



LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

PROJECT 107

THE INTERSECTION OF THE FAMILY LAW & CAVEAT SYSTEMS IN WESTERN AUSTRALIA

DISCUSSION PAPER

THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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Table of Contents

Table of Contents	2
Abbreviations used	3
Submissions.....	4
Acknowledgements.....	4
Terms of Reference	5
Scope to Reference.....	5
Methodology	5
Overview	6
Caveat System - Supreme Court of Western Australia.....	9
Family Law System - Family Court of Western Australia.....	11
Consideration of FLPAWA Submission	16
Conclusion	19
Questions for Consideration	21
Schedule 1 – Excerpts of Transfer of Land Act 1893 (WA)	22
Schedule 2 – Excerpts of Consolidated Practice Directions of Supreme Court of WA.....	25
Schedule 3 – Excerpts of Family Court Act 1997 (WA).....	26
Schedule 4 – Excerpts of Family Law Act 1975 (Cth).....	28
Schedule 5 – Excerpts of Family Law Act Proclamations	33
Schedule 6 – Excerpts of Jurisdiction of Courts (Cross-Vesting) Act 1987 (WA).....	34
Schedule 7 – FLPAWA Proposed Amendments.....	35
Appendix “C”	38

Abbreviations used

FLPAWA:	Family Law Practitioners' Association of Western Australia (Inc.);
Submission:	The submission of the Family Law Practitioners' Association of Western Australia (Inc.) titled: "Submission to the Attorney General for the State of Western Australia in Relation to Issues at the Intersection of Family Law and Caveat Systems";
Commission:	Law Reform Commission of Western Australia;
Supreme Court:	The Supreme Court of Western Australia;
TLA:	Transfer of Land Act 1893 (WA);
FCA:	Family Court Act 1997 (WA); and
FLA:	Family Law Act 1975 (Cth).

Submissions

The Law Reform Commission welcomes your submission and response.

Please send your submission to the email address: lrcwa@justice.wa.gov.au

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Acknowledgements

Dane Chandler, barrister at Francis Burt Chambers, conducted the research and wrote the Discussion Paper.

Dominic Fernandes and Dave Major conducted the editing and prepared the Discussion Paper for publication.

Terms of Reference

On 2 August 2016 the previous Attorney General requested the Law Reform Commission of Western Australia to examine and report upon the caveat system in relation to de facto and marital breakdowns giving consideration to:

- (i) the inter-relationship of the right to lodge a caveat over land and the *Family Court Act 1997* (WA) and the *Family Law Act 1975* (Cth); and
- (ii) the submission of the Family Law Practitioners' Association of Western Australia (Inc.) titled: "Submission to the Attorney General for the State of Western Australia in relation to issues at the intersection of family law and caveat systems"; and
- (iii) the amendments proposed in that submission; namely:
 - a) the creation of a right for a party to lodge a caveat over land owned by a former spouse following a relationship breakdown and pending resolution of matters between the former spouses by way of Family Court order or otherwise; and
 - b) the conferral of power on the Family Court of Western Australia to make an order extending the operation of a caveat where the caveator and the registered proprietor are former spouses who are already parties to a case before the Family Court of Western Australia,

and to recommend whether any legislative or other changes should be enacted or implemented.

Scope of Reference

The scope of this reference is narrow in that it is focussed on the caveat system in relation to de facto and marital breakdowns and in particular to the written Submission provided by the FLPAWA.

The Commission has confined itself to this narrow scope, but has also sought to consider any practical implications that may result from new legislation in this regard. Amongst these practical considerations are those relating to caseloads, procedures and whether this will create an imperative for parties to commence proceedings when they may not have done so.

Stakeholders are invited to make submissions on both the legal and practical consequences of the suggestions in this paper.

Methodology

The Commission received the final Terms of Reference from the Attorney General on 2 August 2016. In February 2017, the Commission finalised the contract with Mr Dane Chandler, barrister at Francis Burt Chambers, for the legal research and writing of the reference.

The FLPAWA provided a detailed Submission which advocated for a new "spousal caveat" for a party not having a direct caveatable interest in the title deed of the land; and for a conferral of powers to extend the operation of a caveat to the Family Court of Western Australia.

The Commission met with key representatives of the Family Court of Western Australia in March 2017, to obtain their views prior to the preparation of the Discussion Paper. The information from the Family Court of Western Australia and the FLPAWA Submission was invaluable in shaping the Discussion Paper.

The Commission will meet with other key stakeholders prior to finalisation of its recommendations in the Final Report.

Overview

1. On 8 October 2015, the Family Law Practitioners' Association of Western Australia (Inc.) ("**FLPAWA**") presented to the Attorney General a detailed written submission ("**Submission**") by which it advocated for legislative amendments to allow a spouse to lodge a caveat against land owned by either spouse during their relationship, following the breakdown of the relationship and to give the Family Court of Western Australia jurisdiction to extend the operation of caveats.
2. The FLPAWA propose these amendments to address the following two interrelated issues:
 - a) the inability of a spouse who is not the registered proprietor of land, and who is unable to establish the criteria for an equitable interest in that land, to lodge a caveat over that land to protect the status quo pending their application for a property alteration order in the Family Court of Western Australia being determined; and
 - b) to avoid the need for a spouse who has lodged a caveat to commence proceedings in the Supreme Court of Western Australia ("**Supreme Court**") to apply to extend that caveat, whilst also needing to commence proceedings in the Family Court of Western Australia for a property alteration order.
3. On 2 August 2016, the Attorney General responded to the Submission by referring the matter to the Law Reform Commission of Western Australia ("**Commission**") under s.11(2) of the *Law Reform Commission Act 1972* (WA). The terms of reference have been set out in full above.
4. Caveats operate as a form of statutory injunction to maintain the status quo of registered interests in land.
5. The FLPAWA is concerned about the ability of one spouse to dispose of property registered in his or her name following the breakdown of a marriage or de facto relationship and prior to the parties agreeing on a division of assets, or the Family Court of Western Australia making orders for the division of assets.
6. As the law currently stands, a person must have a proprietary interest in land to properly lodge a caveat against the land. In the case of a spouse not registered as a legal interest holder of the land, the spouse will need to rely on evidence of a resulting trust or constructive trust over the land as the source of their beneficial, equitable interest.
7. Relevantly for the purposes of this Discussion Paper, it is well established that the mere application for a property alteration order by the Family Court of Western Australia is not enough to support a caveat.
8. A caveat lodged in the proper form will be accepted and effective. Generally, it is when the registered proprietor of land causes notice to be served on the caveator, the effect of which is the caveat will lapse within 14 or 21 days in the absence of an order of the Supreme Court extending the caveat, that the substance of the caveator's claimed proprietary interest in land is analysed. Ordinarily, if a caveat is extended, it is made a condition subsequent that the caveator commence substantive proceedings in the Supreme Court to finally determine the parties' interests in the subject land.

9. In many ways the matters raised for consideration by the Commission on this referral were identified 30 years ago by Glass JA of the New South Wales Court of Appeal in the following statement¹:

The appeal raises for consideration a new field for discord liable to explode into litigation. It exists whenever parties, either within or without the bonds of matrimony, have lived in a home owned by one, and the other has contributed to its acquisition, its maintenance, its equipment with furniture or the running expenses of the household and their relationship has been dissolved without any clear agreement as to their property rights. A dispute between spouses over the ownership of the matrimonial home falls to be resolved in accordance with principles of general application: *Hepworth v. Hepworth*. But such a dispute is more likely to be remitted by the untitled claimant to the Family Law Court which has wide powers, not only to declare but also to alter property rights according to what is just: *Family Law Act 1975* (Cth.), ss. 78-80. Where the parties have not been married, or choose not to invoke this special jurisdiction, the courts may only declare rights, however difficult it may be to unravel the tangled skein of human association, and apply to it considerations of legal principle. This is such a case, and it requires an examination of relevant principles of property and equity law which have been recently agitated in reaction to contemporary innovations in the patterns of domestic life. It will be seen that the law does not countenance, in this respect, different rules for the married and the unmarried. Nor should it be overlooked that the rules, however they come to be formulated, ought to apply indifferently to all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature.

