

FAMILY COURT AMENDMENT BILL 2001

CLAUSE NOTES

PART 1 - PRELIMINARY

Clause 1 - Short Title

This clause provides for the Act to be cited as the Family Court Amendment Act 2001.

Clause 2 - Commencement

This clause is self-explanatory.

Clause 3 - The Act amended

This clause is self-explanatory.

PART 2 - AMENDMENTS ABOUT THE CONSEQUENCES OF FAILURE TO COMPLY WITH ORDERS AND THEIR OBLIGATIONS.

Clause 4 - Section 5 amended

This clause adds or amends definitions necessary for the operation the Act, where applicable, consistent with those in the *Family Law Act* (C'wlth) (hereafter referred to as FLA).

Clause 5 - Section 78A inserted

This clause is consistent with the provisions of the FLA and provides a means to ensure that where people are making a parenting plan, they understand their obligations and the consequences that follow should they fail to observe the plan. This is achieved by requiring the adviser (either the family and child counsellor, or a family and child mediator, or a legal practitioner) providing the assistance to inform the persons of the detail of the obligation that the plan creates on each of the parties, the consequences that may follow if a person contravenes the requirements of the plan and the availability of programs to assist persons experiencing difficulties in complying with the plan.

In addition 78A(1)(c) provides that the adviser is to identify programs that are available to assist a person to comply with the plan.

78A(2) enables the court to produce a document that sets out the availability of programs to assist people experiencing difficulties in complying with their parenting agreement. This amendment will improve the practical operation of the parenting compliance regime. This clause is consistent with the provisions of the FLA.

Clause 6 - Section 86A inserted

This clause inserts new section 86A that sets out a statement of the policy in the 3 tier approach to be taken to promote the exercise of parental responsibility. The details of the 3 tier approach are provided for by in the proposed Division 13 in Part 5, which is inserted by clause 12. This clause is consistent with the provisions of the FLA.

Clause 7 - Section 89 amended

This clause provides that where an application for a parenting order is made after an adjournment of proceedings relating to a contravention of an order relating to children

then the court to which the application is made must deal with the application as soon as practicable. Proposed subsection (b) gives the court dealing with the application for a parenting order the power to dismiss the contravention proceedings where the court believes that to be appropriate. This clause is consistent with the provisions of the FLA.

Clause 8 - Section 89A inserted

This clause is consistent with the provisions of the FLA and inserts 89A, which will provide for stage 1 of the parenting compliance regime. 89A(1) provides that the new section applies when the court makes a parenting order.

89A(2) will ensure that the obligation to explain the effects of a parenting order (including an order by consent) can be met by including standard clauses in the order. The amendment requires the court to draft its parenting orders so that the parties are informed of the obligations and consequences imposed by the order.

89A(3) provides that where a party is not legally represented in proceedings, it is the duty of the court to explain the availability of programs to assist people experiencing difficulties in complying with the parenting order, and the availability of remedial orders for location and recovery of a child if the parenting order is contravened.

89A(4) provides that the court may prepare a document outlining the availability of programs, both in the court and in the community, to assist parties to understand their responsibilities under the order. Such a document may also give information about the availability and use of location and recovery orders, in addition to the use of the compliance provisions, when a breach of the order occurs. This type of document would be particularly useful where consent orders are made by the court, as the parties may not be present when such orders are made.

89A(5) allows the court to request a legal practitioner representing a party in proceedings to assist in the explanation of the obligations and consequences of the order. The court may also request the practitioner to provide details of available programs to help the person in understanding their obligations and the availability of remedial orders for location and recovery of a child if the parenting order is contravened.

89A(6) clarifies that where the court makes a request under (5) to a legal practitioner, the legal practitioner is required to comply with the request.

89A(7) provides that where the court, or a legal practitioner, fails to provide the assistance required by 89A, that failure does not invalidate the parenting order that was made.

89A(8) makes it clear that there is an obligation on both the court and any legal practitioner, when providing the information required, to do so in language likely to be readily understood by the parties.

Clause 9 - Section 99 amended

This is a technical consequential amendment, which substitute references to section 226 in subsections 99 (1)(c) and (d) of the Act with references to the new Division 13 being inserted by the Bill.

Clause 10 - Section 103 amended

This is a technical consequential amendment, which substitute references to section 226 in subsections 103 (1)(b) and (c) of the Act with references to the new Division 13 being inserted by the Bill.

Clause 11 - Section 104 amended

This is a technical consequential amendment, which substitute references to section 226 in subsections 104 (1)(b) and (c) of the Act with references to the new Division 13 being inserted by the Bill.

Clause 12 - Division 13 inserted in Part 5

This clause is consistent with the provisions of the FLA and inserts into Part 5 a new Division.

Division 13 - Consequences of failure to comply with orders, and other obligations that affect children.

The new Division results from a very detailed consideration by the Commonwealth, including broad community consultation, by the Family Law Council on alternative options for achieving substantially increased compliance with parenting orders, particularly contact orders.

Under the current State law, in many cases, contact order compliance is seen by both parents as being optional. Many contact parents make no attempt to undertake the ordered contact that is so vital to the proper well being and development of their child. These parents take too lightly their parental responsibilities for their children.

Of similar disquiet is the large number of residence parents who manoeuvre, with apparent impunity from any retribution, to remove the non-residence parent from the child's life by preventing contact with the child. They will do this even though the court has heard of their concerns during the proceedings on the making of the parenting but has still ordered contact because such contact is in the best interests of the child.

Division 13 makes provision to ensure that non-compliance with parenting orders has serious consequences for any parent who does not comply with a parenting order.

Subdivision 1 - Preliminary

205A - Definitions - FLA s. 70NB

This amendment defines a number of terms for the purposes of the new Division. Of particular importance are the new definitions of "appropriate post-separation parenting program", "order under this Act affecting children" and "post-separation parenting program". The first definition clarifies that the term relates to a program available within a reasonable distance from a person's place of residence or place of work. The definition of "order under this Act affecting children" identifies the range of provisions of the Act that enable the court to make various orders affecting children. "Post-separation parenting program" defines the post-separation parenting programs that the court will be able to order a person to attend and the nature of those programs.

205B - Application of Division - FLA s. 70NBA

This amendment adds a new application provision to the new Division 13 of Part 5 that deals with sanctions for the breach of parenting orders. The application provision is intended to make it clear that the new three stage enforcement regime for orders affecting children will apply to all contraventions of orders affecting children whether committed before or after the new Division commences. The new Division will not apply, however, to contraventions that have already been dealt with by a court under the provisions in Part 10.

205C - Meaning of "contravened an order" - FLA s. 70NC

This amendment defines the meaning of "contravened an order", with the emphasis being on the intent of the parent in failing to comply with a parenting order, or that of another person who prevents a parent from complying with, or assists a parent to contravene, a parenting order.

