

## EXPLANATORY MEMORANDUM

### CHILD SUPPORT (ADOPTION OF LAWS) AMENDMENT BILL 2015

#### Overview of the Bill

The Commonwealth Child Support Scheme is an administrative scheme which was introduced by the Commonwealth *Child Support Act 1988* (Cth) (later the *Child Support Registration and Collection Act 1988* (Cth)) and was part of a suite of reforms which included the *Family Law Amendment Act 1987* (Cth), related amendments to the *Social Security Act 1947* (Cth) and the enactment of the *Child Support (Assessment) Act 1989* (Cth).

The introduction of the Child Support Scheme in 1988 was in response to the recommendations of several inquiries into, and widespread community concern about, the inadequacies of the existing system which was governed by the *Family Law Act 1975* (Cth). That is, unless separating parents could agree as to their respective financial obligation in respect to child support and honour that agreement then the only recourse was to institute family law proceedings for an order of the Court and subsequently, if required, further court proceedings to institute enforcement of that order. Such proceedings were expensive, beyond the resources of most, and the amounts ordered by the Court were generally inadequate. It was estimated that more than 70 per cent of non-custodial parents did not pay regular child support and as a result the standard of living of the children and the custodial parent was at least lower than should have been the case and often resulted in their being dependent upon social security.

The *Family Law Amendment Act 1987* (Cth) amended the *Family Law Act 1975* (Cth) with the object of ensuring that the Family Court awarded adequate levels of child support and ending the practice of the Court taking into account eligibility for social security so that the amount ordered in effect just “topped up” social security benefits available to the custodial parent. It was considered that in this way, responsibility for the child was improperly borne by the social security system.

The amendments imposed on the Family Court a legislative requirement to apply certain principles when determining child support orders. Those principles included: that the parents of a child have the primary duty to maintain the child; that the Court must ensure that children receive a proper level of financial support from their parents; and that children have their proper needs met from reasonable and adequate share of the financial resources of both parents.

The *Child Support Act 1988* (Cth) (later the *Child Support (Registration and Collection) Act 1988* (Cth)) established the Child Support Agency as part of the Australian Taxation Office with the Commissioner for Taxation as Child Support Registrar. The Child Support Registrar was required to administer the Act and to establish and keep a Child Support Register to enable the registration of court orders for child support or court registered child support agreements. Amounts payable under registered child support orders or agreements became a debt to the Agency which enforced and collected those amounts for distribution to the custodial parent via the Department of Social Security.

Subsequently with the enactment of the *Child Support (Assessment) Act 1989* (Cth) administrative assessment of child support liabilities was introduced by reference to a formula recommended by the child Support Consultative Group chaired by the then Justice Fogarty of the Family Court of Australia. The method of administrative assessment removed the necessity for parents to institute court proceedings for child support orders while preserving the right to have the administrative assessment reviewed by the court. In 2007 this review jurisdiction was transferred to the Social Securities Administrative Review Tribunal.

The Commonwealth Child Support Scheme has become more and more administrative since its inception and the role of the courts progressively diminished. The administration of the scheme is complex, the amendments frequent, often consequential upon taxation and social security legislation and much of it technical.

The legislative powers of the Commonwealth Parliament are, for example, set out in section 51 of the Commonwealth Constitution. The Commonwealth Parliament has constitutional power to legislate with respect to marriage, divorce, matrimonial causes and “in relation thereto parental rights and the custody and guardianship of infants” (sections 51(xxii) and 51(xxiii) of the Constitution).

Legislative power in respect to unmarried parents and their children vests in State Parliaments.

However, section 51(xxxvii) of the Commonwealth Constitution provides that the Commonwealth Parliament may legislate with respect to matters referred to it by the Parliament of any State but so that the law will extend only to States by whose Parliaments the matter is referred or which afterwards adopts the law.

That is, for the Commonwealth statutes, and therefore the Commonwealth Child Support Scheme, to apply uniformly to married and unmarried couples and their children, State Parliaments must refer their State Parliament’s legislative power to Commonwealth Parliament or afterwards adopt the Commonwealth statutes by State legislation.