The velocity of social change affecting, not only the financial balance in the relationship of husband and wife, but also producing new forms of association outside marriage has, indeed, produced a flurry of litigious activity. New situations have, it appears, produced some new legal rules. It is inevitable that judge made law will alter to meet the changing conditions of society. That is the way it has always evolved. But it is essential that new rules should be related to fundamental doctrine. If the foundations of accepted doctrine be submerged under new principles, without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new. So it seems to me that a construction of the new rules which can accommodate them within the old structure is to be preferred to one which does not. [...]

10. Similarly, 25 years ago, Kirby P then of the New South Wales Court of Appeal said the following²:

A moment's thought about the three categories set out above will demonstrate, obviously enough, the common forces which are at work here. Legal and equitable principles have been established over the centuries. They have operated in societies of generally stable and recognised human relationships. As a result of various factors, human relationships in society have changed in recent decades. Attitudes to marriage have changed. Many people nowadays undertake a number of marriages in succession. No longer is this activity confined to the scandalous conduct of film stars and millionaires. De facto relationships, akin to marriage, are neither uncommon nor (in most circles nowadays) a source of opprobrium. Anti-discrimination legislation and the other reforms have also reflected changing social experience in relationships between people of the same sex. Sometimes these too evince enduring features akin to marriage. Partnerships which fall short of de facto relationships or enduring personal associations are also not uncommon in today's Australian society.

¹ *Allen v Snyder* [1977] 2 NSWLR 685 at 688, 689.

² *Bryson v Bryant* (1992) 29 NSWLR 188 at 194-197.

The longer such relationships exist, the more likely is it — whether by marriage, de facto relationship, same sex relationship or other form of human partnership — that property interests will become involved. When the relationship ends (either by severance during the lifetime of the parties or by death) it will be necessary for the courts to provide for the property consequences. [...] However, experience in human relationships, as evidenced at least in the courts, is that occasionally, upon termination, there is a serious imbalance between what one party has contributed to the relationship and what that party receives in property at its end.

To cure such imbalances, legislation has been enacted affording large discretions to the courts in certain defined circumstances: see, eg, in this State, the *De Facto Relationships Act 1984* and the *Family Provision Act 1982*; see also *Family Law Act 1975* (Cth), s 79. But it is not surprising that the courts of the common law and of equity also developed, long before the passage of such legislation, principles and remedies to correct the most offensive kinds of imbalances between what was given and received by way of property interests during a human relationship. [...]

Some judges and other jurists have favoured affording to the courts a broad discretion by which to achieve an equitable adjustment of property interests at the end of a personal relationship, and to do so according to notions of justice, fairness or the like. [...] However, Australian courts have consistently rejected the view that a constructive or resulting trust might be imposed simply to achieve a fair distribution of property between partners to a personal relationship. [...]

[...] What is required, in cases such as the present, is that courts should approach claims to disturb what will otherwise be established legal rights by the familiar techniques of applying to those rights the countervailing principles of the law of trusts or of unjust enrichment. [...]

11. In this Discussion Paper the Commission sets out below a commentary in summary form on the state of the relevant law as to the caveat system and alteration of property interests under family law legislation. A discussion of the amendments proposed by the FLPWA and the Commission's preliminary views follows.
12. Prior to the release of this Discussion Paper the Commission had the benefit of meeting with key representatives of the Family Court of Western Australia to discuss the FLPWA proposal. The Family Court of Western Australia representatives were generally in favour of the creation of a spousal caveat and giving the Court power to extend the operation of such a caveat.
13. The Commission's preliminary view is that there are several reasons supporting the creation of a new form of "spousal caveat" and giving the Family Court of Western Australia power to extend this new type of caveat only. Further, that these reasons outweigh any material risks from the same.

Caveat System - Supreme Court of Western Australia

14. The caveat system in Western Australia is set out in Part V of the *Transfer of Land Act 1893* (WA) (“TLA”), relevant excerpts of which are provided in Schedule 1 to this Discussion Paper.
15. Any person claiming an estate or interest in private land may lodge a caveat in the approved form with the Registrar of Titles (Landgate) to forbid the registration of any transfer or any instrument affecting the claimed estate or interest absolutely (an absolute caveat), or until after notice of the intended registration or dealing be given to the caveator (notice caveat) or unless the future instrument be expressed to be subject to the claim of the caveator (subject to claim caveat).³
16. The circumstances of the claims made by the caveator dictate the form of caveat that is appropriate to lodge. In the context of a contentious relationship breakdown, pending or foreshadowed property alteration proceedings in the Family Court of Western Australia and a caveator’s claim of an equitable interest in property, it could reasonably be argued that an absolute caveat is appropriate, to maintain the status quo. If the caveator is certain and confident in claiming only a minority equitable interest in land, a subject to claim caveat may be more appropriate.⁴
17. The role of the Registrar is merely to ensure a caveat is in the proper form; it is an administrative function only.⁵
18. The caveat on its face must make explicit the specific interest claimed; it must reveal to the registered proprietor the nature and extent of the claim. For example, a claim to an “equitable interest” or “interest as beneficiary of a resulting or constructive trust” is defective in form.⁶
19. The caveatable interest must exist at the time the caveat is lodged; it cannot protect a potential, future interest.⁷
20. A caveat is a form of statutory injunction preventing registration of a dealing against land until the caveator has been given a reasonable opportunity to justify the caveat by pursuing such remedies as he or she may have. It keeps the property in status quo until a court has had an opportunity of determining the rights of the parties.⁸
21. The absence of a caveat to protect an equitable interest in land does not of itself result in the loss of priority which the timing of the creation of the interest would otherwise give. However, failure to lodge a caveat will result in the destruction of the equitable interest as soon as there is registration of a subsequent proprietor, who takes the legal interest free from prior unregistered equitable interests.⁹
22. After a caveat has been lodged and accepted, the Registrar will give notice of this to (relevantly) the registered proprietor of the land.¹⁰

³ TLA, ss 137(1), 139(1); Form C1.

⁴ *Midland Brick Co v Welsh* (2006) 32 WAR 287; [2006] WASC 122 at [363], [364]; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27; [2007] WASCA 179 at [43]-[45].

⁵ *Jandric v Jandric* [1999] WASC 22 at [39].

⁶ *Jandric v Jandric* at [40]; *Bashford v Bashford* [2008] WASC 138 at [56], [92]; *Gangemi v Gangemi* [2009] WASC 195 at [41], [43], [59], [61].

⁷ *Gangemi v Gangemi* at [40].

⁸ *J and H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 at 552, 558; *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407 at 419; *Custom Credit v Ravi Nominees* (1992) 8 WAR 42 at 44, 45, 50; *Jandric v Jandric* at [4]; *Midland Brick Co Pty Ltd v Welsh* at [350]; *Bashford v Bashford* at [43].

⁹ *J and H Just (Holdings) v Bank of New South Wales* at 554-557, 559; *Leros v Terara* at 420; *Parianos v Melluish* (2003) 30 Fam LR 524; [2003] FCA 190 at [62]; *Midland Brick Co v Welsh* at [336], [337].

¹⁰ TLA, ss 138(1), 141(2).

