject to a personal insolvency agreement before that application is finally determined.

Proposed subsections 205ZHG(3) and (4) replicate subsections 205ZHG(1) and (2) in relation to a de facto partner who, before a relevant application is finally determined, becomes a debtor subject to a personal insolvency agreement.

Proposed subsections 205ZHG(5) and (6) replicate subsections 205ZHH(1) and (2) in relation to a de facto partner who before a relevant application is finally determined, becomes a party to a proceeding before a court under the Bankruptcy Act that relates to the bankruptcy of the person or the person’s capacity as a debtor subject to a personal insolvency agreement.

Proposed subsections 205ZHG(7) and (8) provide that the applicable Rules of Court may make provision for the bankruptcy trustee of a bankrupt de facto partner to notify a court exercising jurisdiction under the *Family Court Act 1997* (WA) of the making of an application for an order under Part VI Division 4A of the Bankruptcy Act (which

deals with 'Orders in relation to property of an entity controlled by a bankrupt or from which a bankrupt derived a benefit'.

Proposed subsection 205ZHG(9) defines 'finally determined' for the purposes of this section as being when the application is withdrawn or dismissed, or an order (but not an interim order) is made as a result of the application.

Proposed subsection 205ZHG(10) defines 'finally determined' for the purposes of this section in relation to an application for a declaration under section 205ZA, as when the application for a declaration is withdrawn or dismissed, or a declaration is made as a result of the application.

Under proposed section 205HH the applicable Rules of Court may provide for the bankruptcy trustee, where aware that either de facto partner is a party to proceedings under the *Family Court Act 1997 (WA)*, to notify the other de facto partner about an application made by the bankruptcy trustee under section 139A of the Bankruptcy Act.

#### **Clause 21: Section 205ZI amended**

Clause 21 proposes to add in new subsections (4) – (6) to section 205ZI. Section 205ZI sets out the general powers of courts exercising jurisdiction under the *Family Court Act 1997 (WA)*.

Proposed subsection (4) provides that if the bankruptcy trustee is a party to a proceeding before the court, the court may make an order under subsection (1)(e) directed to the bankrupt.

Proposed subsection (5) provides that if a trustee of a personal insolvency agreement is a party to a proceeding before the court, the court may make an order under subsection (1)(e) directed to the debtor subject to the personal insolvency agreement.

In proceedings where a bankruptcy trustee is a party, the proposed amendments will enable the court to make orders directing the bankrupt to execute any necessary deed or instrument and other things be done as are necessary to enable the order to be carried out effectively or to provide security for the performance of the order. The same powers will be available to the court where the trustee of a personal insolvency agreement is a party to proceedings.

#### **Clause 22: Section 205ZL amended**

Clause 22(1) amends subsection 205ZL(1) that provides for the modification of de facto maintenance orders. The wording is amended to reflect that this Bill provides for the bankruptcy trustee or the trustee of a personal insolvency agreement to be a party to de facto maintenance proceedings and that the proceedings may not just be between the parties to the de facto relationship.

Clause 22(2) inserts proposed subsection 205ZL(1a) which sets out the circumstances in which the court's jurisdiction to modify de facto maintenance orders may be exercised, that is:

- (a) in any case, in proceedings with respect to the maintenance of a de facto partner, or
- (b) on the application of the bankruptcy trustee where there is a bankrupt de facto partner, or
- (c) where a de facto partner is a debtor subject to a personal insolvency agreement – on the application of the trustee of the agreement.

Clause 22(3) proposes to make a minor amendment to include the bankruptcy trustee of a de facto partner.

### **Clause 23: Sections 205ZPA and 205ZPB inserted**

#### *Section 205ZPA - Financial agreements may include an agreement that deals with superannuation*

Clause 23 inserts a new section 205ZPA. This proposed amendment clarifies that a financial agreement which is governed by the provisions of the *Family Court Act 1997* (WA) may include an agreement that deals with the superannuation interests of either or both parties as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.

This amendment complements the changes being made by the Commonwealth Act, to include a new section 90YK in the *Family Law Act 1975* (Cth).

The same as the position in relation to superannuation agreements between parties to a marriage or a de facto relationship in other jurisdictions, a superannuation agreement between parties to a de facto relationship in Western Australian will form part of a more general financial agreement dealing with the distribution of property on the breakdown of the relationship. However, in the case of Western Australian de facto couples, the financial agreement is made under the *Family Court Act 1997* (WA) (FCA) rather than under Part VIIIAB of the *Family Law Act 1975* (Cth)<sup>7</sup>.

