

1991-92

**THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA**

HOUSE OF REPRESENTATIVES

**CHILD SUPPORT LEGISLATION AMENDMENT BILL
1992**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Treasurer,
the Hon John Dawkins MP)

General Outline and Financial Impact

The Child Support Legislation Amendment Bill 1992 will amend the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988 by making the following changes:

The Child Support (Assessment) Act 1989

Eligibility of a child subject to a child welfare law.

- Extends the eligibility to obtain an administrative assessment to parents and relatives of a child who is the subject of a child welfare law.
- *Proposal announced:* Announced in the second reading speech for the Law and Justice Legislation Amendment Bill No. 2 1991.
- *Financial impact:* This amendment is at no cost.

Administrative review of child support assessments.

- Provides a system of administrative review for child support assessments including some consequential changes.
- *Proposal announced:* 1991-92 Budget.
- *Financial impact:* This amendment has an estimated cost of \$ 0.08m in 1991-92, \$ 0.32m in 1992-93 and \$ 0.45m in 1993-94.

Special provisions for pensioners with consent orders.

- Ensures that a consent departure order and a consent order for payment of child support in the form of non periodic amounts entered into by a pensioner is scrutinised by the Registrar of the Court before a determination or order is made.
- *Proposal announced:* Not previously announced.
- *Financial impact:* There is no cost in this amendment but it ensures Social Security outlays are protected.

Urgent maintenance orders.

- Clarifies section 139 regarding urgent maintenance orders and removes an anomaly.
- *Proposal announced:* Not previously announced.
- *Financial impact:* This amendment is at no cost.

Elections to end an administrative assessment.

- Removes the ability of pensioners to elect to end their child support liability under a child support assessment.
- *Proposal announced:* Not previously announced.
- *Financial impact:* This amendment is at no cost and will ensure Social Security outlays are protected.

The overlapping liability provisions.

- Removes the overlapping provisions in section 152 and inserts a provision to end orders and agreements for a child when an assessment issues for the child.
- *Proposal announced:* Not previously announced.
- *Financial impact:* This amendment is at no cost.

The Child Support (Registration and Collection)Act 1988

Private receipt of maintenance for pensioners.

- Allows pensioners an option to receive amounts privately that are due under an administrative assessment.
- *Proposal announced:* 1991-92 Budget.
- *Financial impact:* The estimated cost of this measure to the Agency is \$0.60m in 1991/92, \$1.2m in 1992/93 and outyears offset by estimated savings to Department of Social Security of \$0.48m in 1991/92, \$2.98m in 1992/93, \$2.42m in 1993/94 and \$2 6m in 1994/95.

Child support debt due to the payee when enforced overseas, the Commonwealth acting as the collection agent

- A registered child support liability is a debt due to the payee and not to the Commonwealth when it is being enforced overseas by the Commonwealth for the payee.
- *Proposal announced:* Not previously announced.
- *Financial impact:* This amendment will have no cost but an unquantifiable reduction in Social Security outlays could follow.

Registrar to credit payment against a registered liability.

- Broadens the range of non agency payments that can be accepted by the Registrar and credited against the liability of the non custodian to the Commonwealth.
- *Proposal announced:* Not previously announced.

- *Financial impact:* This amendment will have no cost but an unquantifiable reduction in Social Security outlays could follow.

Payment and recovery of child support debts.

- Provides two general garnishment powers to enable the Registrar to recover amounts that are due to the Commonwealth.
- *Proposal announced:* Not formally announced; to be announced in the second reading speech.
- *Financial impact:* This amendment is at no cost but an unquantifiable reduction in Social Security outlays could follow.
- Allows the Registrar in any proceeding under this Act to have a court set aside or restrain the making of an instrument or disposition by a party to defeat an order of the court or the payer's capacity to meet payments under a registered liability.
- *Proposal announced:* Not previously announced.
- *Financial impact:* This amendment is at no cost but an unquantifiable reduction in Social Security outlays could follow.

CHAPTER 1

THE CHILD SUPPORT ASSESSMENT ACT 1989

PARENTS AND RELATIVES OF CHILDREN SUBJECT TO A CHILD WELFARE LAW

Overview

*Extends the eligibility of the
Assessment Act to the
parents and relatives of
a child who is subject to
a child welfare law.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

THE CHILD SUPPORT (ASSESSMENT) ACT 1989

PERSONS WHO MAY APPLY

Summary of proposed amendment

- 1.1. The Bill will amend the Assessment Act to extend eligibility for administrative assessment to parents and relatives who have the care of children subject to a child welfare law.

Background to the legislation

- 1.2. All children who are the subject of a child welfare law have to date been excluded from obtaining an order for maintenance or from applying to the Registrar for an assessment of child support. Following upon agreement between the Social Welfare Ministers of the Commonwealth and the States, the Committee of Attorneys General agreed that these children should be eligible for maintenance and that it be paid under the Commonwealth jurisdiction.
- 1.3. To enable this to occur amendments to the Family Law Act 1975 and the Child Support Assessment Act 1989 were proposed.

Explanation of the proposed amendment

- 1.4. The proposed amendment widens the range of persons who can apply for administrative assessment to include parents and relatives of such children **[Clause 4]** This specific amendment is necessary because it is only parents and relatives who will automatically qualify for assessment. Foster parents and child welfare authorities do not automatically qualify.
- 1.5. Under a complementary change to the Family Law Act 1975 a Child Welfare Authority will be able to obtain an order for maintenance under that Act, at the discretion of

the court, for payment to either a foster parent, alternative caregiver or the Authority itself.