205D - Requirements taken to be included in certain orders - FLA s. 70ND

This amendment enforces the application of the statements of general obligations for compliance with the terms of the orders provided in existing sections 96, 97 and 98 in respect of residence orders, contact orders and specific issues orders respectively

205E - Meaning of "reasonable excuse for contravening an order" - FLA s. 70NE

This amendment incorporates, with only necessary drafting changes, the present relevant subsections of section 225 into Division 13.

205(2) provides that a person may have a reasonable excuse for non-compliance if the person did not understand the obligations imposed by the order and the court is satisfied that the non-compliance should be excused. This may occur where a person has a limited understanding of language because they come from a non-English speaking background or because they have a limited education. This amendment duplicates the reasonable excuse provision contained in existing subsection 225(2).

205(3) requires the court when excusing the contravention to again explain to the person the obligations created by the parenting order and the consequences of further non-compliance with the order.

205F - Standard of proof of reasonable excuse - FLA s. 70NEA

This amendment clarifies that the standard for the determination of whether a reasonable excuse existed for the contravention is proof on the balance of probabilities.

Subdivision 2 - Powers of court where person contravenes an order under this Act affecting children: stage 2 of parenting compliance regime

205G - Application of Subdivision - FLA s. 70NF

205G(1) provides that Stage 2 of the parenting compliance regime applies where a person contravenes a parenting order without reasonable excuse and:

a court has not previously determined that the person has contravened a parenting order without reasonable excuse; or

there is a second or subsequent contravention and it is still desirable for the court to make an order that the person attend a post-separation parenting program. The provision makes it clear that the onus of proving that there is a reasonable excuse lies with the respondent.

205G(2) provides that the court should not make an order to attend a post-separation parenting program where the person has behaved in a way that showed a serious disregard for obligations under a parenting order. What amounts to a serious disregard will depend on the circumstances of the case and the terms of the parenting order but, by way of example, could include the kidnapping of a child or harassment despite repeated warnings and the terms of the parenting order. In such cases, the court will deal with the matter under Stage 3 of the parenting compliance regime, which requires the court to take actions ranging from community service orders to fines and imprisonment.

205H - Powers of court - FLA s. 70NG

This amendment states the powers of a court under stage 2 of the parenting compliance regime. In circumstances where stage 2 applies, a court may order the contravening party and, if appropriate, another party to the enforcement proceedings, to attend a specified appropriate post-separation parenting program. This attendance is to enable the provider of the program to assess whether the contravening party and any other party ordered to attend are suitable to attend an identified program. If they are found suitable to attend the program, they must attend without any further court order. Also, the court may, either alone or in combination with an order to attend an appropriate post-separation parenting program, make an order to compensate for any contact lost as a result of the contravention.

205H(3) provides that a court may order another person (usually the other parent) to attend a post-separation parenting program only where:

- the other person is a party to the proceedings; and
- the court is satisfied that the other persons attendance at the program is appropriate because of a connection between the contravention of the primary order and that persons parental responsibilities under the order.

Also at this stage of the compliance regime for orders affecting children, the court dealing with proceedings relating to the alleged contravention may adjourn proceedings to allow either or both parties to apply for a further parenting order. Any order so made may discharge, vary or suspend the primary order. The reason for adding this procedure is because the contravention may have come about because the parenting order was not the right order. In these circumstances it is better to put the right order in place.

Before the court makes a decision to adjourn proceedings the court must consider a range of matters set out 205H(2). Those matters include whether the orders were made by consent; whether the parties were legally represented when the order was made; and how long it has been since the original order was made before the contravention proceedings were instituted. The longer that the original orders were in place then the less likely it is that an adjournment would be granted. 205H(2)(d) provides that the court must consider any other matter that it thinks is relevant to the making of a decision to adjourn. Such matters would cover a range of issues but would include whether there have been any allegations that the contravention of the order was caused due to concerns about domestic violence or that there are allegations of abuse involving children.

205H(4) provides for the notification by the court to the program provider of the details of the court order.

205I - Duties of provider of program - FLA s. 70NH

Where the provider of a program decides that a person is unsuitable to attend a post-separation parenting program, the provider of the program must notify the court of that assessment.

Where a person fails to attend for assessment to attend a post-separation parenting program or, having been found suitable, fails to attend the program, 205(2) requires the provider of the program to notify the court of the failure to comply with the order. The court will have to consider what action to take.

205J - Evidence - FLA s. 70NI

This amendment provides that evidence of anything said, or admissions made, in the suitability assessment process for a person to attend a post-separation parenting program, or during their attendance at such a program, is not admissible in any proceedings in any court (whether exercising federal jurisdiction or not) or before any person authorised to take evidence. This provision is consistent with section 19N and

subsection 62F(8) of the FLA and section 64 of the Act dealing with the inadmissibility of statements or admissions made during primary dispute resolution.

205K - Court may make further orders in relation to attendance at program - FLA 70NIA

This amendment provides that where a person who has been ordered to attend a post-separation parenting program, or a part of such a program, has failed to attend the program, the court can make a further order as to that persons attendance at the program.

Subdivision 3 - Court to take action in respect of person who contravenes an order: stage 3 of parenting compliance regime

Section 205L - Powers of court - FLA s. 70NJ

This amendment sets out the powers of a court under stage 3 of the parenting compliance regime. This clause is consistent with the provisions of the FLA.

205L(1) sets out the circumstances under which the court must make an order under Stage 3 of the parenting compliance regime. A court must make such an order where a person contravenes a parenting order without reasonable excuse and:

- there has been no previous court order for a contravention of the parenting order but the court is satisfied that the behaviour of the parent is such as to show a serious disregard for his or her parenting obligations; or
- a court has previously determined that the person contravened the order without reasonable excuse.

205L(2) allows a court to determine that, although a person has previously contravened an order without reasonable excuse, it would be more appropriate to deal with the contravention under stage 2 of the parenting compliance regime.

205L(3) provides that where stage 3 of the parenting compliance regime applies to a particular contravention, a court must make the most appropriate of the orders set out in 205L(5).

205L(4) clarifies that the court can make an order under stage 3 of the parenting compliance regime regardless of whether:

- the parenting order to which the contravention relates was made prior to the commencement of the new regime; or
- the contravention occurred prior to the commencement of the new regime.

205L(5) sets out the range of sanctions that may be imposed on a person, namely:

- a community service order;
- an order requiring the person to enter into a bond;
- an order varying the order contravened;
- a fine; or
- a sentence of imprisonment.

205L(6) provides that where a court varies or discharges a community service order it may give any direction as to the effect of the variation or discharge as it thinks appropriate.