Given that a superannuation agreement will form part of a broader financial agreement under the *Family Court Act 1997* (WA), parties making agreements should clearly identify in the agreement which clauses are made under Part VIIIIC of the *Family Law Act 1975* (Cth) and which clauses are made under the *Family Court Act 1997* (WA). The rules about when an agreement is binding under section 205ZS of the *Family Court Act 1997* (WA), are intended to apply to the whole of the agreement, including the superannuation agreement<sup>8</sup>.

#### *Section 205ZPB inserted – Need for separation declaration for certain provisions of financial agreements or former financial agreement to take effect.*

Clause 23 also inserts a new section 205ZPB.

Proposed subsection 205ZPB(1) provides that a financial agreement or former financial agreement that is binding on the parties to the agreement, to the extent it deals with how the parties' property or financial resources are to be dealt with on the breakdown of the de facto relationship, is of no force or effect unless a separation declaration is made.

Proposed subsection 205ZPB(2) provides that subsection 205ZPB(1) ceases to apply if either or both of the parties die.

Proposed subsection 205ZPB(3) provides that a separation declaration is a written declaration and may be included in the financial agreement to which it relates.

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<sup>7</sup> Revised EM, paragraph 63.

<sup>8</sup> Revised EM, paragraph 65.

Proposed subsection 205ZPB(4) provides the declaration must be signed by at least one of the parties to the financial agreement or former financial agreement.

Proposed subsection 205ZPB(5) provides the declaration must state that (a) the parties lived in a de facto relationship, (b) the parties have separated and are living separately and apart at the declaration time, and (c) in the opinion of the party (or parties) making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Proposed subsection 205ZPB(6) provides that for the purposes of section 205ZPB(5)(b), the declaration that the parties have separated and are living separately and apart can be satisfied even if their cohabitation was brought to an end by the action or conduct of only one of them, or they have continued to reside in the same residence, or either of them has rendered some household services to the other.

Proposed subsection 205ZPB(7) provides a definition of "declaration time" for the purposes of subsection 205ZPB(5).

#### **Clause 24: Section 205ZV amended**

Existing section 205ZV outlines the circumstances in which a court may set aside a financial agreement, termination agreement or former financial agreement.

Clause 23 makes several amendments to section 205ZV to clarify that the subsections apply to a financial agreement, termination agreement or former financial agreement.

Clause 23(1)(c) inserts an additional matter for the court to consider when deciding whether or not to set aside a financial agreement, termination agreement or former financial agreement, being where a payment flag is operating under Part VIIIIC *Family Law Act 1975* (Cth) on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part.

#### **Clause 25: Section 205ZZ amended**

Clause 25 amends section 205ZZ to delete the word "either party" and instead insert "a party" as existing section 205ZZ provides that the Director of Public Prosecutions may be a party to an application for the stay to be lifted. For example, one of the de facto partners may be subject to criminal property confiscation proceedings.

#### **Clause 26: Section 210 amended**

Existing section 210 is amended to recognise that the appeal provisions outlined in the *Federal Circuit Court and Family Court of Australia Act 2021* (Cth) and the *Bankruptcy Act 1966* (Cth) apply.

#### **Clause 27: Section 211 amended**

Clause 27 inserts new subsection 211(6) to provide that in dismissing an appeal the Family Court of Western Australia may give reasons for its decision in short form if the Court is of the opinion that the appeal does not raise any question of general principle.

**Clause 28: Section 211B amended**

These changes have been made to align existing section 211B with new section 47C of the *Family Law Act 1975* (Cth) inserted by Schedule 1 to the *Federal Circuit and Family Court of Australia (Consequential Amendments Act 2021)* (Cth). The provision allows for the dismissal of an appeal if there is no reasonable prospect of success.

**Clause 29: Section 222 amended**

Section 222 provides for the court to intervene to prevent the disposition of property where, either intentionally or unintentionally, a party's proposed actions will or may defeat an order of the court in proceedings before the Family Court.

Proposed subsection 222(1A) extends the court's powers where a de facto partner is a bankrupt. It provides that where a party to a de facto relationship is a bankrupt and the bankruptcy trustee is a party to proceedings, the court may set aside or restrain the making of an instrument or disposition designed to defeat an existing or anticipated order (whether intentionally or not) which is made or proposed to be made or proposed to be made, by or on behalf of, or by direction or in the interest, of the bankrupt.