Commencement date

- 1.6. Eligibility will extend to parents and relatives only upon each State and Territory referring its powers to the Commonwealth under the Commonwealth Powers (Family Law - Children) Acts.
- 1.7. An amendment to the Child Support (Assessment) Regulations will be made as the powers are referred by each State and Territory so that eligibility is established.

Clause involved in the amendment

Clause 4: Will amend section 25 to add the persons who will be eligible to receive an assessment.

CHAPTER 2

**THE CHILD SUPPORT
ASSESSMENT ACT
1989**

**REVIEW OF
ADMINISTRATIVE
ASSESSMENT OF
CHILD SUPPORT**

Overview:

*The process to allow the
administrative review
of child support
assessments.*

**THE CHILD SUPPORT
LEGISLATION
AMENDMENT BILL
1992**

THE CHILD SUPPORT (ASSESSMENT) ACT 1989
REVIEW OF ADMINISTRATIVE ASSESSMENT OF
CHILD SUPPORT

Summary of proposed amendments

- 2.1. The Bill will introduce to the child support legislation a process for the administrative review of a child support assessment.

Background to the legislation

- 2.2. From 1 October 1989 custodians of eligible children can only obtain child support by applying for an administrative assessment from the Registrar of Child Support. An amendment to the Family Law Act 1975 which took effect at the same time precluded applications being made under that Act to a court for maintenance if child support could be obtained under the Child Support (Assessment) Act.
- 2.3. In the absence of a private agreement, the only method that is available at present to have the assessment reviewed is through the formal court process and specific provisions are set out in Division 4 of Part 7 of the Act under which they can be reviewed. A decision to have the assessment reviewed by a court is at the cost of the person initiating action and this can be considerable.
- 2.4. On the grounds of equity and justice an administrative review process should also be available to the parties and thus avoid the cost of an enforced application to a court as a first step in the review process.

Explanation of the proposed amendment
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- 2.5. The Registrar will be empowered to review administrative assessments and it will apply to all assessments, whether an original assessment or the annual re assessment, providing it is for a period after 30

June 1992 [**Clause 5.98A**]. It will be available to both parties and application can be made at any time during the course of the assessment period [**Clause 5.98B**]. The grounds of appeal are identical to the grounds already set out in the law at section 117(2) for the court and all parts of that will apply to the review officer. No other grounds can be entertained and an application cannot proceed to determination unless one or more of the specified grounds exist and the Registrar is satisfied that it would be just, equitable and otherwise proper to make a determination [**Clause 5.98C**].

- 2.6. The Registrar may refuse to make a determination, if in the application, the grounds have not been addressed or it would be otherwise not just, equitable and proper to make a determination [**Clause 5.98F**]. If the grounds have been properly established in the application, the other party is to be advised that a valid application for review has been lodged and will be provided with a copy of the application to show the grounds relied upon. They will be invited to reply and make any representations they think relevant [**Clause 5.98G**].
- 2.7. The review will be conducted by a Child Support Review Officer who will be engaged by the Registrar for that single purpose and will exercise a delegated authority from the Registrar under section 149 of the Act to make a determination on the application [**Clause 5.98H**]. They will be employed by the Registrar but will provide an independent review of administratively assessed child support.
- 2.8. Applications for review will be made on an approved form which will set out the precise grounds upon which a determination can be made [**Clause 5.98E**].
- 2.9. Determinations that may be made are the same as a court may order under section 118 and all those provisions are repeated in the amendment to apply to determinations [**Clause 5.98D**].
- 2.10. Before a determination is made the parties may agree either to a determination by consent or to a consent

agreement [*Clause 5.98J*] and if the agreement is a valid agreement the Registrar must accept it [*Clause 5.98K*]. However, where the custodian is in receipt of an income tested pension, allowance or benefit the Registrar must be satisfied that it is just, equitable and otherwise proper that the consent determination should be made or the consent agreement accepted [*Clause 5.98K(2)*]. Again, the existing provisions that apply to the court will apply to the Registrar (sections 117{4} to{9}) [*Clauses 5.98C(3) and 5.98K(3)*].

- 2.11. Any number of applications may be lodged during the currency of an assessment [*Clause 5.98L(1)*] but the Registrar may refuse to make a determination if there is no new matter submitted for consideration with any subsequent application [*Clause 5.98L(2)*].

Commencement date

- 2.12. The amendment will apply to all administrative assessments that commence on and after 1 July 1992.

Clauses involved in the amendment

Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent but will apply only to assessments effective from 1 July 1992..

Clause 5: inserts a new Part 6A after Part 6 in the Act "Departure from Administrative Assessment of Child Support".

CHAPTER 3

**THE CHILD SUPPORT
ASSESSMENT ACT
1989**

**ORDERS FOR
DEPARTURE FROM
ADMINISTRATIVE
ASSESSMENT**

Overview:

*Consequential amendments
following upon the
establishment of the
administrative review
process.*

**THE CHILD SUPPORT
LEGISLATION
AMENDMENT BILL
1992**

THE CHILD SUPPORT (ASSESSMENT) ACT 1989**DIVISION 4 PART 7****ORDERS FOR DEPARTURE FROM ADMINISTRATIVE
ASSESSMENT****Consequential amendments**

- 3.1. The Bill amends section 115 and 116 of the Act to recognise that an application to a court for an order to depart from an administrative assessment only applies to cases in which there has been a prior administrative review and that the court may only accept applications for a departure from an assessment where the Registrar has made, or refused to make, a determination in respect of the assessment which is the subject of the application.