23. There are then several ways in which the validity of the caveat may fall to be considered by the Supreme Court.¹¹ Most commonly, the registered proprietor of the land may, at any time, cause the Registrar to issue a notice to the caveator, the effect of which is that the caveat will lapse in 21 days' time, depending upon the type of caveat, unless an order from the Supreme Court extending the operation of the caveat is attained.¹²
24. An application for extension of a caveat is made by originating summons and ordinarily requires an undertaking as to damages.¹³
25. If the caveat is extended, it may be made conditional upon the caveator commencing substantive proceedings by writ shortly thereafter, to finally prove the claimed interest upon which the caveat is based, if such proceedings have not already been commenced.¹⁴
26. There is a twofold test to be applied when determining whether to order the extension of a caveat.
27. The first is whether the claim of an interest in the land has or may have substance; is there a serious question to be tried?¹⁵
28. Ordinarily, the court will not evaluate the evidence for the purposes of conducting a preliminary trial; it is not appropriate to attempt to resolve conflicts of evidence on affidavit. The usual course is for a caveat to remain if the caveator can demonstrate a reasonably arguable case; disputed questions are to be left for trial.¹⁶
29. The Commission sets out below, in the section concerned with family law legislation, principles relevant to establishing a case for a resulting trust and constructive trust over land, particularly as between spouses.
30. If the first (serious question) test is passed, the second test is whether the balance of convenience favours the extension of the caveat. This involves consideration of various factors such as the strength and size of the claim of an interest, and whether an undertaking as to damages has been given. Interlocutory removal of a caveat will be unusual because the purpose of a caveat is the protection of a proprietary interest, which will in many cases be destroyed if it is removed.¹⁷
31. Parties may also apply to the Supreme Court for injunctive relief in caveat-based disputes.
32. For example, when a caveat is not extended because a pending sale of the land tips the balance of convenience in favour of the sale proceeding, the caveator may seek alternative injunctive relief that the registered proprietor be restrained from disposing or dealing with the net proceeds of sale pending determination of the caveator's interest in the land.¹⁸
33. In circumstances requiring urgent action, a registered proprietor of land may apply for injunctive relief to order the removal of caveat, or restrain the lodgement of any future caveat.¹⁹

11 See *TLA*, ss 138(2) (summons by, amongst others, the registered proprietor) 138(3)-(4) (application by caveator following the issuing of a notice of an application for transfer or other dealing), 138B(1)-(2) (application by caveator following the issuing of a notice by the Registrar).

12 *TLA*, ss 138(2), (3), 138B(1), (2), 141(2).

13 *TLA*, s 138(4), 138C(1); *Consolidated Practice Directions of Supreme Court of Western Australia*, [4.3.4], relevant excerpt of which is in schedule 2.

14 *Jandric v Jandric* at [49]; *The Official Trustee in Bankruptcy as Trustee for the Property of David Maxwell James, a Bankrupt v James & Anor* [2001] WASC 66 at [22]; *Midland Brick Company Pty Ltd v Welsh & Not* [2002] WASC 248 at [95]; *Bashford v Bashford* [2008] WASC 138 at [111].

15 *Custom Credit Corporation Ltd v Ravi Nominees Pty Ltd* at 48; *Jandric v Jandric* at [5]; *Bashford v Bashford* at [45]-[47]; *KWS Capital Pty Ltd v Love* [2013] WASC 294 at [32]-[34].

16 *Jandric v Jandric* at [24], [25]; *Official Trustee James, a Bankrupt v James & Anor* at [20], [22]; *Yardley v Favell Gordon (Aust) Pty Ltd & Anor* [2005] WASC 212 at [53], [62], [70]; *Bride v Registrar of Titles* [2015] WASC 11 at [13].

17 *Custom Credit v Ravi Nominees* at 50; *Jandric v Jandric* at [5]; *Bashford v Bashford* at [50], [101], [104], [105]; *Gangemi v Gangemi* at [45]; *Davies v Davies [No 2]* [2010] WASC 151 at [41]-[43]; *KWS Capital* at [35]-[36]; *Bride v Registrar of Titles* at [31], [32].

18 *Myra Pty Ltd v Thompson* [2011] WASC 230.

19 *Bacardi Holdings Pty Ltd v Greentek Pty Ltd & Ors* [2005] WASC 222; *Walthamstow Pty Ltd v Saliba [No 2]* [2010] WASC 140.

Family Law System - Family Court of Western Australia

34. The Family Court of Western Australia is established under the *Family Court Act 1997* (WA), relevant excerpts of which are in Schedule 3 to this Discussion Paper.
35. The Family Court of Western Australia has been vested with federal jurisdiction through proclamations made under the *Family Law Act 1975* (Cth). Relevant excerpts of the FLA and proclamations are in Schedules 4 and 5 to this Discussion Paper.²⁰
36. The Family Court of Western Australia has express statutory power to make orders it considers appropriate to alter interests in the property of married and de facto couples. The Family Court of Western Australia may only make orders if satisfied that in all of the circumstances it is just and equitable to do so. The Family Court of Western Australia is to take into account various matters including the direct and indirect financial and non-financial contributions to the relationship and any children of the relationship, contributions to the welfare of the family, and to the acquisition, conservation or improvement of the property of the spouses or property of either spouse.²¹
37. Any application to alter spousal property interests requires the Family Court of Western Australia to consider the whole of the assets of the spouses, notwithstanding that a spouse may seek an alteration of interests in only some of that property. This is because the Family Court of Western Australia has power to make only one order for property settlement.²²
38. The High Court has described the test for altering property rights in the following way²³:
- The expression “just and equitable” is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds. And while the power given by s 79 is not “to be exercised in accordance with fixed rules”, nevertheless, three fundamental propositions must not be obscured.
- First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to “altering the interests of the parties to the marriage in the property”. The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.
- Secondly, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. [...]

20 *FCA*, ss 35, 36, 205ZG; *FLA*, ss 31, 33, 39, 41, 78, 79; Proclamations made 04/11/1991.

21 *FCA*, s 205ZG; *FLA*, s 79.

22 *In the Marriage of Hickey* (2003) 30 Fam LR 355; [2003] FamCA 395 at [40], [47], [48].

23 *Stanford v Stanford* (2012) 247 CLR 108; [20112] HCA 52 at [36]-[42].

Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is “just and equitable” to make the order is not to be answered by assuming that the parties’ rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that “[c]ommunity of ownership arising from marriage has no place in the common law”. Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be “decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses”. The question presented by s 79 is whether those rights and interests should be altered.

Thirdly, whether making a property settlement order is “just and equitable” is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised “in accordance with legal principles, including the principles which the Act itself lays down”. To conclude that making an order is “just and equitable” only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.

[...] The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.

In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).

39. The registration of land in the name of one spouse, and even the existence of an intention that the subject land solely be the asset of that spouse, does not preclude an adjustment order being made based on contributions to that property by the other spouse. This does not necessarily mean it is just and equitable to ignore the contributions the registered holder spouse made to the property or generally to the relationship; rather, it means that in the totality of the relationship and its assets, an adjustment order is appropriate.²⁴
40. Property acquired after termination of the relationship is not to be considered as part of the assets of the relationship, even if property acquired during the relationship is used to finance the subsequent land.²⁵

²⁴ *Bilous v Mudaliar* (2006) 65 NSWLR 615; [2006] NSWCA 38 at [167].

²⁵ *Bilous v Mudaliar* at [22].