205L(7) sets out matters that must be taken into account when making an order to vary the existing parenting order that has been contravened. In such cases, this proposed subsection specifically incorporate the paramountcy of the best interests of the child.

The amendment also specifies the other matters relating to the operation of the earlier segments of the three tiered regime that the court must take into account to the extent that each or any of those considerations are present in the particular case.

205L(8) provides that a sanction of imprisonment (205L(5)) may only be imposed for the nonpayment of child maintenance where the contravention was intentional or

fraudulent. Under the present law, imprisonment for non payment of maintenance is not available. The Federal Parliamentary Joint Select Committee in 1992 recommended that imprisonment should be an option and this amendment will give effect to recommendation 67 of its report

205L(9) clarifies that the operation of the new compliance regime, and particularly orders of imprisonment, does not extend to non-compliance with assessments, departure orders or lump sum maintenance orders made under the *Child Support (Assessment) Act 1989*.

205L(10) provides that, where the court imposes a punitive sanction on a person, the court will have the capacity to delay the commencement of the undertaking of that sanction until the expiry of a specified period or at the occurrence of a specified event.

205L(11) clarifies that at the time it makes an order imposing a sanction, the court may also make any other orders it considers necessary to ensure future compliance with the parenting order that was contravened.

205M - When court is empowered to make a community service order - FLA s. 70NK
This amendment is based on existing section 229 of the Act. It is hoped that community service orders will be used more frequently as part of the new parenting compliance regime.

205N - Variation and discharge of community service orders - FLA s. 70NL
This amendment replicates existing section 231(1), with some minor consequential drafting changes.

205O - Bond - FLA s. 70NM
This amendment provides for bonds that a court may, after explaining the purpose and consequences, require a person to enter into for a specified period up to 2 years. A bond may be with or without surety and may include conditions. The provisions are in accordance with a recommendation by the Family Law Council in its report *Child Contact Orders: Enforcement and Penalties*. The term bond is used rather than recognizance, as it is more readily understood in the community.

205P - Procedure for enforcing community service orders or bonds - FLA s. 70NN
This amendment sets out the procedure for enforcing the sentencing options of community service orders and bonds.

205Q - Sentences of imprisonment - FLA s. 70NO
This amendment replicates existing section 227, with some consequential drafting changes, and an additional 205Q(8) to clarify that a term of imprisonment does not reduce the liability to make a payment under a child maintenance order.

205R - Relationship between Subdivision and other laws - FLA s. 70NP
This amendment replicates existing section 232, with some minor consequential drafting changes

205S - Subdivision does not affect the enforcement of child maintenance orders etc - FLA 70NR.
This amendment replicates existing section 233, with some minor consequential drafting changes.

Clause 13 - Section 220A inserted

220A - Rules relating to enforcement - FLA s. 109A

This amendment provides that rules of court can be made to deal with the enforcement of money and property orders made under the Act, the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989*.

220A(2) provides for the types of matters that can be covered by the rules.

220A(3) specifies the types of enforcement actions that can be covered by the rules.

220A(4) provides that regardless of how long an amount has been unpaid, enforcement action will be able to be taken in respect of either the whole or part of the amount.

220A(5) defines "property" and "Registrar" for the purposes of the amendment.

Clause 14 - Section 222A inserted

222A - People not to be imprisoned for failure to comply with certain orders - FLA s. 107

This clause is consistent with the provisions of the FLA and provides that a person must not be imprisoned for the contravention of an order made under the Act for the payment of money. The clause does not affect the operation of Part 5 Division 13 or Part 10 Division 2.

Clause 15 - Heading to Part 10 replaced

PART 10 - SANCTIONS FOR FAILURE TO COMPLY WITH ORDERS, AND OTHER OBLIGATIONS, THAT DO NOT AFFECT CHILDREN

This clause is self-explanatory. It is a consequence of confining the operation of Part 10 to sanctions for failing to comply with court orders other than orders in respect of children.

Clause 16 - Section 223 replaced

223 - Interpretation - FLA s. 112AA

This clause replaces the existing definitions relating to this Part with new or amended definitions that reflect the amendments made to other section in this Part (eg: inclusion of a definition of a "maintenance order")

Clause 17 - Section 224 amended

Section 224(2) is repealed by this clause as a consequence of sanctions for failing to comply with court orders in respect of children now being contained in Division 13 of Part 5. This clause is consistent with the provisions of the FLA.

Clause 18 - Section 225 amended

By this clause section 225 is amended in subsection (1) and subsections (3), (4) and (5) are repealed. This is a consequential amendment to references to certain subsections flowing from the repeal of the other subsections and as a consequence of sanctions for failing to comply with court orders in respect of children now contained in Division 13 of Part 5. This clause is consistent with the provisions of the FLA.

Clause 19 - Section 226 amended

This clause repeals subsections 226 (1) to (4) inclusive as a consequence of sanctions for failing to comply with court orders in respect of children now being contained in Division 13 of Part 5 and inserts replacement subsections (1) to (4) inclusive.

226(1) redrafts the current discretion in the court to impose a sanction for failing to comply with a court order and provides that the court may impose a sanction where the court is satisfied that there has been a failure to comply with a court order without reasonable excuse.

226(2) clarifies that a penalty may be imposed for a failure to comply with a maintenance order even if the maintenance has been paid after the application for the sanction was made but before the sanction hearing takes place.

226(3) establishes the range of sanctions that may be imposed on a person.

226(4) provides that a sanction of imprisonment may only be imposed for the non-payment of maintenance where the contravention was intentional or fraudulent. This provision results from acceptance of a recommendation of the Federal Parliamentary Joint Select Committee report of 1992.

226(5) and (6) are amended by omitting reference to subsection (2)

226(7) is repealed as a consequence of sanctions for failing to comply with court orders in respect of children now being contained in Division 13 of Part 5.

Clause 20 - Section 227 amended

227(1), (2) and (3) are amended to correct a reference in each of the subsections, as a consequence of the re-ordering of the paragraphs in subsection 226(3).

Sections 227(5) and (6) are repealed and replaced. Existing subsection 227 (5) provides for the release of a person on a recognizance, either immediately or after having served part of a specified term of imprisonment. Clause 20 amends the subsection to remove the capacity to release a person on a bond before the term of imprisonment commences.

Subsection 227(6) replaces the existing reference to recognizance with bond.

Subsection 227 (8) is inserted to clarify that where a person serves a term of imprisonment for failure to pay maintenance, other than child maintenance, such term of imprisonment does not reduce the maintenance liability of the maintenance debtor.

The maintenance that might be applicable in these matters is, for example, maintenance for a child over the age of 18 years where that child is undertaking education or where that child has a mental or physical disability.