Background to the legislation

- 3.2. The amendments proposed are essentially consequential upon the introduction of the new administrative review process to be conducted by the Registrar.

Explanation of the amendments

- 3.3. The proposed amendments ensure that either party who wishes to have a court consider the administrative assessment and make an order, must first have made application for administrative review and a determination has been made, or not made, as the case may be, as a result of that process [*Clause 6*]. If not, the court cannot accept an application for an order for departure [*Clause 7*].

Commencement date

- 3.4. The amendment will apply to all administrative assessments that commence on and after 1 July 1992.

Clauses involved in the proposed amendment

Clause 6: will ensure that the only cases that can proceed to court for a departure order are those in which a determination has been made, or refused to be made, by the Registrar.

Clause 7: will ensure that an application can only be made for an order for departure to a court in respect of an administrative assessment upon which the Registrar has made, or refused to make, a determination on the application for administrative review.

CHAPTER 4

THE CHILD SUPPORT ASSESSMENT ACT 1989

ORDERS FOR DEPARTURE FROM ADMINISTRATIVE ASSESSMENT

ORDERS FOR THE PROVISION OF CHILD SUPPORT OTHERWISE THAN IN FORM OF PERIODIC AMOUNTS PAID TO THE CUSTODIAN

Overview:

*Pensioners not to be able to
enter into consent
arrangements without
the scrutiny of the court.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

THE CHILD SUPPORT (ASSESSMENT) ACT 1989**DIVISION 5 PART 7****ORDERS FOR DEPARTURE FROM ADMINISTRATIVE
ASSESSMENT IN SPECIAL CIRCUMSTANCES****ORDERS FOR PROVISION OF CHILD SUPPORT
OTHERWISE THAN IN FORM OF PERIODIC
AMOUNTS PAID TO CUSTODIAN**

Summary of proposed amendments

- 4.1. This proposed amendment will ensure that pensioners are not able to enter into a consent order for departure from an administrative assessment or by a consent order for the provision of child support otherwise than in the form periodic amounts, unless the consent order is scrutinised by the court. The reasons for making the order must be entered in the records of the court, together with its reasons for being satisfied the order should be made.

Background to the legislation

- 4.2. There are special provisions in the child support legislation for custodians who are in receipt of an income tested pension, allowance or benefit. Coupled with the requirement for them to take reasonable action for maintenance under the Department of Social Security guidelines, the vast majority of pensioners are required to register their maintenance liabilities with the Agency and have the amounts payable collected by the Agency.
- 4.3. There are however two possibilities in which a pensioner can minimise the impact of the child support legislation and the maintenance guidelines. They may either seek to maximise a benefit entitlement themselves or they could perhaps be subjected to undue pressure from the non custodian to reduce the amount to be paid by entering into an arrangement by consent to either depart from the

assessment or to receive non periodic amounts (transfers of capital etc in lieu of periodic cash payments).

- 4.4. The opportunity to do this lies in the fact that such consent arrangements are not required to receive the scrutiny of the court and, as a result, reasons do not have to be given for the consent order to be made including reasons why the court is satisfied that it is just, equitable and otherwise proper to do so. ***The court is required to consider this if it makes its own order.***
- 4.5. The scope to circumvent child support assessments is therefore present and has the potential to nullify the intentions of the legislation in these cases.

Explanation of the proposed amendments

- 4.6. The proposed amendment will deny custodians who are in receipt of an income tested pension, allowance or benefit from being able to enter into consent arrangements to depart from an assessment or to receive amounts of maintenance in the form of non periodic amounts without scrutiny of those arrangements by the court ***[Clauses 8 and 9]***.
- 4.7. The outcome of this amendment will be to require the court to:
 - (1) give reasons for accepting the consent departure arrangement and the reasons why the court is satisfied there are grounds to depart from the assessment including why it is just and equitable and otherwise proper to do so; and,
 - (2) give reasons for accepting a consent arrangement for the custodian to receive maintenance in a form other than periodic amounts and the reasons why a statement or statements made in the order to have the non periodic amount either to be counted or not counted in any administrative assessment have been made.

Commencement date

- 4.8. The amendment will apply from the date the Royal Assent is given to the Child Support Legislation (Amendment) Bill 1992 [*Clause 2*].

Clauses involved in the proposed amendments
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Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 8: amends section 118 of the Act to give effect to the amendment.

Clause 9: amends section 126 of the Act to give effect to the amendment.

CHAPTER 5

THE CHILD SUPPORT ASSESSMENT ACT 1989

AGREEMENTS MADE IN RELATION TO CHILDREN

Overview:

*Decisions made by the
Registrar on
agreements under the
administrative review
process to be appealable
to a court*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

THE CHILD SUPPORT (ASSESSMENT) ACT 1989**DIVISION 6 PART 7****AGREEMENTS MADE IN RELATION TO CHILDREN****Summary of proposed amendment**

- 5.1. The proposed amendment will ensure that a decision of the Registrar to accept or not accept a private agreement may be appealed to a court in a case where the parties come to that agreement before a determination is made by the Registrar on an application made for administrative review of an assessment.

Background to the legislation

- 5.2. The amendment is consequential to the changes being made to provide an administrative review process for assessments.

