

2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAMILY LAW AMENDMENT BILL 2005

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

FAMILY LAW AMENDMENT BILL 2005

OUTLINE

The Family Law Amendment Bill 2005 (the Bill) makes a number of diverse amendments to the *Family Law Act 1975* (the Act), mainly in the nature of procedural and technical changes to clarify and improve the operation of the Act.

These Government amendments amend section 66X in Part 14 and insert new Part 17 in the Bill.

Part 14 amendments

Section 66X in Part 14 of the Bill allows the court to make orders for recovery of payments made or property transferred by a person under a child maintenance order, in circumstances where it is later found that the person was not liable to support the child.

The Government amendments to the proposed section 66X will allow the court to recognise that, in some exceptional circumstances, it might be appropriate to reduce the amount to be repaid, or the value of the property to be restored.

The amendments also insert new subsection 66X(5), to clarify that the Child Support Agency is not a person to whom the monies have been paid, for the purposes of section 66X, even if the Child Support Agency has been an agent for collection of monies payable under the original purported child maintenance order through the operation of the *Child Support (Registration and Collection) Act 1988*.

New Part 17

These amendments insert new subsection 79(10A) into the *Family Law Act 1975* (the Family Law Act) in order to clarify the role of third party creditors in family law property matters, where the trustee has the role of representing the interests of creditors.

These amendments relate to the interaction of bankruptcy law and family law, and are intended to supplement other amendments to the Act contained in Schedules 1 and 5 to the *Bankruptcy and Family Law Legislation Amendment Act 2005* (the BFLLA).

These amendments were previously contained in Schedule 1 to the Bankruptcy and Family Law Legislation Amendment Bill, which was considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs, as part of a package of family law and bankruptcy related reforms.

At that time, there were other family law and bankruptcy law related reforms contained in the Family Law Amendment Bill, which were removed from that Bill and consolidated into the BFLLA before it was passed. Subsection 79(10A) was omitted by oversight in that consolidation, and the effect of this Government

amendment is to reinstate subsection 79(10A) with other related amendments to section 79 of the Act affecting third parties and family property matters.

The BFLLA was enacted when it received Royal Assent on 18 March 2005. The amendments to the Family Law Act contained in Schedule 1 to the BFLLA are due to commence operation on 18 September 2005, or on an earlier date if fixed by Proclamation. For consistency, the amendments to the Bill will commence immediately after commencement of the amendments to the Family Law Act in Schedule 1 to the BFLLA.

These amendments are intended to qualify the operation of subsection 79(10) of the Family Law Act, which was inserted by an amendment in Schedule 5 to the BFLLA, and which commenced operation on 15 April 2005.

As with the provisions of the *Bankruptcy and Family Law Legislation Amendment Act 2005*, these amendments are part of the Government response to the recommendations of the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax.

FINANCIAL IMPACT STATEMENT

These Government amendments will have no financial impact.

NOTES ON CLAUSES

Clause 1 – Commencement

1. Clause 1 of the Government amendments provides that the amendments in Part 17 of Schedule 1 to the Bill will commence immediately after commencement of Schedule 1 to the *Bankruptcy and Family Law Legislation Amendment Act 2005*.

Clause 2 - Item 136

2. Clause 2 of the Government amendments omits the words 'to ensure that' and substitutes the word 'for'. This change supports the amendments that follow to paragraphs 66X(2)(a) and (b), that allow the court the option of ordering less than the full amount of child maintenance monies to be repaid, or less than the full value of transferred property to be returned, in exceptional circumstances.

Clause 3 - substitution to paragraphs 66X(2)(a) and (b)

3. These amendments expand the original proposed paragraphs 66X(2)(a) and (b) to allow the court to order the repayment of an amount up to, or equal to, the full amount of child maintenance monies paid, or the value of property transferred under the original purported order.
4. The amendments specify that that the option of ordering less than the full amount of monies paid, or the value of property transferred, is only available to the court in exceptional circumstances. These circumstances might include, for example, the situation where the likely effect of ordering recovery of the full amount of child maintenance monies paid under the purported order would be to render the original beneficiary of those monies bankrupt.

Clause 4 - new subsection 66X(5)

5. This amendment inserts new subsection 66X(5) at the end of section 66X. The provision is the equivalent of subsection 143(4) of the *Child Support (Assessment) Act 1989*, and makes it clear that the Child Support Agency is not to be taken to be the 'person' to whom the amounts of maintenance were paid, for the purposes of section 66X, so that the Child Support Agency cannot be ordered to repay amounts of child maintenance paid to the Agency under the purported maintenance order. Section 30 of the *Child Support (Registration and Collection) Act 1988* provides that where a maintenance order has been registered under that Act the amounts become a debt to the Commonwealth which may otherwise lead to a potential liability for the Commonwealth to repay.

Clause 5 – insertion of Schedule 5

6. Clause 5 of the Government amendments inserts new Part 17 of Schedule 1 to the Bill.

Part 17 - Alteration of property interests

Item 139 – After subsection 79(10)

7. Item 1 inserts new subsection 79(10A) in the Act. This amendment is intended to qualify the operation of subsection 79(10), being an amendment to the Act contained in Schedule 5 to the *Bankruptcy and Family Law Legislation Amendment Act 2005*.

Subsection 79(10) provides that a creditor of a party to property proceedings is entitled to become a party to those proceedings, if the creditor may not be able to recover his or her debt if an order was made in those proceedings. Also, any other person whose interests would be affected by an order in family property proceedings may apply to become a party to those proceedings.

Subsection 79(10A) provides that subsection 79(10) does not apply to a creditor of a party to the proceedings in two situations. Firstly, if the party is a bankrupt, subsection 79(10) does not apply to the extent that the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*). Secondly, if the party is a debtor subject to a personal insolvency agreement, subsection 79(10) does not apply to the extent that the debt is covered by the personal insolvency agreement.