Clause 21 - Section 228 is replaced

This clause is consistent with the provisions of the FLA and replicates existing section 228, with minor drafting changes, as a consequence of the change from recognizance to bond.

Clause 22 - Section 229 amended

Subsections 229(2) and (5) are amended to correct a reference in each of the subsections, as a consequence of the re-ordering of the paragraphs in subsection 226(3).

Clause 23 - section 230 amended

Subsection 230(1) is amended to correct a reference in the subsection, as a consequence of the re-ordering of the paragraphs in subsection 226(3).

Clause 24 - section 232 amended

This clause repeals subsection 232(5) as a consequence of sanctions for failing to comply with court orders in respect of children now being contained in Division 13 of Part 5.

Clause 25 - Saving

This clause is a saving provision and ensures that any order imposing a sanction under the existing provisions of Part 10 continues to operate according to its terms, despite the amendments contained in this Bill.

Clause 26 - Heading to Part 10 Division 3 replaced and Section 233A inserted

This clause repeals the existing heading to Division 3 of Part 10.

PART 10A - CONTEMPT OF COURT.

223A Interpretation

233A inserts definitions for the purpose of this amendment

Clause 27 - Section 234 amended

This clause makes a drafting change to existing subsection 234(1), consequential on the addition of a new subsection 234(1a) which provides that where a person is to be prosecuted for contempt for non-payment of a maintenance order, and prior to the hearing of the matter the person complies with the order, then the prosecution for contempt cannot continue.

234(8) is inserted and provides that, to avoid any doubt, where a person is imprisoned as a result of a contempt arising out of a failure to pay maintenance, the imprisonment does not negate the liability to pay the maintenance or reduce it in any way.

Clause 28 - Section 244 amended

This clause deletes subsection 244(3)(n) that provides for rules of court to be made about enforcement and execution of decrees as the power is provided in 220A (see clause 13). It is not necessary therefore to include reference to such provision in the general rule making powers of the Act.

PART 3 - AMENDMENTS ABOUT DE FACTO RELATIONSHIPS

Clause 29 - Section 5 amended

This clause adds to or amends definitions necessary for the operation of the Act, where applicable, consistent with those in the FLA. Further it inserts a new definition of “de facto relationship” as defined in Clause 45 and the definition of “step-parent” is extended to persons in a defacto relationship.

Clause 30 - Section 33 amended

This clause will not allow for the delegation to Registrars of the power of setting aside a registered award under clause 37, consistent with the limitation in the FLA.

Clause 31 - Section 36 amended

This clause will expand the jurisdictional limits of the Court to make declarations and revoke declarations that it has made and hear and decide all other matters under the proposed Part 5A of the Bill. In particular, the Court has jurisdiction to hear and decide on applications for orders with respect to interests in property and the provision of maintenance.

Clause 32 - Section 39 amended
This clause is self-explanatory.

Clause 33 - Section 43 amended
This clause amends the transfer provisions so that they are consistent with the FLA and additionally allows for the transfer of the proposed Part 5A proceedings.

Clause 34 - Section 43A inserted
This clause allows the transfer of proceedings from a court of summary jurisdiction other than as detailed in Clause 33 above.

Clause 35 - Section 47 amended
This clause includes in the definition of primary dispute resolution, arbitration services provided by arbitrators, which is consistent with the FLA.

Clause 36 - Section 48 amended
This clause includes arbitration as a means of primary dispute resolution, consistent with the FLA.

Division 3A - Arbitration

Clause 37 - Division 3A inserted in Part 4
This clause inserts a new Division, which provides a workable scheme for both court referred and private arbitration as a cheaper, quicker and more accessible dispute resolution procedure than court litigation for the resolution of property disputes. To ensure finality of resolution, provision is made for confinement of reviews of awards to questions of law. Provision is made for the charging of arbitration fees.

Division 4 - Miscellaneous

Clauses 38, 39, 40, 42 and 44 - Sections 61, 62A, 63, 65 and 160 amended
These clauses consequently amend the Act in relation to arbitration matters.

Clause 41 - Heading to Part 4 Division 4 repealed
This clause is self-explanatory.

Clause 43 - Section 124 amended
This clause is consequential to the widening of the definition of step parent to include a de facto relationship. It makes provision for the length and circumstances of the de facto relationship with the relevant parent of the child to be considered by the court when considering the making a child maintenance order.

PART 5A - DE FACTO RELATIONSHIPS

Division 1 - Introductory

Clause 45 - Part 5A inserted
Under the proposed legislation, the court may make property adjustment and maintenance orders regarding de facto relationships unless the partners have entered

into a binding financial agreement (including former agreement) in relation to specified matters. The clause aims to ensure fair and just treatment to de facto couples.

205T - Interpretation

The definitions contained herein follow the FLA, except in so far as the meaning of defacto partner and de facto relationship have the meaning given by the proposed sections 205V and 205W.

205U - Application of Part generally

The proposed Part 5A does not have application to a de facto relationship that ended before the commencement of the Part. The proposed Part will apply to persons over the age of 18 years of age. However, it may apply if de facto partners have attained at least 16 years of age and a court has made a finding that the circumstances of the relationship are so exceptional and unusual to justify the application of the Part to the partners.

205V - Meaning of "de facto relationship"

Defines a 'de facto relationship' as a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship. De facto relationships include same sex relationships and may apply to persons legally married to some one else or in another de facto relationship. The indicators of whether or not a de facto relationship exists between 2 persons include the following

- the length of the relationship;
- whether they are living together;
- whether there is a sexual relationship between them;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment by them to a shared life;
- whether they care for and support children;
- the reputation and public aspects of the relationship between them.

205W - Meaning of "de facto partner".

"Defacto partner" is defined to mean a person who lives, or has lived, in a de facto relationship, the remainder of the clause is self-explanatory.

205X - Right to certain civil proceedings limited

This clause limits the jurisdiction of the Supreme Court in its equitable jurisdiction in respect to property, thereby giving exclusive jurisdiction to the Family Court at first instance.

Division 2 - Property adjustment orders and maintenance orders

Subdivision 1- Introductory

205Y - This Division does not apply to certain matters covered by binding financial agreements or former financial agreements - FLA s. 71A

Financial agreements and former financial agreements (see definition) which relate to financial matters and to financial resources (see definitions) are not covered in this division.

205Z - People to whom this Part applies - connection with W.A.

Subsection 36(5) of the Act is qualified to the extent that a Court must be satisfied that one or both of the parties to the application were resident in Western Australia on the day on which the application was made. In addition, that either both parties have resided in Western Australia for a least one third of the duration of their de facto relationship or a substantial contribution (as therein defined) has been made in the State by the applicant.