Explanation of the proposed amendment

- 5.3. The Bill will include a decision made by the Registrar on a consent agreement made by the parties during the course of an administrative review, and before a determination is made on that application for review, as being a decision which may be appealed to a court *[Clause 10]*.

Commencement date

- 5.4. The amendment will apply to all applications for review of an administrative assessment that commences on and after 1 July 1992 and a consent agreement is either accepted or not accepted before a determination is made on the application.

Clauses involved in the proposed amendment

Clause 10 :amends section 132 of the Act to include as appealable decisions, decisions of the Registrar made on consent agreements during the course of the administrative review of an assessment.

CHAPTER 6

THE CHILD SUPPORT ASSESSMENT ACT 1989

URGENT MAINTENANCE ORDERS AND STAY ORDERS

Overview

*Clarify section 139 by
ensuring orders end if
there is no entitlement
to child support under
the Act and remove an
anomaly*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

THE CHILD SUPPORT (ASSESSMENT) ACT 1989**DIVISION 7 PART 7****URGENT MAINTENANCE ORDERS AND STAY ORDERS****Summary of proposed amendment**

- 6.1. The proposed amendment is to clarify section 139 and to correct an apparent anomaly in the area of urgent maintenance orders obtained under the child support legislation.
- 6.2. An urgent order for maintenance can only be obtained under the Act if an application for assessment has been made.
- 6.3. The amendment will ensure that any such order made ends on the date contained in the order. In the event that the Registrar ultimately makes a decision refusing to accept an application for assessment and the urgent maintenance order has not ceased to have effect, it will cease from the day the Registrar's decision becomes final to not accept the assessment application, or the time when a court's decision is final as to whether the custodian is entitled to child support under an assessment or a subsequent appeal against the court's decision.

Background to the legislation

- 6.4. Section 139 needs to be clarified and moreover there is a need to ensure that an urgent order for maintenance under the Act cannot continue in force after all of the processes to obtain maintenance under the Act have been finalised and there is no entitlement under that Act. The present position is considered to be anomalous.
- 6.5. The amendment will not deny a custodian from obtaining maintenance as it will be always open to apply to the court for an order under the Family Law Act. In the

circumstances outlined this is the proper avenue to obtain maintenance.

Explanation of the proposed amendments

- 6.6. Section 139 will be amended by replacing the existing sub section (2) with a new sub section (2) and sections 139(2A) and (2B) saying an order made under section 139 has effect for the period specified in the order and if the Registrar ultimately does not accept the application for assessment and all of the court appeal processes have been completed, the order ceases to have effect [*Clause 11*].

Commencement date

- 6.7. The proposed amendment will apply from the date the Royal Assent is given to the Child Support Legislation (Amendment) Bill 1992 [*Clause 2*].

Clauses involved in the proposed amendment

Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 11: amends subsection 139(2) by replacing the subsection with a new subsection and adding sections 139(2A) and 139(2B).

CHAPTER 7

THE CHILD SUPPORT ASSESSMENT ACT 1989

ELECTIONS TO END AN ASSESSMENT AND OVERLAPPING LIABILITIES.

Overview

*Ensure pensioners cannot end
an assessment by
election and repeal the
overlapping liability
provisions.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

THE CHILD SUPPORT (ASSESSMENT) ACT 1989

PART 9 MISCELLANEOUS

ELECTION BY CUSTODIAN ENTITLED TO CHILD SUPPORT TO END ADMINISTRATIVE ASSESSMENT

OVERLAPPING LIABILITIES

Summary of proposed amendment

- 7.1. This amendment will deny pensioners being able to elect to end the liability of a custodian to pay child support under section 151. It will also remove the requirement for the Registrar under section 152 to have to offset any amounts payable under an order of the court or an agreement against amounts that subsequently become payable for the same child for the same period under an administrative assessment.

Background to the legislation

End Liability

- 7.2. A provision had to be provided in the Act to allow a person to administratively stop the requirement of a person to pay child support if that was their wish. It would be inappropriate to require any other sort of formal proceeding to end something that had in fact started by the lodgment of an application for administrative assessment of child support.
- 7.3. The reason is to allow a quick remedy when people reconcile.
- 7.4. The provision is however available to pensioners and for similar reasons set out in the background to the amendments in clauses 8 and 9 of this Bill, a pensioner can minimise the impact of the child support legislation and possibly the Department of Social Security

maintenance guidelines by improperly using this section. This avenue needs to be stopped for these people.

- 7.5. In so doing it will not deny a pensioner an easy remedy to properly end the liability as the happening of a terminating event specified in section 12 of the Act will automatically ensure the liability is ended when there is a reconciliation. In fact it should only be the happening of these events which should allow a pensioner to have the liability ended. That, however, is not the case with non pensioners and the provision in section 151 needs to be retained for them.

Overlapping liabilities

- 7.6. The requirement set out in section 152 on how to treat overlapping liabilities is complex and the need is questionable. It arises in the situation where, at the same time, there is an order of the court to pay maintenance for a child and the same child is an eligible child under the Act. The occurrence is relatively rare and when it does it only serves to overcomplicate what the Registrar must do in considering both liabilities.
- 7.7. If the assessed amount is greater than the ordered amount the outcome is there are 2 separate registrations in the child support register when the overlapping requirements are implemented. One is for the court ordered amount and the other is the additional amount payable for the child under the assessment, In these cases it is always the assessed amount that is the amount payable.
- 7.8. If the ordered amount is greater than the assessed amount it is the ordered amount that continues to be payable. There is an inequity in this because child support payments are now based upon capacity to pay. It could be argued that the ordered amount should remain payable because of an artificial arrangement in place to minimise the custodians liability under the Act but this can easily be remedied. The administrative review process set out in clause 5 which inserts a new Part 6A in the Act will provide ready access to a review for

custodians who by chance may be disadvantaged and after that there is always a court action possible to ensure maintenance is payable if the court so orders.