Proposed subsection 222(1B) extends the court's power in a corresponding manner to proposed subsection 222(1A) where a de facto partner is a debtor subject to a personal insolvency agreement.

Proposed subsection 222(4AA) provides an application may be made to the court for an order under this section by:

- (a) a party to the proceedings; or
- (b) a creditor of a party to the proceedings if the creditor may not be able to recover their debt if the instrument or disposition were made; or
- (c) any other person whose interests would be affected by the making of the instrument or disposition.

**Clause 30: Section 235A amended**

Existing section 235A deals with the circumstances in which a court may grant an injunction relating to de facto relationships. The section mirrors section 114 of the *Family Law Act 1975* (Cth).

The proposed amendment which adds subsections (4) to (7) expands upon the court's powers where a de facto partner is either a bankrupt or debtor subject to a personal insolvency agreement. The amendments empower the court to grant an injunction restraining the:

- (a) bankruptcy trustee from declaring and distributing dividends;
- (b) the trustee of the insolvency agreement from disposing of property subject to the agreement.

**Clause 31: Section 247 amended**

The proposed amendment inserts new subsection 247(3) which adds transitional provisions into schedule 2 Division 3 of the *Family Court Act 1997* (WA) in relation to various amendments to be made by this Bill to the *Family Court Act 1997* (WA).

**Clause 32: Schedule 2 Division 3 inserted**

This clause inserts Division 3: Provisions for the *Family Court Amendment Act 2022*

and provides at subclause 13(1) that a reference to **commencement date** means the date on which Part 2 of the *Family Court Amendment Act 2022* comes into operation.

Proposed subclause 13(2) provides that subject to subclause (3) the amendments under proposed sections 4,5,7,9,14,15,16,17,18,20,21,22,23,29 and 30 to the extent they relate to bankruptcies or personal insolvency agreements apply in relation to:

- (a) bankruptcies for which the date of bankruptcy is on or after the commencement day; and
- (b) personal insolvency agreements whether executed before, on or after commencement day.

Content of proposed sections affected:

Section 4 – definitions

Section 5 – meaning of **debtor subject to a personal solvency agreement**

Section 7 – defines proceedings under section 139A of the *Bankruptcy Act* as “related proceedings” for the purposes of section 45 which allows the Court as appropriate to stay or dismiss the proceedings if in the interests of justice.

Section 9 – amends section 205W which is in Division 2 - Property adjustment and maintenance orders – to include maintenance proceedings or proceedings with respect to any vested bankruptcy property between a de facto partner and the bankruptcy trustee of the other de facto partner.

Section 14 – amends section 205ZC to allow the transfer of vested bankruptcy property in relation to the bankrupt de facto partner to satisfy an order for maintenance of the other de facto partner.

Section 15 – amends 205ZCA – Powers of court in maintenance proceedings – to provide for when a de facto partner is a bankrupt or subject to a personal solvency agreement.

Section 16 – amends section 205ZD – Maintenance orders - to provide for the situation where a de facto partner is bankrupt including that the Court must consider the effect of any order on: the ability of a creditor to recover the creditor’s debt; the property of the de facto partners; vested bankruptcy property and the terms of any order made under Part VIII C of the *Family Law Act 1975* (Cth) in relation to a de facto partner.

Section 17 – amends section 205ZG - Alteration of property interests – to provide for circumstances where one of the de facto partners is bankrupt or a debtor subject to a personal solvency agreement.

Section 18 – amends section 205ZH – Setting aside of orders altering property interests – to include in matters for the Court to consider: a creditor of a party to proceedings.

Section 20 – inserts new sections to allow for rules to specify circumstances in which notice must be given of an application for property adjustment or maintenance orders under Part 5A Division 2 of the *Family Court Act 1997* (WA) to a person who is not a party to the proceedings, including a bankrupt notifying their bankruptcy trustee and a debtor subject to a personal insolvency agreement notifying the trustee of their personal insolvency agreement.

Section 21- amends section 205ZI – General powers of the Court under Part 5A Division 2 – Property adjustment and maintenance orders – to permit the Court to make an order compelling a bankruptcy trustee or a trustee of a personal solvency agreement who is a party to proceedings, to execute documents, produce documents of title and do other things necessary to enable an order to be carried out effectively, or to provide security for the due performance of an order.