205ZA - Court not otherwise limited by connection with W.A. referred to in section 205Z

Despite the above, the Court may consider facts and circumstances relevant to 205Z that may have occurred before the application date or outside the State.

205ZB - Where court may make order under this Division

A court may make an order in relation to a de facto relationship only if satisfied of one of the matter detailed therein. The matters relate to the length of the relationship (2 years) or if there is a child of the de facto relationship or one partner has made an substantial contribution and failure to make the order would result in serious injustice. In deciding the length of a relationship the court must consider whether there has been break in the continuity of the relationship, and if there has been a break, the length of the break and the extent of the breakdown in the relationship.

205ZC - Declaration of interests in property - FLA s. 78

A court may declare the title or rights, a partner has in respect of property and may make consequential orders binding on the parties only as to the sale or partition and interim or permanent orders as to possession.

Subdivision 2 - Alteration of property interests, and maintenance

205ZD - Time limit for making applications

A de facto partner may apply within one year after the relationship ended for an order under the proposed division and the court may extend the time if satisfied that hardship would be caused to a de facto partner if leave is not granted.

205ZE - Right of de facto partner to maintenance - FLA s. 72

Consistent with s.72 FLA this clause provides that a defacto partner is liable to maintain the other de facto partner to the extent that he or she is reasonably able, if:

the other partner is unable to support herself or himself adequately due to the care and control of a child of the relationship who has not attained the age of 18 years;

or by reason of age or physical or mental incapacity for appropriate gainful employment; or

for any other adequate reason

having regard to any relevant matter referred to in 205ZF.

205ZF - Maintenance orders - FLA s. 75

Consistent with section 75 FLA, this amendment gives the court the right to make an order for the provision of maintenance and sets out the matters to be considered by the court in making such an order. These factors follow the factors in the FLA and include:

the age and state of health of each of the de facto partners;

the income, property and financial resources of each of the de facto partners and the physical and mental capacity of each of them for appropriate gainful employment;

whether either de facto partner has the care or control of a child of the de facto relationship who has not attained the age of 18 years;

commitments of each of the de facto partners as specified therein;

the responsibilities of either party to support any other person;

the eligibility of either party for certain pensions allowances or benefits;

a reasonable standard of living;

the ability of maintenance to enable further training and education;

the extent to which the applicant has contributed to the income, earning capacity, property and financial resources of the other;

the need to protect a party who wishes to continue that party's role as a parent;

the financial resources relating to cohabitation;

the terms of any property settlement;

child support payable;

the justice of the case requires; and

the terms of any financial agreement that is binding on the parties

205ZG - Urgent de facto partner maintenance cases- FLA s. 77

Consistent with section 77 FLA, provision is made for an urgent maintenance orders, if the court is satisfied that immediate financial assistance is required pending the disposal of the proceedings.

205ZH - Specifications in orders of payments etc. for de facto maintenance purposes - FLA s. 77A

Consistent with section 77A, the court must specify in orders for payment, transfer or settlement the extent to which provision has been made for the maintenance.

205ZI - Alteration of property interests - FLA s. 79

Consistent with section 79, the court may in circumstances where it is just and equitable make an order altering the interests of the parties in the property after considering all relevant matters including:

- the direct and non-direct contributions made by each partner;
- the direct and non-direct contributions made by each partner to the welfare of the other partner or a child of the partners; and
- the income/earning capacity, property and financial resources and financial needs of each partner.

The court may adjourn the proceedings if there is likely to be a significant change in the financial circumstances of either party until a time as to do justice as between the parties and in the interim make appropriate orders. The clause also allows for the proceedings to be continued by the legal representative and the enforcement of orders against the estate. Orders should not normally be made under this section unless the parties have attended a conference.

205ZJ - Setting aside of orders altering property interests - FLA s. 79A

Consistent with section 79A FLA, the Court may vary, set aside or make another order altering property interests if satisfied of circumstances as set out therein.

205ZK - General powers of court - FLA s. 80

Consistent with section 80 FLA, this amendment sets out the general powers of the Court in relation to making orders regarding property interests and maintenance, including payment by instalments, transfer or settlement of property and the imposing of terms and conditions.

205ZL - Duty of court to end financial relations of de facto partners - FLA s. 81

Consistent with section 81 FLA, a court must make such orders, as far as practicable, to finalise the financial relationships between partners who are no longer in a de facto relationship so as to avoid further proceedings.

205ZM - Cessation of de facto maintenance orders - FLA s. 82

Consistent with section 82 FLA, maintenance orders cease upon the death or marriage of a de facto partner.

205ZN - Modification of de facto maintenance orders - FLA s. 83

Consistent with section 83 FLA, de facto maintenance orders can be modified including discharging, suspending, revising a suspended order, or varying the order based on a change in circumstances of the person involved or economic factors.

Division 3 - Financial agreements

This amendment deals with financial agreements, dealing with some or all of the property, maintenance and financial resources of the parties, to be made and will provide for the mechanism to make such agreements binding.

20520 - Definition - FLA s. 90A This amendment is self-explanatory and deals with the definition of "dealt with".

205ZP - Financial agreements before beginning a defacto relationship - FLA s. 90B

Consistent with section 90B FLA, provision is made for people to make a written agreement at the time they are contemplating entering into a de facto relationship, in respect to the matters set out in 205ZP(2). There can only be one financial agreement in force at any particular time. This should not be interpreted so as to limit the operation of 205ZP(4), which permits the making of a subsequent financial agreement, and the termination of an existing financial agreement, within the same agreement. Similar provision has been made in respect of agreements under 205ZQ and 205ZR.

205ZP(2) provides that people will be able to make a financial agreement about how any property or financial resources owned by either or both of them is to be dealt with on the breakdown of the relationship. Financial agreements can deal with property that was acquired by either, or both, of the parties after the agreement was made and prior to the end of the relationship. Similar provision has been made in respect if agreements under 205ZQ and 205ZR.

205ZP(3) provides that financial agreements may also deal with matters other than those outlined in 205ZP(2). These other matters must be incidental, or ancillary, to the matters specified therein. Similar provision has been made in respect of agreements under 205ZQ and 205ZR.

As mentioned above, subsection 205ZP(4) provides that a financial agreement made under 205ZP(1) may terminate an existing financial agreement.

205ZQ - Financial agreements during de facto relationship - FLA s. 90C

Consistent with section 90C FLA, financial agreements may also be made during a de facto relationship, in the same terms and about the same matters as financial agreements before a de facto relationship. The terms of the section are consistent with the terms of 205ZP.

In addition, 205ZQ(4) provides that as well as terminating a financial agreement made under 205ZQ(1), a financial agreement made under 205ZQ(1) may also terminate a financial agreement made before the defacto relationship, under 205ZP(1).