<p align="center">Explanation of the proposed amendment</p>
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- 7.9. A new subsection 151(4) will be added which has the effect of not allowing an election to be made under the section if the custodian entitled to child support is in receipt of an income tested pension, allowance or benefit **[Clause 12]**.
- 7.10. The existing section 152 is repealed and replaced by a new section 152 the effect of which is to ensure all court orders in respect of maintenance of a child cease to have effect when child support is payable for the child under an administrative assessment **[Clause 13]**.

<p align="center">Commencement date</p>
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- 7.11. The amendment will apply from the date the Royal Assent is given to the Child Support Legislation (Amendment) Bill 1992 **[Clause 2]**.

<p align="center">Clauses involved in the proposed amendment</p>

Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 12: amends section 151 by inserting a new subsection 151(4).

Clause 13: repeals the existing section 152 and inserts a new section 152 the effect of which is to cause orders and agreements for the payment of maintenance for a child to cease if the child is an eligible child under the Act and child support is payable under an assessment.

CHAPTER 8

THE CHILD SUPPORT REGISTRATION AND COLLECTION ACT 1988

REGISTRATION OF MAINTENANCE LIABILITIES.

Overview

*Provide pensioners with a one
time option to have
child support paid
privately.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

**THE CHILD SUPPORT (REGISTRATION AND
COLLECTION) ACT 1988**

DIVISION 2 OF PART III

REGISTRATION OF MAINTENANCE LIABILITIES

Summary of proposed amendment

- 8.1. The Bill will remove the compulsion for pensioners to have to register an administrative assessment for collection by the Registrar as soon as the assessment is raised.

Background to the legislation

- 8.2. There have been difficulties for Department of Social Security (DSS) staff when pensioners have been able to come to an amicable agreement with the liable parent and the agreement, having been made, needs to be examined to see if it meets DSS reasonable action for maintenance guidelines. There has been some scope for discretion in deciding in individual cases but it always had to be based on a calculation made by the Agency for DSS to enable them to decide whether the agreement meets the guidelines.
- 8.3. Part of the problem is the assessment made by the Agency may not have been correct in all cases (because no application had been lodged and the circumstances of the liable parent had to be assumed) and so the decision required to be made by DSS could not be based on a proven situation. In addition, the existing agreement may not constitute a legally enforceable liability and in the event of default by the liable parent, the custodian has no recourse at law.
- 8.4. There is a need therefore to ensure that decisions relating to maintenance are made based on the real situation. DSS, under their guidelines, will now require all

pensioners to apply for an assessment when they apply for pension.

- 8.5. At the same time the pensioner will have the opportunity to receive the amounts directly and privately if that is their wish. If however they subsequently report that amounts are not being received in accordance with the assessment they will then be required to register for collection by the Agency under the DSS guidelines. Once registered they will not be able to either end the liability under the assessment unless a terminating event occurs or choose to opt out of collection because the existing section 38 prohibits that. What is being made available to pensioners is a one time opportunity to receive amounts privately and if that fails they must then register. ***It should be noted that there has never ever been a requirement for a non pensioner to have to register for collection.***

Explanation of the proposed amendment
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- 8.6. The Bill will amend section 24A by omitting paragraph (2)(a) in which the requirement for pensioners to register in all cases is contained [***Clause 15***].

Commencement date

- 8.7. The amendment will apply from the date the Royal Assent given to the Child Support Legislation (Amendment) Bill 1992 [***Clause 2***].

Clauses involved in the proposed amendment

Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 15: amends section 24A to omit paragraph (2)(a).

CHAPTER 9

THE CHILD SUPPORT REGISTRATION AND COLLECTION ACT 1988

ENFORCEMENT OF CHILD SUPPORT DEBTS WHEN PAYER IS NOT PRESENT IN AUSTRALIA.

Overview

*Changes the nature of the debt
from one due to the
Commonwealth to one
due to the payee when
enforcement action is
taken overseas.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

**THE CHILD SUPPORT (REGISTRATION AND
COLLECTION) ACT 1988**

PART III DIVISION 2

REGISTRATION OF MAINTENANCE LIABILITIES

Summary of proposed amendments

- 9.1. The Bill will change the nature of the debt from being one due to the Commonwealth to one due to the payee, the Commonwealth acting as agent for the payee, if the payer is not physically present in Australia and it is being enforced overseas by the Commonwealth.

Background to the legislation

- 9.2. This amendment is a machinery type change to enable the Commonwealth to enforce payments in reciprocating overseas jurisdictions listed in the Schedules to the Family Law Act Regulations.
- 9.3 The difficulty encountered is that some European countries will not enforce maintenance liabilities if the debts are by law a debt payable to the Government of a country. This is the present effect of section 30 and as a result the Commonwealth has not always been able to enforce debts in those countries.

Explanation of the proposed amendments

- 9.4 The Bill inserts a new provision which changes the nature of the debt when the payer is not physically present in Australia and enforcement action is instituted overseas. In the event that a court or authority of the overseas country has made an order in that country enforcing the debt, the debt is one due to the payee but is to be paid to the Agency in Australia as the agent of the payee[*Clause 16*].