Section 22 – amends section 205ZL – Modification of de facto maintenance orders – to enable the Court to exercise jurisdiction where there is a bankruptcy trustee or a trustee of a personal insolvency agreement.

Section 23 – inserts two new sections to clarify that a financial agreement may include an agreement that deals with a superannuation interest and further that it is of no force or effect unless there is a separation declaration.

Section 29 – amends section 222 – Transactions to defeat claims – to extend the Court's powers to set aside or restrain the making of certain instruments or dispositions designed to defeat an existing or anticipated order under the *Family Court Act 1997* (WA) to apply also where a de facto partner is bankrupt and the bankruptcy trustee is a party to the proceedings or where the de facto partner is a debtor subject to an insolvency agreement.

Section 30 – amends section 235A to enable the Court to grant an interim injunction restraining a bankruptcy trustee from declaring or distributing dividends amongst the bankrupt's creditors and similarly, restraining a trustee of a personal insolvency agreement from disposing of property the subject of the agreement.

**Subclause 13(3)** provides that certain sections listed below, apply to proceedings instituted on or after the commencement day, whether the date of bankruptcy is before, on or after the commencement day –

(a) Section 205ZCA (2) (3) (4) and (5)

Section 205ZCA relates to the powers and obligations of the court in maintenance proceedings where one of the de facto partners is a bankrupt or a debtor subject to a personal insolvency agreement. The proposed amendments provide that if the bankruptcy trustee applies to become a party, the bankruptcy trustee must be joined as a party to the proceedings where the court is satisfied that the interests of the bankrupt's creditors may be affected by an order.

Proposed new subsection (4) provides that where the bankruptcy trustee is joined as a party then, except with the leave of the court, the bankrupt de facto partner is not entitled to make submissions to the court in connection with any vested bankruptcy property. Subsection (5) says that the court must not grant leave unless satisfied there are exceptional circumstances.

(b) Section 205ZCA(10) to the extent to which it relates to section 205ZCA(2). Section 205ZCA(2) provides for proceedings for maintenance of a de facto partner where: (a) the other de facto partner either was a bankrupt when the application was filed or became a bankrupt before the proceedings are finally determined; and (b) the bankruptcy trustee applies to be joined as a party; and (c) the court is satisfied that creditors of the bankrupt may be affected by the making of the order. Subsection (10) defines when an application under the section is taken to be determined.

(c) Definitions in section 5 to the extent they relate to subsections 205ZCA(2)(3)(4) and (5).

The relevant definitions are; ***bankrupt, bankruptcy trustee and vested bankruptcy property.***

(d) Section 205ZG(12)(13)(14) and (15)

This section sets out the powers of the court to make orders altering in respect to adjustment of property interests. The proposed amendments at subsections (12),(13),(14) and (15) are required to provide for the exercise of bankruptcy jurisdiction.

Subsection (12) covers the situation where a de facto partner was a bankrupt when the application was made or where the de facto partner becomes a bankrupt before the property adjustment proceedings are finally determined. The provisions allow for a bankruptcy trustee to be joined as a party if the bankruptcy trustee makes an application to do so and the Court is satisfied that the interests of the bankrupt's creditors may be affected by an order.

Subsection (13) provides that where the bankruptcy trustee is joined as a party to proceedings then the bankrupt de facto partner may not make a submission without the leave of the court.

Subsection (14) provides that the court is to grant such leave only in exceptional circumstances (15).

(e) Section 205ZG(20) to the extent it relates to section 205ZG(12)

Subsection 205ZG(20) prescribes when a matter is taken to be finally determined. Subsection 205ZG (12) relates to when there is an application for an order for alteration of property interests and (i) when the application was made the de facto partner was bankrupt or (ii) after the application was made, but before finally determined, the de facto partner became a bankrupt.

(f) The definitions in section 5(1) to the extent they relate to section 205ZG(12)(13)(14) and (15)

The relevant definitions are: ***bankrupt bankruptcy trustee and vested bankruptcy property***

**Subclause 13(4)** includes a transitional provision for section 205ZA(3). Section 205ZA enables a court to declare rights that a de facto partner has with respect to existing title or rights in respect of property. Subsection (3), is proposed for deletion by this Bill because it states that a declaration or order of the court is binding on the de facto partners but not anyone else. This is no longer the case with the vesting of bankruptcy jurisdiction, resulting in the court being able to make declarations or orders binding on other parties, such as a bankrupt trustee of a bankrupt de facto partner. However, subclause 13(4) states that the existing subsection 205ZA(3) applies before commencement and continues to apply on and after that day to a declaration or order made under section 205ZA before commencement day.