205ZR - Financial agreements after de facto relationship ends - FLA s. 90D

Consistent with section 90D FLA, financial agreements may be made after a de facto relationship is ended, in the same terms and about the same matters as financial agreements before or during a relationship. The terms of the section are consistent with the terms of 205ZP.

In addition, 205ZR(4) provides that as well as terminating a financial agreement made under 205ZR(1), a financial agreement made under 205ZR(1) may also terminate a financial agreement made before the de facto relationship, under 205ZP(1), or a financial agreement made during the de facto relationship, under 205ZQ(1).

205ZS - Requirements with respect to provisions in financial agreements relating to the maintenance of a defacto partner or a child or children - FLA s. 90E.

Consistent with section 90E FLA, in a financial agreement dealing with maintenance of children and the maintenance of a partner, it will be void unless the provision specifies the person who is to be maintained and the amount or value of the maintenance to be provided.

205ZT - Certain provisions in agreements - FLA s. 90F

Consistent with section 90F FLA, the purpose of this amendment is to ensure that people can not agree away their obligation to maintain the other party, with the effect of increasing the burden on the social security system. 205ZT provides that an agreement that purports to exclude or limit the courts jurisdiction in relation to the maintenance of a party to marriage is of no effect where the party would have been unable to support themselves without an income tested pension, allowance or benefit. The assessment of whether or not the party would be able to support themselves without an income tested pension, allowance or benefit needs to be made at the time of the break down of the de facto relationship. A court will be permitted to exercise jurisdiction only where the agreement was entered into after the breakdown of the relationship. The jurisdiction of a court is not required where the agreement is made before the breakdown of the relationship.

205ZT(2) clarifies that continuing to own property or financial resources will constitute dealing with that property or financial resources, for the purposes of binding financial agreements.

205ZU - When financial agreements are binding - FLA s. 90G

Consistent with section 90G FLA, a financial agreement is binding on the parties to the agreement if:

- the agreement is signed by both parties;
- compulsory independent advice is obtained by each party to the agreement;
- the agreement contains a statement to the effect that each of the parties to the agreement has been provided with independent legal advice as to the effect of

the agreement on their rights, whether at the time the advice was provided it was to the advantage of that party to make the agreement and whether or not at the time the provisions of the agreement were fair and reasonable;
 those who have provided the required advice have signed a certification to that effect;
 the agreement has not been terminated or has not been set aside by a court; and
 after the agreement is signed, the original is given to one party and a copy is given to the other.

All of these criteria will have to be met in order for a financial agreement to be binding. If an agreement is binding a court will not be able to deal with the matters with which the agreement deals. A court will be able to deal with any property or financial resources of the parties that have not been dealt with by a binding financial agreement between them.

205ZU(2) provides that a court may make such orders for the enforcement of a binding financial agreement as it thinks necessary.

205ZV - Effect of death of party to financial agreement - FLA s. 90H

Consistent with section 90H FLA, a financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement. It provides that the agreement will be binding on the legal personal representative of the deceased party, in similar terms to existing s. 130 that provides for the circumstances in which a child maintenance order is binding on the legal personal representative of the deceased person.

205ZW - Termination of financial agreement and former financial agreement - FLA s. 90J

Consistent with section 90J FLA, parties to a financial agreement may terminate the agreement by including a provision to that effect in another financial agreement, as provided for above or through the making of a written (termination) agreement to that effect. The provision also allows for the termination of former financial agreements.

Additionally, the terms by which a termination agreement is binding on the parties are set out and are consistent with the approach taken in relation to the making of a financial agreement.

A court may make such order or orders (including an order for the transfer of property) it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to financial agreement or former financial agreements and any other interested persons, where an agreement has been terminated. This amendment protects the rights of both the parties to the agreement and any third parties who may have had dealings in relation to property that was the subject of the agreement.

205ZX - Circumstances in which court may set aside a financial agreement, termination agreement or former financial agreement - FLA s. 90K

Consistent with section 90K FLA, a court may set aside the above mentioned if it is satisfied that:

the agreement was obtained by fraud, the ground of fraud extends to the nondisclosure of a material matter;

the agreement is void, voidable or unenforceable including whether the agreement is obtained by the unconscionable conduct of one of the parties. These grounds reflect the principles of common law and equity, under which an agreement would fail because the agreement is affected by duress, undue influence,

unconscionability, misrepresentation or operative mistake. The inclusion of unconscionability as a separate ground is simply to make it clear that this ground is simply to make it clear that this ground is included within the grounds for setting aside an agreement. Unconscionability will retain its ordinary meaning within the law of contract. The provision is modelled upon the provisions of subsection 87(8)(c) of the FLA and it is expected that it is to be interpreted in a similar way (see for example the decision of the Full Court of the Family Court in *Blackman v Blackman* (1998) FLA 92 -791); or since making the agreement, a material change in circumstances relating to the care, welfare and development of a child of the relationship, such that a party to the agreement would suffer hardship if the court does not set aside the agreement. This will require a court to make a finding as to whether having responsibility for children brings about a change in circumstances sufficient to warrant the courts intervention to set the agreement aside.

A definition is provided of when a person has 'caring responsibility' for a child.

205ZY - Validity, enforceability and effect of financial agreements, termination agreements and former financial agreements - FLA s. 90KA

Consistent with section 90KA FLA, whether a financial or termination agreement is valid, enforceable or effective is to be determined by a court according to the principles of law and equity. Common law and equitable doctrines of particular relevance to maintenance agreements include mistake, rectification, fraudulent, negligent and innocent misrepresentation, collateral contract, estoppel and damages for breach.

Clause 46 - Section 235A inserted

235A - Injunctions relating to de facto relationships FLA s. 114

Consistent with section 114 FLA, a person may apply for an injunction in relation to a matter arising out of a de facto relationship, allowing the court to make an order or grant an injunction as it considers proper, including:

- for the personal protection of a de facto partner;
- restraining a person from entering or remaining in a specified area or place;
- in relation to the property of a de facto partner; or
- relating to the use or occupancy of the home previously shared by the de facto partner

Additionally, the court may grant an injunction with respect to a matter to which the proceedings relate, by interlocutory order or otherwise, in any case in which it appears to the court to be just or convenient to do so. An injunction or order under this section may be granted unconditionally or on such terms and conditions as a court considers appropriate.

Clause 47 - Section 236 amended

The amendment is consequential and self-explanatory.

Clauses 48 and 49 - Sections 244 and 245 amended

The amendments are consequential to the provision of arbitration in the resolving of disputes.

Clause 50 - Consequential and related amendments - Schedule 1.

This clause is self-explanatory.