Commencement date

- 9.5 The amendment will apply from the date the Royal Assent is given to the Child Support Legislation Amendment Bill 1992 [*Clause 2*].

Clauses involved in the proposed amendment

Clause 2: proposes the Act proposed by the Bill will commence on the date it is given the Royal Assent

Clause 16: amends section 30 to include a new section 30A

CHAPTER 10

THE CHILD SUPPORT REGISTRATION AND COLLECTION ACT 1988

PAYMENT AND RECOVERY OF CHILD SUPPORT DEBTS.

Overview

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

*Broaden the range of
payments that the
Registrar may accept
for credit against a
registered liability*

**THE CHILD SUPPORT (REGISTRATION AND
COLLECTION) ACT 1988**

PART V

**PAYMENT AND RECOVERY OF CHILD SUPPORT
DEBTS**

Summary of proposed amendments

- 10.1. The Bill will broaden the range of payments that the Registrar may accept for credit against a registered maintenance liability.

Background to the legislation

- 10.2. The Registration and Collection Act has a provision that enables the Registrar to credit to a payer's liability to the Registrar, amounts that are paid to the payee directly by the payer providing they both agree that the payment is for maintenance and should be credited against the liability to the Registrar. This facility is used quite extensively by clients of the Agency but in practice it has proven to be restrictive in the range of payments that can be credited.
- 10.3. In particular payments that are not made directly to the payee cannot be credited. As a result payments made to third parties for a whole range of pre separation debts, whether joint debts or debts of one or both of the parties, or payments that the payer has made to a third party after the separation to assist the custodian and children do not qualify. This often leads to increased tensions between the Agency, payees and payers and can frustrate future collection strategies and efforts.
- 10.4. It is widely held that the Agency should be able to consider these types of payments when both parties agree and all that is stopping an amicable conclusion is the restrictive wording of this provision.

Explanation of the proposed amendment

- 10.5. The Bill will insert a new provision at section 71A to extend the payments that may be accepted to include those that are made to third parties. The requirement for the parties to agree remains and this will ensure that the thrust of this whole provision remains dependent upon the agreed wishes of the parties [*Clause 17.71A*].

Examples of a payment to a third party which is accepted for credit against the payer's liability to the Agency

- 10.6. (1) The payer contacts the Agency to advise that a payment has been made for the payee to a bank to settle a credit card debt which had been incurred by the payee to purchase school needs for the children with the custodian. The Agency contacts the payee who confirms the payment to settle the debt to the bank, and agrees that it should be credited towards the payer's liability with the Agency because of the special circumstances.
- 10.7. (2) The payee contacts the Agency to advise that the children have been provided with new footwear by the payer whilst they were on their regular access visit at the weekend and that the value of the footwear was \$85.00. It is agreed that the amount should be offset against the next payment of maintenance that is due. An appropriate form is provided for completion which is duly returned and the amount is credited to the payer's liability to the Agency.
- 10.8. The payee in this case is a pensioner and when the monthly payout is made by the Department of Social Security the advice to the payee shows that an amount of \$85.00 has been accepted as having been paid direct and the cash balance due has been paid to the credit of the nominated bank account. The Department of Social Security subsequently advises that there has been an adjustment made to the sole parent benefit for the full

amount of the maintenance received, as cash and for the amount paid for the footwear.

- 10.9. (3) The payer contacts the Agency to advise that it has been agreed with the payee that mortgage payments on the matrimonial home will be met in future by him to ensure the asset is not lost pending sale and the final property settlement. The Agency contacts the payee to confirm the agreement and establishes that she is prepared to accept that the ongoing liability should be credited to the extent of an agreed figure and another amount be paid in cash each month. The Registrar can accept the arrangement as this is agreed by the parties.

Commencement date

- 9.10. The amendment will apply from the date the Royal Assent is given to the Child Support Legislation (Amendment) Bill 1992 [*Clause 2*].

Clauses involved in the proposed amendments
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Clause 2: proposes that the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 15: provides for the insertion of a new section 71A.

CHAPTER 11

THE CHILD SUPPORT REGISTRATION AND COLLECTION ACT 1988

PAYMENT AND RECOVERY OF CHILD SUPPORT DEBTS.

Overview

*Introduce two new
garnishment powers
and a power to have a
court set aside and
restrain the making of
transactions designed to
limit the ability to pay
child support.*

THE CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

**THE CHILD SUPPORT (REGISTRATION AND
COLLECTION) ACT 1988**

PART V

**PAYMENT AND RECOVERY OF CHILD SUPPORT
DEBTS**

Summary of proposed amendments

11.1. This Bill proposes to:

- (i) insert a general power to enable the Registrar to collect child support related debts from a third person;
- (ii) insert a general power to enable the Registrar to collect from a person receiving or controlling money of a child support debtor who is not physically present in Australia; and,
- (iii) insert a power to enable the Registrar to seek from a court an order to set aside an instrument or disposition, or to restrain the making of an instrument or disposition by, or on behalf of, the payer of an enforceable maintenance liability, the effect of which is to reduce or defeat the payer's liability to an existing or anticipated child support debt or to meet payments under the enforceable maintenance liability.