41. Relevant to the intersection of caveat law, the mere application for alteration of property interests under family law legislation does not create a caveatable interest. The fact a spouse may in the future be entitled to an order for alteration of property interests does not give that spouse a caveatable interest in property legally owned by the other spouse, even in circumstances where the property owning spouse has been restrained by order of the Family Court of Western Australia from disposing of relevant property; that is, the Family Court of Western Australia has already ruled that there is a serious question to be tried as to whether the non-legal interest holding spouse will ultimately be found to be entitled to an interest.²⁶
42. Also, an entitlement to other forms of family law relief does not give a spouse a caveatable interest in land. An order for spousal and child maintenance does not constitute a caveatable interest in the land of the spouse against which the order is made.²⁷
43. A proprietary interest in land is required to support a caveat; in the case of a spouse not registered as the holder of a legal interest in land, that spouse must rely on a finding that an equitable interest in the land is held on trust for him or her.
44. Separate to the specific statutory power to make “just and equitable” property adjustment orders, the Family Court of Western Australia has a general power to make declarations as to the interests of spouses in property; that is, the Family Court of Western Australia may determine and declare that interests in property are held on trust by one spouse for the other.²⁸
45. When determining the interests of parties in property, the initial presumption is that parties intend that the beneficial, equitable interest in property should be in accordance with the legal title. That is, if one spouse is not registered as having any legal interest in land, the presumption is that that spouse has no equitable interest in the land.²⁹
46. Any claim to a beneficial interest in land by a person who is not vested with legal title must be based upon a trust, be it a resulting or constructive trust and, relevantly, having regard to the principle of advancement.³⁰
47. The relationship of marriage alone does not create a caveatable interest pursuant to a trust and whether a spouse has a caveatable interest must be decided in accordance with the same general principles which apply to persons who are not spouses.³¹
48. If the legal interests in land are registered in equal shares but the persons contributed in unequal shares to the costs of acquisition, there is a rebuttable presumption that the beneficial interests in the land are in proportion to the persons’ respective contributions.³²
49. This presumption is rebutted if and to the extent it appears the person who made a greater contribution intended the other to take a beneficial interest commensurate with their legal title.³³

26 *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11, 579; *Ioppolo v Ioppolo* (unreported, Full Court, Supreme Court of Western Australia, 13 November 1978) at 1, 2; *In the Marriage of Stevens* at [4]; *Lightfoot v Lightfoot* (unreported, Supreme Court of Western Australia, 27 February 1991, BC9101239) at 15; *Morling v Morling* (1992) 16 Fam LR 161 at 163; *Bell v Graham* at [19]; *Hayes v O’Sullivan* at [20], [24], [54]; *Elmant Pty Ltd v Dickson* (2001) V ConvR 54-647; [2001] VSC 155; *Goldstraw v Goldstraw* (2006) V ConvR 54-712 at [27], [31]-[34]; *Bevan v Bevan* (2013) 279 FLR 1; [2013] FamCAFC 116 at [73], [80], [86].

27 *Dykstra v Dykstra* (1991) 22 NSWLR 556; *Goldstraw v Goldstraw* at [38]-[42].

28 *FCA*, s 36(4a), 205ZA; *FLA*, s 78.

29 *Currie v Hamilton* at 690; *Brennan v Duncan* at [11].

30 *Allen v Snyder* at 689-691, 697-699, 705, 706.

31 *Hepworth v Hepworth* (1963) 110 CLR 309 at 317, 318; *Bell v Graham* [2000] VSC 142 at [18]; *Hayes v O’Sullivan* (2001) 25 WAR 40; [2001] WASC 55 at [32], [42]-[44].

32 *Noack v Noack* [1959] VR 137 at 139; *Calverley v Green* at 246, 247, 255, 258; *Currie v Hamilton* at 690; *Muschinski v Dodds* at 612; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 155; *Tracey v Bifield* (1998) 23 Fam LR 260 at 268.

33 *Noack v Noack* at 141; *Calverley v Green* at 246, 247, 250, 251, 255, 258; *Currie v Hamilton* at 690; *Muschinski v Dodds* at 590, 593, 612; *Vedejes v Public Trustee* [1985] VR 569 at 573-575; *Baumgartner v Baumgartner* at 155.

50. The principle of advancement assumes that a husband gifts his wife legal title in excess of her contribution to the costs of acquiring the land. This principle does not apply so that it is to be assumed wives gift husbands legal title greater than their contribution. Whether the principle applies to a de facto relationship will depend upon the circumstances of the relationship; for example, has the relationship proved itself to have apparent permanence, in which the spouses live together and otherwise present themselves as a married couple? The contemporary relevance of the principle of advancement has been questioned.³⁴
51. A resulting trust will be found where it is determined that the parties intended, at the time of acquisition, that one spouse would hold an interest in the land on trust for the other spouse. Parties' actual intentions may be determined by what they said and did when the property was purchased, as well as their subsequent conduct insofar as that conduct throws light on what their intentions were at the time of purchase.³⁵
52. Equity will grant a proprietary interest in land through a constructive trust in the family home or other properties where it would be unconscionable to deny this interest to the other spouse. The relevant unconscionable conduct must arise out of and be concerned with both the relationship and the property. These are now settled principles.³⁶
53. Naturally, a resulting trust based on the parties' intent would make the imposition of a constructive trust inappropriate; it is one form of trust or the other.³⁷
54. For example, a constructive trust may arise where, by the conduct and words of one spouse, the other had been led to believe that with the continuation of the relationship she would obtain an interest in the property and thereafter she acted on this expectation in continuing the relationship by contributing to joint living expenses and bearing children.³⁸
55. Another example would be when property registered in one spouse's name was acquired, developed as a home and largely financed out of the spouses' pooled earnings.³⁹
56. Generally, the question is whether there has been a pooling of earning by the spouses designed to ensure that these monies would be expended for their joint relationship and for their mutual security and benefit; for example, to secure accommodation for themselves and their children.⁴⁰
57. Equity may go so far to find that a spouse has an interest in property held by a corporate entity where that entity is in effect the alter ego of the other spouse.⁴¹
58. Third parties affected by any property alteration order or declaration may apply to be a party to the proceedings.⁴²

34 *Noack v Noack* at 139; *Calverley v Green* at 246, 247, 250, 256, 260; *Currie v Hamilton* at 690; *Baumgartner v Baumgartner* at 155; *Trustee of James, Bankrupt v James* at [12], [13]; *Trustees of Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278; [2006] HCA 6 at [55].

35 *Allen v Snyder* at 707; *Calverley v Green* at 262, 269; *Muschinski v Dodds* at 590; *Vedejes v Public Trustee* at 573; *Cummins v Cummins* at [65]-[67]; *Tracy v Bifield* at [265]; *Brennan v Duncan* at [14].

36 *Muschinski v Dodds* at 608, 620, 621; *Baumgartner v Baumgartner* at 147; *Bennett v Tairua* (1992) 15 Fam LR 317 at 323; *Jandric v Jandric* at [32], [33]; *Lloyd v Tedesco* (2002) 25 WAR 360; [2002] WASCA 63 at [5]-[12], [30], [31]; *Parianos v Melluish* at [30]-[38]; *Robinson v Rouse* [2005] TASSC 48 at [25], [26], [29], [30].

37 *Tracey v Bifield* at 263.

38 *Bennett v Tairua* at 322, 323.

39 *Baumgartner v Baumgartner* at 149, 150, 156.

40 *Baumgartner v Baumgartner* at 149, 152, 157; *Parianos v Melluish* at [55]-[57].

41 *Yardley v Favell Gordon (Aust)* at [61], [62].

42 *FCA*, s 208; *FLA*, ss 79(10), 92.

59. Ordinarily, where there are simultaneous property alteration proceedings in the Family Court of Western Australia and trust proceedings in the Supreme Court, it will be appropriate for the Supreme Court matter to be transferred to the Family Court of Western Australia under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA), even where the interests of third parties to the marriage in the subject property are involved. Relevant excerpts of the cross-vesting legislation are in Schedule 6 to this Discussion Paper.⁴³
60. There is authority for the Family Court of Western Australia having jurisdiction to make a binding declaration in relation to the rights or interests of parties in property, including non-spousal parties, in the event of the transfer of proceedings under cross-vesting legislation concerning the subject property.⁴⁴

43 *Stanley v Stanley Exploration Services Pt Ltd* (1998) 24 Fam LR 242 at 245, 246, 250-252; *Miller v Miller* (unreported, Supreme Court of Western Australia, 19 June 1998, Lib No: 980340) at 6, 7.

