

## **CHAPTER 2**

### **PROVISIONS OF THE BILL**

2.1 This chapter briefly outlines the main provisions of the Bill.

#### **Background**

2.2 The Explanatory Memorandum of the Bill explains the background to the Bill in the following terms:

In line with the Government's ongoing reform agenda in Family Law this Bill makes a range of changes to the Family Law Act. In particular the Bill deals with the interaction of bankruptcy and family law, the enforcement of court orders, introduces the term 'divorce', allows for recovery of child maintenance paid by a person found not to be a parent, strengthens the court's powers in relation to vexatious litigants and clarifies the rule-making power of the Family Court, and a range of largely technical amendments intended to improve the operation of the Act.<sup>1</sup>

2.3 The Bill is divided into 19 parts, with each part addressing different aspects of the *Family Law Act 1975*.

2.4 This chapter will briefly outline the changes made by each part of the Bill.

#### ***Part 1 – Parenting Compliance Regime***

2.5 Items 1 to 4 of the Bill relate to the contravention of parenting orders. Proposed section 70NEB provides that where in proceedings alleging the contravention of a parenting order, either the court is not satisfied that the contravention occurred or the court is satisfied that contravention occurred but the respondent had a reasonable excuse, the Court may vary the parenting order.

#### ***Part 2 – Costs and offers of settlement***

2.6 The *Explanatory Memorandum* explains that Item 5 of the Bill proposes to amend paragraph 117(2A)(f) so that when a judge is determining whether to make a cost order (under subsection 117(2)) there is no longer a requirement for them to consider whether the parties have made an offer of settlement in accordance with section 117C.<sup>2</sup>

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1 Family Law Amendment Bill 2004 *Explanatory Memorandum*, p.1.

2 Family Law Amendment Bill 2004 *Explanatory Memorandum*, p.5.

***Part 3 – Suspension of sentences of imprisonment***

2.7 Item 8 of the Bill proposes to insert a new provision which gives the court an express power to suspend or terminate a suspension of an imprisonment order, where a sentence of imprisonment has been made under paragraph 70NJ(3)(e).

***Part 4 – Enforcement (removing of information procedure)***

2.8 Item 10 of the Bill would repeal subsections 70NN(2) to (7), and substitute a new subsection (2). The repealed subsections detail the process following the provision of information before a magistrate in the context of proceedings that relate wholly or partly to a parenting order.

2.9 The amendments would provide that where a court has made a community service order or required a bond be entered into, if is satisfied that a person failed to comply with the order or bond without reasonable excuse, then it can exercise its powers under subsection (8) without having to go through the information procedure.<sup>3</sup>

***Part 5 – Private arbitration***

2.10 Item 18 of the Bill proposes to repeal paragraph 19E(3)(a) of the Act and replace it with a provision that would add three new types of proceedings which may be subject to a private arbitration under the Act. These three new types of proceedings are Part VIIIA proceedings relating to financial agreements, Part VIIIB proceedings relating to superannuation and section 106A proceedings relating to execution of instruments by order of the court.

***Part 6 – Change of Venue***

2.11 Item 19 of the Bill proposes to give the Court an express power to make an order for a change of venue. This is a discretionary power and can be used at any point during a proceeding, the court has the capacity to direct that only part of the proceedings be subject to a change of venue.

***Part 7 – Definition of disposition***

2.12 Item 20 repeals the definition of disposition and substitutes it with an expanded definition which includes the issue, grant, creation, transfer or cancellation or variation of rights in an interest in a company or trust.

***Part 8 – Appeals***

2.13 Item 24 brings under paragraph 24(2D)(d) six additional types of procedural application which concern the conduct of an appeal to the Family Court from courts other than the Federal Magistrates Court. These are procedural applications: for an

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3 Family Law Amendment Bill 2004 *Explanatory Memorandum*, p.6.

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extension of time within which to file an application for leave to appeal; for security of costs in relation to an appeal; to reinstate an appeal dismissed under a provision of the Rules of Court; to adjourn the hearing of an appeal; to vacate the hearing date of an appeal; or to expedite the hearing of an appeal.

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

2.14 Part 9 amends section 46 of the Act to provide for the transfer of property proceedings from a State court of summary jurisdiction to the Federal Magistrates Court (in addition to the Family Court and the State Supreme Courts). It also amends section 69N to provide for the transfer of proceedings for a parenting order.

***Part 10 - Terminology***

2.15 This part amends various provisions of the Act to replace the term 'dissolution of marriage' with the term 'divorce'.

***Part 11 – Leave to appeal***

2.16 Part 11 amends section 94AA to provide a comprehensive table of the requirements for leave to appeal.

***Part 12 – Power to dismiss appeal***

2.17 Part 12 contains proposed section 96AA to empower a court hearing an appeal to order the stay or dismissal of the appeal if the notice of appeal does not disclose proper grounds of appeal.

***Part 13 – Appeals to High Court***

2.18 This part amends section 95 of the Act to provide that an appeal only lies to the High Court from the Full Court of the Family Court with special leave of the High Court.

***Part 14 – Recovery of amounts paid under maintenance orders***

2.19 An important provision of this part is proposed section 66X which provides that where a court has made an order that a person pay maintenance, and the person has paid that maintenance, but the court later determines that the person is not a parent or step-parent of the child, the amount paid may be recovered in a court having jurisdiction under Part VII of the Act.

***Part 15 – Frivolous or vexatious proceedings***

2.20 This part proposes to replace section 118 with a revised, more detailed section.

***Part 16 – Rules as to costs***

2.21 This part contains proposed subsection 117(1A), which provides that the Rules may provide 'in the circumstances specified in the Rules' that a party to proceedings under the Act must bear the costs of another party to those proceedings unless the court otherwise orders. This would depart from the general rule that each party bears their own costs.

***Part 17 – Civil penalties for contravention of Rules***

2.22 Proposed paragraph 123(1)(ta) would allow Rules "providing for civil penalties for failures to comply with the standard Rules of Court". Amendments to the Bill would limit such penalties to 50 penalty units (\$5,500).

***Part 18 – Powers of judicial registrars***

2.23 This part extends the powers of judicial registrars to vary an order for contravention proceedings where contravention without reasonable excuse is not proved.

***Part 19 – Interaction of family law and bankruptcy law***

2.24 Amongst the changes in this Part are proposed subsection 79(10) which would entitle a third party creditor to become a party to proceedings if 'the creditor may not be able to recover his or her debt' if the order for property settlement were made. It would also entitle any other person 'whose interests would be affected by the making of the order' to become a party to proceedings for an order for property settlement. Proposed section 79F would provide that the Rules of Court may make provision for a person applying for an order under Part VIII of the Act to give notice of the application to third –party creditors.