PART 4 - OTHER AMENDMENTS

Clause 51 - Section 44 amended

This clause is self-explanatory.

Clause 52 - Section 79 amended

This clause makes minor consequential drafting amendments to section 79(2)(b)(i) and (ii) and inserts subparagraph (iii) to provide for a signed statement by the family and child mediator involved prior to the development of a parenting plan.

The clause also inserts subsection 229(2)(a) which is self explanatory.

Clause 53 - Section 88 amended

This clause inserts subsection 88(ba) to provide a grandparent may apply for a parenting order.

Clause 54 - Section 113 amended

This clause inserts subsection 113(da) and is consequential on the insertion of Subdivision 5A (see clause 58).

Clause 55 - Section 118 amended

This clause inserts in Section 118(1) paragraph (ba) to provide that a grandparent of a child may apply for a child maintenance order.

Clause 56 - Section 123 amended

This clause inserts proposed subsection 123(1a) to provide the court with power to make a maintenance order when a child is 17, to take effect when or after the child turns 18.

Clause 57 - Section 128 amended

This clause amends section 128(1)(b) to provide that more than one person may apply to modify a child maintenance order.

It also inserts after section 128(1) proposed subsection (1a) and (1b) that clarify the power of a court to modify child maintenance orders with the consent of the parties to the first order.

Further, the clause amends section 128(2) which are consequential on the amendments to section 128(1).

Clause 58 - Subdivision 5A inserted in Part 5 Division 7

Subdivision 5A - Varying the maintenance of certain children

This clause is consistent with the provisions of the FLA and inserts 128A to provide for the variation of maintenance of certain children.

128A(1) sets out the persons to which the amendment applies.

128A(2) provides that people may vary or revoke an earlier agreement or order by registering in a court a new written agreement.

128A(3) provides that registered agreement is of no effect to the extent that it allows any entitlement of a child or another person to an income tested pension, allowance or benefit to affect the duty of that child's parents to maintain the child.

128A(4) provides that, unless the agreement or order otherwise provides, if an original agreement is varied it will continue to operate despite the death of the payer, the payee

or a person entitled to receive the payment and will operate in favour of the legal representative of the deceased.

128A(5) provides that where the agreement or order is for periodic payment of maintenance, such an agreement or order will cease on the death of the party entitled to receive the periodic payments.

128A(6) clarifies that the amendment will apply despite anything in Division 4.

Clause 59 - Section 131A inserted and transitional

131A - Children who are 18 or over: change of circumstances - FLA s. 66VA

The amendment is consistent with the provisions of the FLA. Existing section 123 provides for the circumstances in which a court may make a child maintenance order in relation to a child who is 18 or over. Existing subsection 123(1) provides that such an order must not be made unless a court is satisfied that maintenance is necessary to enable the child to complete their education or because the child has a mental or physical disability.

The clause provides for what will happen if a child does not continue to meet the criteria for maintenance under subsection 123(1).

131A(2) provides that a person who is in receipt of such maintenance must inform the payer of the change in circumstances as soon as practicable.

131A(3) provides that if there is any overpayment of maintenance, because the child no longer meets the criteria, the amount overpaid may be recovered by proceedings in a court

The amendment only applies to child maintenance orders made after the commencement of the section.

Clause 60 - Section 132 replaced and transitional

132 - Recovery of arrears - FLA s. 66W

This amendment is consistent with the provisions of the FLA. Existing subdivision 6 of Division 7 of Part 5 of the Act deals with the circumstances in which an order for child maintenance ceases to be in force. Section 132 makes provision for the recovery of any arrears of child maintenance that were due at the time the order ceased to be in force. In *Heethuis v Van Genderen* (1999) 24 Fam LR 396 the Family Court held that, if the court order stopped being in force, the court did not have the power to vary the maintenance order under section 128. However, whilst the order continued for the purposes of recovery of arrears by virtue of section 132, there was no provision for the variation or discharge of those arrears. The effect of this can be particularly harsh on liable parents. This clause overcomes the concern expressed in that case.

132(1) repeats the wording of the original section with the addition of references to other provisions of the Act that provide for the cessation of the operation of the maintenance order. 132(2) provides that, where arrears of maintenance have accrued at the date of the cessation of the maintenance order, the court may order the discharge, or variation, of the arrears.

The clause also provides that the court is able to make orders in respect of arrears outstanding at or after the date of commencement of the new section.

Clause 61 - Section 144 amended

Existing section 144 provides for the people who may apply for a location order. This clause is consistent with the provisions of the FLA and inserts new 132(ca) to specifically include a grandparent of the child.

Clause 62 - Section 149 amended

Existing section 149 defines recovery order for the purposes of the Act. Paragraph 149(g) provides that a recovery order may authorise the arrest without warrant of a person who, on a second or subsequent occasion, removes a child in contravention of an order.

This clause amends paragraph 149(g) to provide that the recovery order may both authorise the arrest without warrant or direct a person to arrest without warrant.

Clause 63 - Section 152 amended

Existing section 152 provides for the people who may apply for a recovery order. This clause inserts new paragraph 152(ca) to specifically include a grandparent of the child.

Clause 64 - Section 155 amended

This clause makes minor consequential amendments to subsection (1) and inserts a new subsection (2). Existing section 155(1) provides how long a recovery order remains in force. 155(2) is added to avoid doubt that a recovery order can be used as many times as is necessary during its duration.

Clause 65 - Section 214A inserted

214A - Children swearing affidavits, being called as witnesses or being present in court. This clause is consistent with the provisions of the FLA and inserts a new section 214A. The Rules provide that a child shall not be called as a witness or remain in court without leave and only allow a child (other than a child who is, or is seeking to become, a party to the proceedings) to swear an affidavit for the purposes of a proceeding with the leave of a court. Those rules have a sound policy basis. In *Renshaw and Reschke* (1997) 22 Fam LR 354, a husband applied to call his 16 year old son as a witness. Counsel for the husband argued that the particular rule was beyond the rule-making power contained in the Act. The Full Court did not have to decide the issue but commented there was some force to the argument. 214A overcomes the doubts expressed by the court in *Renshaw and Reschke*, and deals with the issue of the swearing of affidavits. It does so using three new subsections. 214A(1) deals with the issue of a child swearing an affidavit. It is consistent with the approach of the existing Rule. However, rather than requiring the leave of the court, an order of the court must be obtained. There is no practical difference, in terms of the procedure that must be followed by a party to proceedings, between seeking the leave of the court and obtaining an order of the court. To ensure consistency, therefore, between the subsections of new section 214A, the requirement to obtain a court order has been applied to both.