44 *In Marriage of Finlayson* (2002) 174 FLR 165; [2002] FamCA 898 at [84], [119], [120], [122]-[124].

Consideration of FLPWA Submission

61. It is apparent to the Commission that family law practitioners in Western Australia have for some time clearly supported the creation of a “spousal caveat” and giving the Family Court of Western Australia power to make orders with respect to such caveats.
62. The amendments proposed by the FLPWA offer what could be described as a potentially radical change to the well settled legal principles that govern caveats. The amendments propose that a spouse may, by the mere fact of their marriage or de facto relationship, in effect be accorded a proprietary interest (or at the very least some of the rights commensurate with having a proprietary interest) in land registered in the other spouse’s name, be it the residence of the relationship or an investment property, at least until their respective interests have been agreed between them or determined by the Family Court of Western Australia.
63. As a practical matter, the amendments appear to benefit only a discrete class of people, in limited circumstances.
64. That is, the amendments are not for the benefit of a spouse that holds a legal interest in land.
65. The amendments are also not necessary to permit a spouse that is joint mortgagor to properly lodge a caveat; a right of contribution under a joint mortgage will entitle a spouse to a charge over the property to secure that right and thus a caveatable interest in the land.⁴⁵
66. The FLPWA amendments appear to be directed to protect a spouse that is not registered as holding any interest in the land and the land is not the subject of a joint mortgage between spouses. By this statement, the Commission does not intend to suggest that this class of persons is insignificant in their size or need to be further protected by the law in the event of a relationship breakdown. However, the Commission has been unable to identify any statistics as to the size or numbers of persons falling within this class.
67. The anecdotal evidence from the Commission’s consultation with the Family Court of Western Australia is that the Court hears approximately one application a week by a spouse for an injunction seeking to restrain the other spouse from dealing with “property of the relationship”.
68. It is also apparent from the support of the proposed amendments by those experienced in the practice of family law that it is a common occurrence that they have to advise or rule that a spouse does not have an interest in property capable of supporting a caveat.
69. The Commission invites submissions as to the size and extent of the persons (or class of persons) currently affected by the inability to properly lodge a caveat over property in which they are not the registered proprietor.

⁴⁵ *Ingram v Ingram* [1941] VLR 95 at 102; *Calverley v Green* (1984) 155 CLR 242 at 263; *Currie v Hamilton* [1984] 1 NSWLR 687 at 692, 693; *Muschinski v Dodds* (1985) 160 CLR 583 at 596, 598; *Brennan v Duncan* [2006] NSWSC 674 at [70].

70. The Family Court of Western Australia presently has jurisdiction under the FCA to determine whether a trust arrangement exists over spousal property. The Commission has therefore considered the option of not creating a separate spousal caveat, but rather simply vesting the Family Court of Western Australia with the jurisdiction under the TLA to determine caveat disputes between spouses (as an alternative or in addition to the Supreme Court). In this option, the Family Court of Western Australia would apply the existing law relating to caveats, and spouses in dispute need not commence additional proceedings in the Supreme Court.
71. Whilst this option addresses the FLPAWA's concerns regarding the need to commence proceedings in both the Family Court of Western Australia and the Supreme Court, it does not address the legal ability of a spouse to lodge (or extend) a caveat.
72. Further, the Commission understands from its consultation with the Family Court of Western Australia, that it is rare that a spouse will allege a trust arrangement over relationship property in family law proceedings. Instead, the norm is that a spouse will apply for orders altering interests in property, resulting in the application of the statutory "just and equitable" test. The Family Court of Western Australia representatives made the compelling point that if the Family Court of Western Australia was to be given jurisdiction over caveat disputes then, as a matter of policy and consistency, it ought to apply the same family law principles currently applied, rather than the equitable principles that have so far generally governed caveat disputes between spouses; that is, the Family Court of Western Australia ought to develop its own jurisprudence and rules.
73. The amendments proposed by the FLPAWA would alter the current caveat system so that when a new "spousal caveat" is lodged and accepted, a show cause notice issued and an application for orders extending the caveat made, the Family Court of Western Australia would then have to consider whether there was a serious question to be tried as to whether it is just and equitable that interests in the subject property be altered so that the caveator would be given an interest.
74. The balance of convenience test at this interlocutory stage would remain to protect the interests of the registered proprietor and third parties.
75. The Commission holds various concerns about the consequences that could flow from the creation of a "spousal caveat".
76. The Commission can conceive of a new practice where, soon after the breakdown of a relationship, spouses lodge caveats against land held in the name of their partners. A new conservative approach for a spouse's legal advisor may be to recommend this action be taken as soon as possible if it was available to the client. It seems to the Commission that this has the real potential to encourage an increase in the rate of lodgement of caveats, which are of course statutory injunctions that affect all interest holders in land.
77. This practice could then lead to an increase in applications to validate caveats and the substantive court proceedings which must follow; such proceedings by their subject matter and nature ought expeditiously be progressed through to trial and determination.
78. Obviously, an increase in the lodgement and challenge of caveats would mean an increased demand on the limited resources of parties and the Family Court of Western Australia.
79. The Commission is also cognisant of the difficult position the Family Court of Western Australia may be put in when seeking to apply a "just and equitable" test at an interlocutory stage, when the whole picture of the spouses' assets is unlikely to be available to the decision maker and there is the real possibility that one spouse may not entirely be aware of the assets of the relationship; for example, by reason of one spouse generally managing the assets of the relationship, or one spouse bringing his or her assets into the relationship.
80. All of these matters appear to the Commission to have the potential to escalate the stakes, complexity and level of disputation between spouses at a naturally emotional and difficult time in their lives, at an early stage following the breakdown of the relationship.

81. However, there are counterpoints to these concerns and the Commission was comforted by its consultation with the Family Court of Western Australia representatives.
82. The creation of a spousal caveat has the potential to protect a spouse in a vulnerable position, be it because he or she holds no legal interest in land or has not managed and is not familiar with the assets of the relationship. A caveat maintains the status quo, but also puts the onus on the caveator to justify their claimed interest in land if challenged by the registered proprietor spouse. This seems to the Commission to be a fair and just balance of interests in the circumstances of disputes between spouses over property.
83. Third parties affected by caveats may intervene in proceedings in the Family Court of Western Australia⁴⁶ and the Commission understands from its consultation with representatives from the Family Court of Western Australia that banks regularly do intervene in disputes concerning land in which they hold a security interest.
84. Whether or not there would be a greater number of applications to validate spousal caveats compared to the current applications for injunctions to restrain a spouse dealing with property can only be the subject of speculation.
85. The Commission considers that the Family Court of Western Australia is a forum better suited to deal with disputes over property between spouses who are in the process of divorce or separation than the Supreme Court. Both Courts appropriately emphasise alternative dispute resolution, but it is the Family Court of Western Australia that has the expertise and experience in dealing with the many and varied considerations involved in disputes between former spouses. Applications to extend the operation of caveats in these circumstances will need to be complemented with an application to alter interests in the property of the relationship, which then allows the Family Court of Western Australia to direct the spouses towards its counselling and alternative dispute resolution support services.
86. Similarly, it makes good policy sense for judicial officers of the Family Court of Western Australia to apply family law principles when determining whether a caveat by one spouse over land held by the other spouse should continue to have effect, pending final determination of their interests in not only the land but all spousal property according to what is just and equitable. For example, relevant considerations for the Family Court of Western Australia may be the custody and accommodation of any children, or the proportion of the value of the caveated land to the total value of the spouses' assets. These are matters with which the Family Court of Western Australia deals every day.