Background to the legislation

- 11.2. The child support legislation provides 4 methods for a payer to meet amounts due under a registered maintenance liability. These are payment to the Registrar direct, by withholding from salary and wages of employees, by interception of a tax refund that is about to issue or by enforcement action in the court.
- 11.3. There is also the availability to have amounts paid directly to the payee (or to a third party under an another amendment proposed by this Bill [*Clause 17.71A*]) but these arise only in special circumstances.

- 11.4. The success of the child support scheme will ultimately be judged on the ability of the Registrar, through the operation of the child support legislation, to collect amounts due in a timely and regular fashion as the existing legislation sets out.
- 11.5. With more than three and one half years collection experience of child support debts to date, some aspects of the collection powers need to be streamlined and other dimensions need to be added to ensure the objects of the legislation are met.
- 11.6. The amendments proposed by this Bill seek to achieve this.

Explanation of the proposed amendments

Collections from a third person

- 11.7. The first of the proposed amendments, a power to collect amounts from a third person, both adds a new method of collection and streamlines existing methods. It will avoid the time consuming process of obtaining orders from the court against a third person who holds money for the child support debtor. Court action often gives the debtor the chance to move funds and avoid payment.
- 11.8. The proposed amendment will insert a power which will enable the Registrar to give written notice to a person to whom money is due or accruing on behalf of a child support debtor, a person who actually holds money for the child support debtor, or a person who holds money on account of another person for payment to the child support debtor and require that person to pay to the Registrar an amount up to that held by the person and limited to the actual amount owed to the Registrar. In addition a notice may issue to a person to have amounts the person is liable to pay to the debtor from time to time forwarded to the Registrar [***Clause 18.72A(1)***].
- 11.9. A person who fails to comply with a notice will be guilty of an offence [***Clause 18.72A(2)***]. Section 4K(1) of the Crimes Act 1914 does not apply to an offence under

subsection (1) [*Clause 18.72A(4)*]. The notice must specify a day the money is to be paid by [*Clause 18.72A(3)(a)*] and the notice may be varied at any time [*Clause 18.72A(3)(b)*]. If a person is found guilty of an offence the court may order that the amount that should have been paid under the notice is to be paid [*Clause 18.72A(8)*].

- 11.10. A copy of the notice is to be sent to the debtor at the last known address [*Clause 18.72A(5) and (6)*]. A notice may also be served on the Commonwealth, State or Territory [*Clause 18.72A(7)*].
- 11.11. The person who receives a notice is indemnified by law in respect of any payment made as they are taken to have acted on the authority of the debtor [*Clause 18.72A(9)*].
- 11.12. Building society withdrawable shares in the capital of the society are deemed to be money either due to the debtor or which may become due to the debtor [*Clause 18.72A(11)*].
- 11.13. Terms used in this new section are defined for the purposes of the section [*Clause 17.72A(13)*].

Examples of the exercise of the proposed Clause 72A power.

- 11.14. Debtors who are not employees for the purposes of the child support legislation do not come within the scope of collection by withholding amounts from salary and wages, the cornerstone of the collection system set up in the original legislation. However many debtors receive regular payments from a single or a few main sources which in other circumstances would be salary and wages. It will be possible with the proposed amendment to issue a notice to a person who is liable to pay the debtor money, requiring that person to pay out of each payment the person is liable to pay to the debtor, an amount to satisfy the child support debt the debtor has to the Registrar.
- 11.15. This could be considered to be an extension of the withholding at source deduction method for employees.

- 11.16. The proposed amendment will also allow a notice to issue to a financial institution holding money for a debtor, to an estate agent or legal representative who may be holding or who is expecting to receive amounts for payment to the debtor or to any other person in a similar situation.
- 11.17. The power will enable the Registrar to act in his own right with speed when, to not do so, would see an opportunity lost to collect an amount for the benefit of the children. It is not proposed to use the power as a first up option in all cases but normally selectively where the debtor has a poor payment history. If however, in the judgment of the Registrar it should be used early and quickly the amendment allows this.

Debtor not physically present in Australia

- 11.18. The second of the proposed amendments, collection from a person receiving or controlling money of a debtor who is outside Australia, is also both a new method of collection and a streamlining of existing methods.
- 11.19. There are numbers of child support payers who leave Australia making no provision to pay child support to the custodian for the children remaining in Australia. It becomes a very difficult task to recover amounts if the payer is not being paid from Australia whilst out of the country. The liability continues to mount with little or no prospect of the Registrar being able to collect.
- 11.20. The proposed amendment will insert a power which, in the case of a debtor who derives income or capital gains from a source in Australia or is a shareholder, debenture holder or depositor in a company deriving income or capital gains from a source in Australia, and a person in Australia receives controls or disposes of any of the debtors money, then that person, if notified by the Registrar, is required to pay the debtor's child support debt or retain amounts from time to time to pay the debtor's child support debt [*Clause 18.72B(1)(a) to (e)*].
- 11.21. The person notified is personally liable for the child support debt of the debtor to the extent of any amount retained or that should have been retained and is taken

to be authorised by the debtor to make any payments notified under this clause [**Clause 18.72B(1)(f) and (g)**].