The proposed deletion of section 205ZA(3) will align with the corresponding provision in the *Family Law Act 1975* (Cth), section 78.

**Subclause 13(5)** provides that section 205ZB amendments made by this Bill apply in relation to applications made on or after the commencement day.

Section 205ZB of the *Family Court Act 1997* (WA) provided that an application for alteration of property interests and maintenance must be made within 2 years of the end of the de facto partner's de facto relationship.

The amendments now add other threshold conditions, to provide now that an application for alteration of property interests and maintenance must be made:

- (a) within 2 years of the end of the de facto partner's de facto relationship (current provision); or
- (b) within 12 months of a financial agreement or former financial agreement between the de facto partners being set aside or found to be invalid; (or
- (c) where both parties consent to the application. If the application is by consent the court may dismiss the proceedings if satisfied the consent was obtained by fraud, duress, or unconscionable conduct.

Previously the court could grant leave to apply after the expiry of the time limit for an application if satisfied that hardship would be caused to a de facto partner if leave were not granted. Under the amendments the court may also consider whether a child would suffer hardship if leave were not granted.

**Subclause 13(6)** provides that, section 205ZPA, which permits a financial agreement made under Part 5A of the *Family Court Act 1997 (WA)* to include a superannuation agreement made under Part VIIIIC of the *Family Law Act 1975 (Cth)* (as inserted by the Commonwealth Act), applies in relation to a financial agreement made on or after the commencement day.

This means that superannuation agreements made under Part VIIIIC cannot form part of a financial agreement that was made by Western Australian de facto couples prior to the commencement of Part VIIIIC, under Part 5A of the *Family Court Act 1997 (WA)*.<sup>9</sup>

De facto couples in Western Australia who have made a financial agreement under Part 5A prior to the commencement of Part VIIIIC of the *Family Law Act* would need to terminate that prior agreement and make a new Western Australian financial agreement after commencement of Part VIIIIC, if they wished to include a superannuation splitting agreement as part of their financial agreement. In practice, this would only be possible if the property the subject of the agreement had not been distributed and was still available to be divided by agreement.<sup>10</sup>

**Subclause 13(7)** provides that the need for a separation declaration for certain provisions of financial agreements to take effect, added by the new section 205ZPB, only applies in relation to a financial agreement or former financial agreement made between de facto partners whose relationship breaks down on or after commencement day.

**Subclause 13(8)** provides that section 211(6) (that permits the Family Court of WA to give short form reasons for a decision dismissing an appeal where the appeal does not raise any question of general principle), applies in relation to appeals whether instituted before on or after the commencement day.

**Subclause 13(9)** provides that section 211B amendments apply in relation to appeals whether instituted before, on or after commencement day. The amendments proposed to section 211B are only to reflect a consistent drafting style and do not change the effect of section 211B, hence the change is to apply before, on and after commencement day.

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<sup>9</sup> Revised EM, paragraph 394.

<sup>10</sup> Revised EM, paragraph 395.

### **Part 3 – Family Legislation Amendment Act 2006 amended**

#### **Clause 33: Act amended**

Clause 33 states that Part 3 of the Bill amends the *Family Legislation Amendment Act 2006 (WA)*.

#### **Clause 34: Part 4 deleted**

Clause 34 deletes Part 4 of the *Family Legislation Amendment Act 2006 (WA)*.

The provisions deleted relate to the facilitation of the vesting of jurisdiction in respect to bankruptcy in the Family Court of Western Australia in matters involving de facto couples. That jurisdiction was not vested at that time (in 2006) as expected and the provisions were never proclaimed. Rather than proceeding by way of proclamation now, they have been included in this Bill and therefore need to be deleted from the *Family Legislation Amendment Act 2006 (WA)*.

### **Part 4 – Duties Act 2008 amended**

#### **Clause 35: Act amended**

Clause 35 states that Part 4 of the Bill amends the *Duties Act 2008 (WA)*.

#### **Clause 36: Section 128 amended**

Clause 36 amends various defined terms in section 128 of the Duties Act, to take effect on the day after Royal Assent.