46 FCA, s 208; FLA, s 92.

Conclusion

87. The Commission is grateful to have had the benefit of the comprehensive and considered submission made by the FLPAWA and the opportunity to consult with representatives of the Family Court of Western Australia when preparing this Discussion Paper. The amendments the FLPAWA propose be made to the TLA and FCA are set out in Schedule 7 to this Discussion Paper.
88. The FLPAWA proposes that a new form of “spousal caveat” be created and the Family Court of Western Australia be given express power to extend the operation of spousal caveats. The Commission’s preliminary view is that it supports this proposal.
89. The proposal to give the Family Court of Western Australia power to extend caveats involves the conferral of State jurisdiction to a State Court, not an unconstitutional conferral of State jurisdiction to a Federal Court. This is unique to Western Australia because of its State Family Court.⁴⁷
90. The case of *Jandric v Jandric* offers a good example of how giving the Family Court of Western Australia power to extend this type of caveat in disputes between spouses could result in a more efficient use of the limited resources of parties and the courts. A caveat was lodged against property by the former husband of the registered landholder, whom also claimed that the parties were in a de facto relationship subsequent to their divorce and when the property was acquired. He claimed an equitable interest in the land from his financial and non-financial contribution to the land and its improvements by way of charge and constructive trust. The caveator applied to the Supreme Court for orders to extend the caveat. Ultimately, the caveat was not extended because it was defective in form; however, it was found that there was a serious question to be tried as to whether the caveator had an equitable interest in the land. An injunction was ordered against the registered landholder, made conditional on the caveator commencing separate, substantive proceedings in the Supreme Court to establish his alleged equitable interests in the land. Commissioner Buss QC, as he then was, observed that whereas the caveator may additionally have cause to bring proceedings in the Family Court of Western Australia, it was not appropriate that he order an injunction made conditional on substantive proceedings being commenced in that (other) Court.⁴⁸
91. There can be little doubt that the underlying claims of the caveator in *Jandric v Jandric* fall within the existing jurisdiction of the Family Court of Western Australia and that the most efficient way for the parties’ dispute to be resolved would be in the one court and, perhaps more relevantly, a court specialising in family and property disputes. Instead, the caveator had to go to the Supreme Court to seek orders extending his caveat, whilst also needing to commence an action in the Family Court of Western Australia for a property alteration order.

⁴⁷ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 at [108]-[111], [113], [119]-[122], [126], [127].

⁴⁸ [1999] WASC 22.

92. Also, the caveator had to claim an interest in land based on equitable principles of trusts to seek to support his caveat. The Commission understands that in the Family Court of Western Australia, former spouses in dispute over property rarely invoke these principles and instead prefer to rely on the statutory test of what is just and equitable to resolve their property disputes.
93. The Commission's preliminary view is to support the creation of a new type of "spousal caveat" and to vest the Family Court of Western Australia with the sole jurisdiction to make orders with respect to this new form of caveat only. Amendments to the TLA and the FCA will be needed to accommodate such a change.⁴⁹
94. The Commission's preliminary view is that there should not be any amendments to the existing legislative power of the Supreme Court concerning caveats and that it is not desirable to grant the Family Court of Western Australia the jurisdiction to make orders with respect to any other caveats. Rather, it is the preliminary view of the Commission that jurisdiction for caveats other than the new "spousal caveat" more properly align with the jurisdiction and expertise of the Supreme Court.
95. Finally, it is the Commission's preliminary view that a new standard form for a spousal caveat be drafted. The standard form should contain, in the equivalent "interest in land" part, a pro forma statement to the effect that the caveator is the husband, wife or de facto partner of the registered proprietor for the relevant number of years and that if the caveat is challenged, the caveator will commence proceedings in the Family Court of Western Australia within a specified period of time to alter the interests in the property of the relationship, including the subject land. The Commission considers it important that there be a new standard spousal caveat form to make it simple for the caveat to be completed and accepted at lodgement, and that the form put the parties on notice of the consequences of lodging and challenging a caveat.
96. The Commission invites submissions in relation to its preliminary views. In order to guide submissions on this Discussion Paper, the Commission offers some proposals and questions for consideration which are set out below with the relevant paragraph (if applicable) under which they can be found.

⁴⁹ With the Parliamentary Counsel's Office being the appropriate Office to draft such amendments.

Questions for Consideration:

1. Do you have any comments as to the size and extent of the persons (or class of persons) currently affected by the inability to properly lodge a caveat over property in which they are not the registered proprietor?
2. Is there a need for legislative change to adopt a new “spousal caveat” as proposed by the FLPAWA or is the Family Court of Western Australia’s power to provide injunctive relief sufficient to meet any shortfall in the Family Court of Western Australia’s ability to deal with caveats? Do you have any comments in relation to this? De-identified case examples will be useful.
3. The introduction of a new “spousal caveat” may mean that a spouse’s legal advisor may as a matter of course recommend the action of lodging a new “spousal caveat” if it was available to the client. Does this have the potential to encourage an increase in the rate of lodgement of caveats? Is this likely to lead to an increase in applications to validate caveats and the substantive court proceedings which must follow.
4. An increase in the lodgement and challenge of caveats would mean an increased demand on the limited resources of parties and the Family Court of Western Australia (paragraph 77). Do you have any comments in relation to the potential increase in caveat lodgements and the potential resourcing demands upon the Family Court of Western Australia and parties?
5. Should the test to determine caveat matters in the Family Court of Western Australia align with the treatment of caveats in the Supreme Court or should the Family Court of Western Australia apply the “just and equitable” test as stipulated under the FCA?
6. The Commission’s preliminary view is that there should not be any amendments to the existing legislative power of the Supreme Court concerning caveats and that it is not desirable to grant the Family Court of Western Australia the jurisdiction to make orders with respect to any other caveats. Do you have any comments in relation to this?
7. Do you have any comments on whether a new “spousal caveat” is likely to result in substantive proceedings in the Family Court of Western Australia that may not otherwise have been launched? Would a new “spousal caveat” have the potential to aggravate a relationship where the parties may otherwise have reconciled?

Schedule 1 - Excerpts of *Transfer of Land Act 1893 (WA)*

137. Lodging caveats for land already under this Act

- (1) Any beneficiary or other person claiming any estate or interest in land under the operation of this Act or in any lease mortgage or charge under any unregistered instrument document or writing or under any equitable mortgage or charge by deposit without writing or by devolution in law or otherwise may lodge a caveat with the Registrar in an approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or until after notice of the intended registration or dealing be given to the caveator or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat. ...

138. Consequences of lodging caveat

- (1) Upon receipt of such caveat the Registrar shall notify the same to the person against whose application to be registered as proprietor or (as the case may be) to the proprietor against whose title to deal with the estate or interest such caveat has been lodged and the judgment creditor named in any property (seizure and sale) order registered under section 133 in respect of the judgment debtor's saleable interest in such land.
- (2) Any such applicant, proprietor or judgment creditor, or any person claiming under any transfer or other instrument signed by the proprietor may if he think fit summon the caveator to attend before the Supreme Court or a judge in chambers to show cause why such caveat should not be removed; and such court or judge may upon proof that such caveator has been summoned make such order in the premises either ex parte or otherwise as to such court or judge may seem fit.
- (3) Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar pursuant to the direction of the Commissioner every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected

by the transfer or other dealing upon the expiration of 14 days after notice served on the caveator that such proprietor has applied for the registration of a transfer or other dealing unless in the meantime such application is withdrawn.