- 11.22. The requirement for a written notice and what the notice must contain are specified in the Bill [**Clause 18.72B(2)**].
- 11.23. If the person who receives, controls or disposes of a debtor's money is the Commonwealth, a State or a Territory or an authority of any, they are not personally liable for the child support debt in respect of any amount withheld or that should have been withheld [**Clause 18.72B(3)**].
- 11.24. Money that is a natural resource payment or a royalty payment within the meaning of Division 3B of Part VI of the *Income Tax Assessment Act 1936* is not money for the purposes of this clause, but all other money due by the person to the debtor is taken to be money that comes to the person on behalf of the debtor [**Clause 18.72B(4)**].
- 11.25. Words and expressions used in this clause have the same meaning given by the *Income Tax Assessment Act 1936* or in clause 72A for the purposes of this clause [**Clause 18.72B(5)**].

Example of the use of the proposed Clause 72B power

- 11.26. The child support debtor is not physically present in Australia and has a child support debt which has accrued and remains outstanding and the child support liability is to continue for another two years. The Registrar establishes that one of the debtor's brothers is holding money for the debtor and a sister is receiving income on behalf of the debtor under a contract which requires amounts to be paid to her for work previously performed by the debtor whilst the debtor is now working and being paid overseas. The Registrar will issue a notice to the brother to pay as much of or all of the accrued debt as he is able from the money he holds [**Clause 18.72B(1)(d) and 18.72B(2)**]. The sister will also receive a notice to retain from time to time amounts, as notified, out of money that comes to her on behalf of the debtor, in

satisfaction of the debtor's on going child support debt
[Clause 18.72B(e) and 18.72B(2))].

Transactions to defeat payment of a child support debt or a maintenance liability

- 11.27. The third of the proposed amendments is aimed at those payers who artificially contrive to construct their affairs in order to minimise or eliminate either their capacity to pay child support for their children or to minimise or eliminate their liability to pay child support for their children.
- 11.28. There are payers who set out purposely to deny their children support by entering into financial arrangements, the effect of which, is to leave themselves without assets or identifiable income and so can easily demonstrate to a court their inability to pay. So often the income and assets continue to be enjoyed as if they were the payer's and this arrangement has been set up with that precise aim in mind. There is clearly a need to be able to call into question transactions that are entered into for this purpose and which have the effect of reducing or defeating a payer's liability or capacity to pay.
- 11.29. The amendment proposed will insert a power which will enable the Registrar to apply to a court for an order or to seek an order of the court in any proceeding that has been instituted under the child support legislation, to set aside an instrument or disposition that has been made, or to restrain an instrument or disposition that is proposed to be made by a payer of an enforceable liability, ***if the court is satisfied*** that the intention and purpose is to reduce or defeat the payer's ability to pay an existing or anticipated child support debt or to meet a liability ***[Clause 18.72C(1) and (2)]***.
- 11.30. It will also allow the court to order that any money or any real or personal property which is the subject of the instrument or disposition to be taken in execution or applied to such amounts of child support and costs as the court orders and that any proceeds of a court ordered sale be paid to the court, at the same time protecting the

interests of a bona fide purchaser [*Clause 18.72C(3) and (4)*].

- 11.31. The court may also order the payment of costs incurred by the payee, a purchaser or the Registrar to be paid by the payer or a person with whom the payer has colluded [*Clause 18.72C(5)*].

Examples of the exercise of the proposed Clause 72C power

- 11.32. During an enforcement proceeding the court learned the child support payer either sold a motor vehicle for a nominal sum or transferred the ownership to another person yet the payer continues to use the motor vehicle for work and garages it at home at night. The registration papers show the vehicle is registered in the name of the other person.
- 11.33. After examination of the payer in court it becomes apparent that the ownership arrangements are suspect because the payer feared the court would order that it be sold and the proceeds applied to the child support debt owed to the Agency. The court hears evidence about 3 possible scenarios. The car was either purchased by the payer but registered in another name, sold for a nominal sum or gifted to the other person. The person representing the Agency in the proceeding, on the basis of the evidence provided, asks the court to accept that the vehicle transaction was undertaken to reduce or defeat the payer's ability to meet the outstanding debt to the Agency and order that the "transfer" should be set aside, a further order made to sell the vehicle as if it was still the property of the payer and the proceeds applied to the outstanding child support debt.
- 11.34 The proposed amendment will also enable the Registrar to ask the court to set aside dubious dispositions which the court finds, after examination, to have been

undertaken to reduce or defeat a liability or a capacity to pay. For example, some clients claim to have to repay loans to family members out of the sale of assets but there is no supporting documentation to substantiate the loan was actually made in the first place.

11.35. Another type of suspect transaction occurs where the child support debtor is in business on one day and the next day a "new" business is set up in another name or it is transferred to another person and the child support debtor continues to be "employed" by the business but claims to receive little or no payment for services rendered. Not only does this shield assets in the business it also has the effect of reducing, even eliminating, the basic liability under any assessment that may issue. Whilst there are other remedies available to a custodian, it will also allow the Registrar to have the matters scrutinised by a court in any other action taken under the child support legislation.

11.36. In the above examples it is not the Registrar but the Court that must be satisfied that the arrangements have had the effect of reducing or defeating a liability or capacity to pay child support under an existing or anticipated liability.

Commencement date

11.37 The amendment will apply from the date the Royal Assent is given to the Child Support Legislation Amendment Bill 1992 [*Clause 2*].

Clauses involved in the proposed amendments

Clause 2: provides the Act proposed by the Bill will commence on the date it is given the Royal Assent.

Clause 16 provides for the inclusion of new section 71A and contains the references to clauses referred to in the body of this Explanatory Memorandum.

Clause 17 provides for the inclusion of new sections 72B and 72C and contains the references to clauses referred to in the body of this Explanatory Memorandum.



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