214(2) provides for a court, where it considers that course is appropriate, to make an order allowing a child to be called as a witness, or to be present, during proceedings in the court. The issue of when it might be appropriate for a child to give evidence or be present in family law proceedings was considered in early cases. In the case of *In the Marriage of Borzak* (1979) 5 Fam LR 571 at 575, Wood SJ said the prohibition against calling a child as a witness is designed to protect the child from giving evidence for or against either of his parents. Matters that might be taken into account in exercising the discretion include: the nature and degree of cogency of the evidence that the child might provide; the availability of such evidence from alternative sources; the maturity and background of the child; and the relationship of the child to persons affected by those proceedings.

214A(3) makes it clear that the provision applies to all persons under the age of 18 years.

Clause 66 - Section 219A inserted

219A - Maintenance orders - more than 12 months old - FLA s. 106

This clause inserts 219A which removes any doubt that the court has the power to enforce maintenance orders regardless of whether they are more than 12 months in arrears. This will overturn the current common law in this regard.

Clause 67 - Section 236 inserted

This clause is consistent with the provisions of the FLA. Existing subsection 236(1) provides for the powers of arrest without warrant. Existing subsection 236(1)(b) provides for the circumstances in which a police officer may arrest a person, without warrant, pursuant to the breach of an injunction designed to protect another person. These circumstances include that the person has breached the injunction by causing or threatening to cause bodily harm to the protected person. This clause adds to the circumstances by including stalking of another person. It also repeals the existing definition in subsection 236(6) and substitutes a new definition of "holding period", to clarify that a person arrested has to be brought before the court before the close of business on the next working day after the arrest.

Clause 68 - Section 240 amended

This clause is consistent with the provisions of the FLA and inserts a new subsection 240(2a) that provides that if a party files an application of offer of settlement and that offer is accepted by the other party before it is withdrawn, that acceptance brings the proceedings to an end.

Clause 69 - Section 243 amended

243 - Restriction on publication of court proceedings

This clause is consistent with the provisions of the FLA. It extends the definition of publication in subsections 243(1) and (2) to include all forms of electronic means, in order to cover current forms of dissemination of information.

It also extends the definition of publication in subsections 243 (3) (b) and (c) to include all forms of electronic means, in order to cover current forms of dissemination of information.

Existing subsection 243(7) provides that proceedings for an offence under section 243 shall not be commenced except by, or with the written consent of, the Attorney General. This function will now rest with the Director of Public Prosecutions, under section 5 of the *Director of Public Prosecutions Act 1991*.

Subsection 243(8) is amended by inserting after (d) a new paragraph (da) and by making minor consequential amendments to paragraphs (f)(i) and (f)(ii) and inserting a new paragraph (f)(iii).

243(8)(da) will provide that section 243 does not apply to the display of notices in the premises of a court that lists proceedings identified by reference to the names of the parties that are to be dealt with by the court.

Existing paragraph 243(8)(f) provides for an exception to section 243, this clause inserts proposed subparagraph 243(8)(f)(iii) that provides an additional exception for an individual who is a party to any proceedings under the Act in connection with those proceedings. There is an increasing number of people who represent themselves in family law proceedings and this will enable such self-represented litigants to obtain information to assist them in the conduct of their proceedings.

243 (9) makes minor amendments to the definition of "court" and also adds a definition of "electronic means", to encompass existing and future means of transmitting information.

Clause 70 - Section 243A inserted

243A Use of reasonable force in arresting persons

There has been some confusion as to the level of force that may be used in arresting persons under the Act. This clause inserts proposed section 243A, which provides that a person may use reasonable force to make an arrest, with or without warrant, or to prevent a person escaping.

Clause 71 - Section 245 amended

Section 245 is amended by adding after subsection (4) a new subsection (5) to clarify the precedence of the regulations where any inconsistency exists.

Clause 71 - References to "recognizance" changed to "bond".

This change is consequential as a result of new section 205O, 227(6), etc.

Clause 73 - Certain penalties increased

Penalties applying under the provisions of various sections of the Act are to be increased 10%.

Schedule 1 - Consequential and related amendments

***Administration Act 1903* amended**

This clause makes amendments to the *Administration Act 1903* allowing for the distribution on intestacy to defacto partners

Subclause (1) specifies that it is the *Administration Act 1903* being amended

Subclause (2) is self-explanatory and consequential.

Subclause (3) allows for the distribution on intestacy to a de facto partner in the circumstances specified therein. The terms "de facto partner" and "de facto relationship" have the same meanings as in the proposed Part 5A. The amendments made do not apply to or in respect of the estate of a person who died intestate as to all or any of the person's property before the commencement of the proposed Amendment Act.

***Stamp Act 1921* amended,**

This clause makes amendments to the *Stamp Act 1921* to ensure that the stamp duty treatment applicable to property transfers arising from the breakdown of a de facto relationship has parity with that applying to the separation or divorce of a married couple.

Subclause (1) specifies that it is the *Stamp Act 1921* being amended.

Subclause (2) inserts a definition of "de facto partner" and "de facto relationship" into section 112UA(1).

It should be noted in regard to the definition of "de facto relationship" that the Commissioner will take into account whether the relationship has existed for at least

two years, whether a minor exists from the relationship and whether substantial financial contributions have been made by a partner. Where a relationship does not meet these criteria, the application of nominal stamp duty on any resulting property transfers under Part IVD of the *Stamp Act* may not apply.

It should also be noted that the definition of “de facto relationship” as proposed by section 205V means that the nominal duty treatment provided in Part IVD of the *Stamp Act* will apply to property transfers arising from the breakdown of same sex de facto relationships.

Subclause (3) replaces section 112UB(1) and introduces a new subsection 112UB(1a).

The new subsection 112UB(1) specifies that the provisions of section 112UC and 112UD, which allow nominal duty treatment in the specified circumstances, do not apply to an order or maintenance agreement (as defined in section 112UA) unless the parties referred to in the order or agreement are separated or divorced from each other.

This requirement means that nominal duty treatment will not apply to a binding financial agreement made under section 90B of the FLA of the Commonwealth on the basis that the parties cannot satisfy this criteria.

New subsection (1a) provides corresponding restrictions that apply to marriage breakdowns under subsection 112UB(1), to orders and maintenance agreements arising from the breakdown of a de facto relationship. In this regard, the provisions will not apply unless the de facto relationship between the de facto partners has ended.

Subclause (4) inserts a new subsection 112UB(3). This provision is evidentiary in nature, and would allow parties entering into a 90C or 90D binding financial agreement to make a statement in the agreement that the parties to the marriage are separated (or divorced in the case of a 90D agreement) or that the de facto relationship has ended.

Where this appears in the agreement, the parties seeking nominal duty treatment under Part IVD of the *Stamp Act* would not have to produce conclusive evidence that would otherwise be required to demonstrate the end of the marriage or relationship