All States except Western Australia have referred legislative power on this matter to the Parliament of the Commonwealth. WA has not referred power but has adopted the Commonwealth child support legislation, initially by the *Child Support (Adoption) Act 1988* (WA) which adopted the *Child Support Act 1988* (Cth).

Subsequently, when the Commonwealth child support legislation became the two statutes: the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989*; the WA Parliament adopted those statutes by the *Child Support (Adoption of Laws) Act 1990* (WA) and the *Child Support (Adoption) Act 1988* (WA) was repealed.

Until the Parliament of Western Australia amends the *Child Support (Adoption of Laws) Act 1990* (WA) to adopt again the Commonwealth statutes, as amended, those Commonwealth amendments which effect change to the child support scheme do not apply to unmarried couples and their ex-nuptial children in WA.

Under the Constitution, and the provisions of the Commonwealth statutes themselves, adoption by a State Parliament cannot occur until after the Commonwealth amendments have come into operation.

Consequently, the adoption method means there is necessarily a hiatus between commencement of the Commonwealth amendments, and consequent changes to the scheme, and adoption by the WA Parliament so that the scheme applies uniformly to all affected children and their parents.

Recently the Commonwealth Parliament enacted the *Tribunals Amalgamation Act 2015* (Cth) which commenced 1 July 2015 and which amalgamated Social Securities Appeals Tribunal and the Migration Review Tribunal-Refugee Tribunal with the Administrative Appeals Tribunal (AAT).

The purpose of the *Tribunals Amalgamation Act 2015* (Cth) was to continue the policy of implementing a coordinated merits review tribunal which established the AAT in 1975.

The *Tribunals Amalgamation Act 2015* (Cth) gives effect to recommendations of several reviews, most recently the National Commission of Audit report in 2014, *Towards Responsible Government*. The Report noted: "Merging the resources of the Commonwealth's civilian merits review tribunals can provide significant medium to long-term savings and better services. This is demonstrated by the successful establishment of amalgamated 'super tribunals' in State jurisdictions." The National Commission of audit recommended specifically that the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal be amalgamated within the Administrative Appeals Tribunal.<sup>1</sup>

The *Tribunals Amalgamation Act 2015* (Cth) impacts on the Commonwealth Child Support Scheme by changing the avenues of appeal for child support matters.

The former SSAT had jurisdiction to review on the merits certain administrative child support decisions to which objection had been taken and the internal review unsuccessful. An appeal from SSAT to the AAT was available on some matters for a review on the merits. The Family Court had jurisdiction to hear an appeal against a decision of SSAT on a question of law. The *Tribunals Amalgamation Act 2015* (Cth) transfers that jurisdiction of the Family Court to the Federal Circuit Court and the Federal Court.

The Commonwealth Acts were amended also by the *The Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) Schedule 4 amends the *Income Tax Assessment Act 1997* (Cth) to insert a new subdivision which, the guide explains, "extends the ordinary meaning of Australia to include each external Territory of Australia (other than the Australian Antarctic Territory) and certain offshore areas and certain offshore installations." Other Acts have been amended to define Australia by reference to the rewritten definition in the *Income Tax Assessment Act 1997* (Cth). The purpose was not to effect any policy change but to simplify the definition and to make it uniform across all laws relating taxation. There was a consequential amendment to the Commonwealth Acts because the definition of Australia in those Acts incorporated a reference to a provision in the *Income Tax Assessment Act 1936* (Cth) which was repealed as part of the changes.

The Child Support (Adoption of Laws) Amendment Bill 2015 will adopt the Commonwealth Acts in the form in which they stood on 1 July 2015 so as to ensure the adoption by the WA Parliament of the Commonwealth Acts as amended by the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) and the *Tribunals Amalgamation Act 2015* (Cth).

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

Clause 1 provides that the Bill, once enacted, will be known as the *Child Support (Adoption of Laws) Amendment Act 2015*.

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<sup>1</sup> *Towards Responsible Government* Report of the National Commission of Audit Phase One February 2014 at pp 211-212

**Clause 2: Commencement**

Clause 2 makes provision for the commencement of the Act. Clause 2(a) provides that sections 1 and 2 of the Act will commence on the day the Act receives the Royal Assent. Clause 2 (b) provides that the rest of the Act will commence on the day after Royal Assent.