Section 128 of the Duties Act defines the terms used in sections 128 to 133, which provide a transfer duty concession for certain transfers of property after a marriage or de facto relationship breakdown.

On 22 November 2018, provisions of Part VIII B of the *Family Law Act 1975* were renumbered by the *Civil Law and Justice Legislation Amendment Act 2018 (Cth)*. Subsections (2) and (4) update the sections of the *Family Law Act 1975* referred to in the following terms defined in section 128 of the Duties Act:

<b>Term</b>	<b>Current reference</b>	<b>New reference</b>
<i>flag lifting agreement</i>	s 90MN	s 90XN
<i>superannuation agreement</i>	s 90MH	s90XH

Subsection (1) deletes the definition of *superannuation interest* and subsection (5) makes a consequential amendment as a result of the deletion. Subsection (3) includes the definition of *superannuation interest* within the definition of *matrimonial property*.

These are all minor technical amendments that do not change the practical effect of the provisions.

Sections 128 to 133 of the *Duties Act (WA)* apply nominal duty to transactions related to the break-up of a marriage or de facto relationship if the transactions are in accordance with, or effected by, a matrimonial instrument or a de facto relationship instrument.

A matrimonial instrument includes a maintenance agreement, a financial agreement, a Family Court order, a splitting agreement or a flag lifting agreement under sections 90XH and 90XN of the *Family Law Act 1975* (Cth) respectively.

A de facto relationship instrument only includes a financial agreement or former financial agreement as defined in the *Family Court Act 1997* and a Family Court order.

Section 113 of the Duties Act also exempts a dutiable transaction to the extent it is effected by a financial agreement or splitting agreement for separating spouses, or a financial agreement or former financial agreement for separating de facto partners.

**Part 4 Division 3**, comprising clauses 37 to 39, amends the Duties Act to ensure that superannuation agreements, flag lifting agreements and court orders for splitting the superannuation of de facto couples are treated the same as for married couples. These amendments are to commence on a day fixed by proclamation.

**Clause 37: Section 128 amended**

Clause 37 amends section 128 to insert definitions of a *flag lifting agreement*, *de facto splitting agreement* and a *de facto superannuation agreement*. It also amends the definition of *de facto relationship property* to include a *superannuation interest* as defined in section 90YD of the *Family Law Act 1975* (Cth).

**Clause 38: Section 130 amended**

Clause 38 amends section 130 of the Duties Act which defines a de facto relationship instrument. The term is relevant for section 131 which applies nominal duty to a dutiable transaction that is effected by or in accordance with these instruments.

This clause amends section 130 to include as new types of de facto relationship instruments:

- (a) a de facto splitting agreement (which is defined as a de facto flag lifting agreement or a de facto superannuation agreement); and
- (b) a court order made under the *Family Law Act 1975* Part VIIIIC or a law of the Commonwealth or another State or Territory that substantially corresponds to this part.

The amendment to include a de facto splitting agreement in section 130(a) will mean that a superannuation agreement and a flag lifting agreement for separating de facto partners are also exempt under section 113 of the *Duties Act*. This is consistent with the duty treatment for these agreements for separating spouses.

In practice, this means that duty is paid only when property under these agreements is actually transferred. When this occurs, nominal duty applies under section 131 to the extent that the transfer is in accordance with the agreement.

Part VIIIIC of the *Family Law Act 1975* deals with the splitting of superannuation interests between separating de facto partners in Western Australia.

While in most cases court orders involving the splitting of superannuation would be made in the context of an overall property settlement for de facto partners under Part 5A of the *Family Court Act 1997* (WA), it is possible there may be cases where superannuation is the only asset available to the separating parties so the parties are only involved in Part VIIIIC proceedings.

**Clause 39: Section 131 amended**

Clause 39 amends section 131 of the Duties Act.

Section 131 applies nominal duty to a dutiable transaction to the extent that it is effected by, or in accordance with, a matrimonial or de facto relationship instrument and the property is transferred to:

- (a) either, or both, of the parties to the relationship;
- (b) the parties' children or children's trustee; or
- (c) for matrimonial property only, the trustees of the parties' superannuation funds.

Clause 39 amends subsection 131(2)(d) of the Duties Act to ensure that nominal duty applies if de facto relationship property is transferred to a trustee of a superannuation fund of either of the parties of the relationship.

This is consistent with the treatment of duty on transactions related to the break-up of a marriage.