- (4) A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest except subject to the state of the Register at the time of the renewal of such caveat; but if before the expiration of the said period of 14 days or such further period as shall be specified in any order made under this section the caveator or his agent appears before a judge and gives such undertaking or security or lodges such sum in court as such judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed then and in such case such judge may direct the Registrar to delay registering any dealing with the land lease mortgage or charge for a further period to be specified in such order or may make such other order as may be just. ...

138A. Caveats to which s. 138B to 138D apply

A caveat that has not been lodged —

- (a) under section 30, 176 or 223A; or
- (b) by or on behalf of a beneficiary claiming under a will or settlement; or
- (c) under a court order; or
- (d) by the Registrar on the direction of the Commissioner; or
- (e) under any written law other than this Act; or
- (f) under any Commonwealth Act; or
- (g) by or on behalf, or with the consent, of the Minister for Lands, is a caveat for the purposes of sections 138B to 138D.

138B. Requiring caveator to seek court order extending s. 138A caveat

- (1) If a section 138A caveat has been lodged then the proprietor of the land in respect of which the caveat was lodged, or the judgment creditor named in a property (seizure and sale) order registered under section 133 in respect of the judgment debtor's saleable interest in such land, may apply, in an approved form and on payment of the prescribed fee, for the Registrar to serve the caveator with a notice to the effect that, unless the caveator takes the action referred to in subsection (2) within 21 days after the day on which the notice is served, the caveat will lapse.
- (2) If the notice referred to in subsection (1) is served on the caveator then the caveat lapses 21 days after the day on which the notice was served unless, before that time, the caveator has —
 - (a) obtained from the Supreme Court an order extending the operation of the caveat —
 - (i) for such further period as is specified in the order; or
 - (ii) until the further order of the court;
 and
 - (b) lodged with the Registrar a copy of the order.

138C. Supreme Court's powers on application by caveator

- (1) A caveator who is served with a notice under section 138B(1) may apply to the Supreme Court, in accordance with rules of the court, for an order extending the operation of the caveat.
- (2) On the hearing of an application under subsection (1), the Supreme Court —
 - (a) if satisfied that the caveator's claim has or may have substance —
 - (i) may make an order extending the operation of the caveat for such period as is specified in the order; or
 - (ii) may make an order extending the operation of the caveat until the further order of the court; or
 - (iii) may make such other orders as it thinks fit concerning the caveat or the land in respect of which the caveat was lodged;
 and
 - (b) if not satisfied that the caveator's claim has or may have substance, shall dismiss the application; and
 - (c) may make such ancillary orders in relation to the application as it thinks fit.
- (3) An interim order under this section may be made ex parte unless the court orders otherwise.
- (4) The applicant shall ensure that the Registrar is served with a copy of each order made by the court on an application under subsection (1).

139. Effect of caveats

- (1) While any caveat shall remain in force prohibiting any registration or dealing the Registrar shall not enter in the Register any change in the proprietorship of or any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged unless —
 - (a) subsection (2) applies; or
 - (b) the instrument is a property (seizure and sale) order within the meaning given in section 133; or
 - (c) the instrument is a sheriff's dealing (within the meaning given in section 133) and the matter to which the caveat relates does not, under section 133(7), prevail against the dealing; or
 - (d) section 142 applies.
- (2) Where an instrument is presented for registration and a caveat is lodged after the time of the presentation of the instrument, the caveat shall not have the effect of preventing registration of the instrument but the caveat shall take effect as if lodged after registration of the instrument. ...

141. Registrar's duties when caveat lodged or lapses

- (1) Where —
 - (a) a caveat is lodged under section 137; or
 - (b) a caveat lapses, whether because of the effect of a provision of this Act or the operation of an order of the Supreme Court, the Registrar shall enter a memorandum of the caveat or the lapse of the caveat, as the case requires, on the certificate of title for the land in respect of which the caveat was lodged.
- (2) A copy of a caveat lodged under section 137 or of so much of the caveat as the Registrar thinks is material to the person to be notified under section 138 shall be sent with the notification under section 138.

Schedule 2 - Excerpts of Consolidated Practice Directions of Supreme Court of Western Australia

4.3.4 Interlocutory Injunctions - Usual Undertakings as to Damages

- (1) Where a party is subjected to a restraint imposed by an interlocutory injunction or an interlocutory undertaking to the Court, (whether the application for an injunction is made without notice being given to the other party (ex parte), by consent, or otherwise) the party having the benefit of the restraint will generally be required to give to the Court the usual undertaking as to damages in the terms set out below. The undertaking will also be required to be given by any party obtaining the benefit of an order under:
 - (a) s 138 of the *Transfer of Land Act 1893*, having the effect of extending a caveat lodged under s 137 of that Act pending the determination of the claim in respect of which the caveat was lodged; or
 - (b) s 138C of the *Transfer of Land Act 1893*, having the effect of extending the operation of caveats after a s 138B notice
- (2) Any party seeking and obtaining the benefit of any such injunction, undertaking or order will generally be required to give the usual undertaking as to damages, regardless of whether such party is named in the proceedings as a plaintiff, as a defendant, or otherwise.

...
- (4) It should be noted that the usual undertaking, by its terms, unless otherwise ordered, remains operative during the period of any extension (whether by consent or otherwise) of the injunction, undertaking or order in connection with which it was originally given.
- (5) The form of the usual undertaking is as follows:

‘The plaintiff or defendant (as the case may be) undertakes to the court that he will pay to any party restrained or affected by the restraints imposed by this interlocutory injunction, or this interlocutory undertaking to the court, or the caveat as extended by this order (as the case may be) or of interim continuation thereof, such compensation as the court may in its discretion consider in the circumstances to be just, such compensation to be assessed by the court or in accordance with such directions as the court may make and to be paid in such manner as the court may direct.’

Schedule 3 - Excerpts of *Family Court Act 1997 (WA)*

35. Federal jurisdiction of Court

The Court has throughout the State the federal jurisdiction with which it is invested by or under the Family Law Act or any other Commonwealth Act and any subsidiary legislation in force under such an Act.

36. Non-federal jurisdictions of Court

...

(4a) Without limiting subsection (1), the Court has jurisdiction under Part 5A to —

- (a) make declarations and to revoke declarations that it has made;
- (b) hear and decide all other matters under that Part,

and in particular the Court has jurisdiction to hear and decide the following —

- (c) applications for orders with respect to property;
- (d) applications for orders for the provision of maintenance.

205ZA. Declaration of interests in property — FLA s. 78

- (1) In a proceeding between de facto partners with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a partner has in respect of the property.
- (2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.
- (3) A declaration or order under this section is binding on the de facto partners but not on anyone else.

205ZG. Alteration of property interests — FLA s. 79

- (1) In proceedings with respect to the property of de facto partners, or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the partners to make, for the benefit of either or both of the partners or a child of the de facto relationship, such settlement or transfer of property as the court determines.
- (2) An order made under subsection (1) in proceedings with respect to the property of de facto partners, or either of them may, after the death of a partner to the proceedings, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (3) The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in proceedings with respect to any property of de facto partners, or either of them, the court must take into account —
 - (a) the financial contribution made directly or indirectly by or on behalf of a de facto partner to the de facto relationship or a child of the de facto relationship to the acquisition, conservation or improvement of any of the property of the de facto partners, or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the de facto partners or either of them; and

- (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a de facto partner or a child of the de facto relationship to the acquisition, conservation or improvement of any of the property of the de facto partners or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the de facto partners or either of them; and
 - (c) the contribution made by a de facto partner to the welfare of the family constituted by the de facto partners and any children of the de facto partners, including any contribution made in the capacity of homemaker or parent; and
 - (d) the effect of any proposed order upon the earning capacity of either de facto partner; and
 - (e) the matters referred to in section 205ZD(3) so far as they are relevant; and
 - (f) any other order made under this Act affecting a de facto partner or a child of the de facto relationship; and
 - (g) any child support under the Child Support (Assessment) Act that a de facto partner has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.
- ...