**Clause 3: The Act amended**

Clause 3 provides that the amendments are to the *Child Support (Adoption of Laws) Amendment Act 1990*.

**Clause 4: Section 3 amended**

The WA Parliament does not adopt just the specific amendments to the Commonwealth legislation, it adopts the Commonwealth legislation as amended at the date specified in the Bill to amend the *Child Support (Adoption of Laws) Act 1990* (WA).

Thus, Clause 4 provides that section 3(a) of the *Child Support (Adoption of Laws) Act 1990* is amended so that the date 1 July 2014 is deleted and replaced by 1 July 2015.

This amendment ensures that the adoption by the WA Parliament of the *Child Support (Registration and Collection) Act 1988* (Cth) extends to that Act as amended:

(a) on 25 February 2015 by the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth), Schedule 4 item 66.

The *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) Schedule 4 amends the *Income Tax Assessment Act 1997* (Cth) to insert a new subdivision which, the guide explains, “extends the ordinary meaning of Australia to include each external Territory of Australia (other than the Australian Antarctic Territory) and certain offshore areas and certain offshore installations.”

Other Acts relating to taxation are amended to make the definition consistent with the amendment to the *Income Tax Assessment Act 1997* (Cth) and to make that definition uniform across all laws relating to income tax. According to the Commonwealth Explanatory Memorandum the intent of the Schedule is to simplify how the taxation laws define “Australia” without changing existing policy.

The definition of “resident of Australia” in the *Child Support Registration and Collection Act 1988* (Cth) previously incorporated a reference to section 7A(2) of the *Income Tax Assessment Act 1936* (Cth).

The *Income Tax Assessment Act 1936* (Cth) was amended by the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) to include a new interpretation provision: “Australia’ has the same meaning as in the *Income Tax Assessment Act 1997* (Cth).” Other provisions, including section 7A, were repealed or amended to accommodate the new definition.

As a consequence the definition of “resident of Australia” in the *Child Support (Registration and Collection) Act 1988* (Cth) was changed to exclude the reference to the repealed section 7A(2) but the meaning of “resident of Australia”, and therefore the jurisdiction of the Registrar, is unaltered. The amendment to the *Child Support (Registration and Collection) Act 1988* (Cth) became operative on 1 July 2015.

(b) on 25 February 2015 by the *Tribunals Amalgamation Act 2015* (Cth).

The *Tribunals Amalgamation Act 2015* (Cth) abolished the Social Security Appeals Tribunal (SSAT) and the Migration Review Tribunal and Refugee Tribunal (MR-RT).

The jurisdiction of those tribunals has been transferred to the Administrative Appeals Tribunal (AAT) and new specialist divisions added to the AAT which include the Social Services and Child Support Division and Migration and Refugee Division to be presided over by former members of SSAT and MRT-RRT. The registries of the discontinued tribunals are transferred to the AAT.

The amalgamated tribunal is established under the *Administrative Appeals Tribunal Act 1975* (Cth) and known as the AAT.

Prior to its abolition, applications for a merits review of certain child support decisions were made to SSAT. Some decisions of SSAT could be reviewed by the AAT. Appeal to the Family Court was available from a decision of SSAT but restricted to a question of law.

The *Tribunals Amalgamation Act 2015* (Cth) transfers the merits review jurisdiction from the SSAT to the AAT and the appeal jurisdiction of the Family Court in respect to child support matters to the Federal Circuit Court and the Federal Court under the *Administrative Appeals Tribunal Act 1975* (Cth).

Matters previously determined by SSAT will now come under the jurisdiction of the Social Services and Child Support Division of the AAT. Most of the Commonwealth amendments relate to making the appropriate changes to provisions to substitute the AAT for the SSAT.

The two tier review provided for in certain child support matters – first to SSAT and from SSAT to the AAT – has been retained. Both reviews which correspond with existing SSAT reviews and AAT reviews now come under the jurisdiction of the AAT and will be known as “AAT first review” and “AAT second review” respectively.

The AAT first review retains for the most part the same jurisdiction, powers and procedures as the former SSAT. However, unlike the SSAT, the AAT first review will include the jurisdiction to review a decision of the Child Support Registrar to refuse to make a determination because the issues are too complicated.

Previously, jurisdiction for review of this decision was with the Family Court and the Federal Circuit Court of Australia. The Commonwealth Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 explained the reason for this change of policy was that the SSAT has developed a level of expertise such that review by a Court is no longer necessary.

The Commonwealth Explanatory Memorandum explains that to streamline pathways of judicial review, jurisdiction in respect to child support matters will no longer lie with the Family Court but with the Federal Circuit Court and the Federal Court.

Other amendments, together with amendments to the *Administrative Appeals Tribunal Act 1975* (Cth), are of a technical nature to accommodate the amalgamation. This involves the substitution of AAT for SSAT wherever it occurs and appropriate changes to procedures in the AAT to replicate procedures in SSAT relating specifically to child support matters.

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

Clause 5 provides that section 4(b) of the *Child Support (Adoption of Laws) Act 1990* (WA) is amended so that the date 1 July 2014 is deleted and replaced by 1 July 2015.

This amendment ensures that the adoption by the Western Australian Parliament of the *Child Support (Assessment) Act 1989* (Cth) extends to that Act as amended –

(a) on 25 February 2015 by the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth), Schedule 4 item 66.

As noted, the purpose of this schedule to the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) was to rewrite the definition of “Australia” to simplify the definition and to make it uniform across all income tax law. The Commonwealth Explanatory Memorandum explained that the definition is critical to income tax law as it determines who should be taxed and on what income. Prior to these amendments the definition could be ascertained only by reference to the common law and 13 different Commonwealth Acts.

The definition is important to the Child Support Scheme because the jurisdiction of the Child Support Registrar is restricted to residents of Australia and residents of reciprocating jurisdictions.

The repealed section 7A(2) of the *Income Tax Assessment Act 1936* (Cth) included the external territories as part of the definition of Australia. As with the *Child Support (Registration and Collection) Act 1988* (Cth), the amendment removes reference to the repealed section 7A and replaces it with a reference to the definition of Australia in the *Income Tax Assessment Act 1936* (Cth) with the added words (“other than a person who is a resident of Australia solely because the definition of Australia in that Act includes the external Territories”).

(b) on 1 July 2015 by the *Tribunals Amalgamation Act 2015* (Cth).

The *Tribunals Amalgamation Act 2015* (Cth) makes changes to the *Child Support (Assessment) Act 1989* (Cth) Act required to give effect to the amalgamation of SSAT with the AAT and the transfer of jurisdiction in respect to child support assessment decisions from SSAT to the Social Services and Child Support Division of the AAT.

The Commonwealth Acts which govern the Child Support Scheme work together and complement each other.

For example: the *Child Support (Registration and Collection) Act 1988* (Cth) establishes the office of Child Support Registrar who administers both Commonwealth Acts; the *Child Support (Assessment) Act 1989* (Cth) provides that, unless otherwise stated, expressions used have the same meaning as in *Child Support (Registration and Collection) Act 1988* (Cth); and provisions governing the review of decisions made under the *Child Support (Assessment) Act 1989* (Cth) both the internal review and review formerly by the SSAT and the AAT and now to the AAT are in the *Child Support (Registration and Collection) Act 1988* (Cth). References are made in the *Child Support (Assessment) Act 1989* (Cth) to the availability of a review but that a review is expressed to be subject to the provisions of the *Child Support (Registration and Collection) Act 1989* (Cth).

Accordingly, the amendments to the *Child Support (Assessment) Act 1989* (Cth) are consistent with the effect of amendments to the *Child Support (Registration and Collection) Act 1988* (Cth) as outlined in Clause 4. The amendments are minor and for the most part substitute references to the SSAT to the AAT, insert necessary new definitions of “AAT” “AAT Act”. The meaning given to AAT first review and AAT second review is by cross reference to the provisions of the *Child Support (Registration and Collection) Act 1989* (Cth).