208. Intervention by other persons — FLA s. 92

- (1) Any person may apply for leave to intervene in any proceedings under this Act, and the court hearing the proceedings may make an order entitling that person to intervene in the proceedings.
- (2) An order under this section may be made upon such conditions as the court hearing the proceedings thinks fit.
- (3) If a person intervenes in proceedings by leave of a court the person is, unless the court otherwise orders, to be treated as a party to the proceedings with all the rights, duties and liabilities of a party.

Schedule 4 - Excerpts of *Family Law Act 1975 (Cth)*

4 Interpretation

- (1) In this Act, the standard Rules of Court and the related Federal Circuit Court Rules, unless the contrary intention appears:

...

matrimonial cause means:

...

- (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

- (i) arising out of the marital relationship;
- (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
- (iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or

...

4AA De facto relationships

Meaning of de facto relationship

- (1) A person is in a **de facto relationship** with another person if:
- (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

- (2) Those circumstances may include any or all of the following:
- (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of children;
 - (i) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- 5) For the purposes of this Act:
- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

- (6) For the purposes of subsection (1), 2 persons are **related by family** if:
- (a) one is the child (including an adopted child) of the other; or
 - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
 - (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

31 Original jurisdiction of Family Court

- (1) Jurisdiction is conferred on the Family Court with respect to:
- (a) matters arising under this Act or under the repealed Act in respect of which matrimonial causes are instituted or continued under this Act; and
 - ...
 - (b) matters arising under a law of a Territory (other than the Northern Territory) concerning:
 - ...
 - (iv) the property of the parties to a marriage or either of them, being matters arising between those parties other than matters referred to in the definition of **matrimonial cause** in subsection 4(1); or
 - ...
 - (c) matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act

33 Jurisdiction in associated matters

To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters (including matters before the Court upon an appeal) in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings upon an appeal) before the Court.

39 Jurisdiction in matrimonial causes

- (1) Subject to this Part, a matrimonial cause may be instituted under this Act:
- (a) in the Family Court; or
 - (b) in the Supreme Court of a State or a Territory.
 - ...
- (5) Subject to this Part and to section 111AA, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Family Court and on the Supreme Court of each Territory, with respect to matters arising under this Act in respect of which:
- (a) matrimonial causes are instituted under this Act; or
 - ...
- (9) The jurisdiction conferred on or invested in a court by this section includes jurisdiction with respect to matters arising under any law of the Commonwealth in respect of which proceedings are transferred to that court in accordance with this Act.

40 Limitations on jurisdiction of Family Court and of State and Territory Supreme Courts

...

- (3) The Governor-General may, by Proclamation, fix a date as the date on and after which matrimonial causes, and other proceedings, referred to in subsection 39(5) may not be instituted in or transferred to the Supreme Court of a State or Territory specified in the Proclamation, or may be so instituted or transferred only where specified conditions are complied with, and such a Proclamation may be expressed to apply only to proceedings of a specified class or specified classes and may be expressed to apply only to the institution of proceedings in, or the transfer of proceedings to, a particular Registry or Registries of a Supreme Court referred to in the Proclamation.
- (4) The Supreme Court of a State or Territory shall not hear and determine proceedings under this Act instituted in or transferred to that Court otherwise than in accordance with any Proclamation in force under subsection (3), but nothing in this section invalidates a decree made by such a Supreme Court.

...

- (6) A party to proceedings instituted or continued under this Act that are at any time pending in the Supreme Court of a State or Territory, being proceedings that could, at the date of the application under this subsection, have been instituted in the Family Court, may apply to the Family Court for an order transferring the proceedings to the Family Court, and the Court may order accordingly.

41 Establishment of State Family Courts

- (1) As soon as practicable after the commencement of this Act, the Commonwealth Government shall take steps with a view to the making of agreements with the governments of the States providing for the creation of State courts to be known as Family Courts, being agreements under which the Commonwealth Government will provide the necessary funds for the establishment and administration of those courts (including the provision of counselling facilities for those courts).
- (2) Where, whether before or after the commencement of this Act, a State has created a court known as a Family Court, the Governor-General may, by Proclamation, declare that, on and after a date specified in the Proclamation, this section applies to that court.
- (3) Where, by virtue of a Proclamation under subsection (2), this section applies to a court, this Act has effect in relation to the institution of proceedings on or after the date fixed by the Proclamation, and in relation to proceedings so instituted and proceedings transferred to that court in accordance with this Act, as if references in sections 39, 46, 94 and 96 to the Supreme Court of a State were, in relation to the State in which the court referred to in the Proclamation is established, references to that court, and that court is invested with federal jurisdiction accordingly.

...

- (4A) A party to proceedings instituted or continued under this Act that are at any time pending in the Supreme Court of a State or Territory, being proceedings that could, at the date of the application under this subsection, have been instituted in a Family Court of a State, may apply to a Family Court of a State for an order transferring the proceedings to that Court, and the Court may order accordingly.

...

78 Declaration of interests in property

- (1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.
- (2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.

79 Alteration of property interests

- (1) In property settlement proceedings, the court may make such order as it considers appropriate:
 - (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or
 - (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage—altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

 - (c) an order for a settlement of property in substitution for any interest in the property; and
 - (d) an order requiring:
 - (i) either or both of the parties to the marriage; or
 - (ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

...

- (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:
 - (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
 - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
 - (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and
 - (d) the effect of any proposed order upon the earning capacity of either party to the marriage; and
 - (e) the matters referred to in subsection 75(2) so far as they are relevant; and
 - (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

...

(10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the **subject marriage**):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

(aa) a person:

(i) who is a party to a de facto relationship with a party to the subject marriage; and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;

(ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

(b) any other person whose interests would be affected by the making of the order.

...

92 Intervention by other persons

(1) In proceedings (other than divorce or validity of marriage proceedings), any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.

...

(2) An order under this section may be made upon such conditions as the court considers appropriate.

(3) Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

Schedule 5 - Excerpts of Family Law Act Proclamations

Family Law Act 1975 s 40(3) - Proclamation (23/11/1983)

I, SIR NINIAN MARTIN STEPHEN, the Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council in pursuance of sub-section 40 (3) of the *Family Law Act 1975* and section 4 of the *Acts Interpretation Act 1901*, hereby fix 25 November 1983 as the date on and after which proceedings that are matrimonial causes referred to in paragraph 39 (5) (a) or (b) of the *Family Law Act 1975* or that are proceedings referred to in paragraph 39 (5) (c), (d) or (e) of that Act may not be instituted or transferred to the Supreme Courts of the States of New South Wales, Victoria, Queensland, South Australia and Tasmania or to the Supreme Courts of the Australian Capital Territory and Norfolk Island.

Family Law Act 1975 s 40(3) - Proclamation (04/11/1991)

I, WILLIAM GEORGE HAYDEN, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, being satisfied that:

- (a) arrangements have been made under which Judges will not be appointed to the Family Court of Western Australia except with the approval of the Attorney-General of the Commonwealth;
- (b) Judges appointed to that Court are by reason of training, experience and personality, suitable persons to deal with matters of family law and cannot hold office beyond the age of 70 years; and
- (c) counselling facilities will be available to that Court;

declare that under subsection 41 (2) of the *Family Law Act 1975* that, on and after 5 November 1991, section 41 of the *Family Law Act 1975* applies to the Family Court of Western Australia.

Schedule 6 - Excerpts of *Jurisdiction of Courts (Cross-Vesting) Act 1987 (WA)*

5. Transfer of Proceedings

...

(4) Where —

(a) a proceeding (in this subsection referred to as the relevant proceeding) is pending in the Supreme Court or the State Family Court (in this subsection referred to as the first court); and

(b) it appears to the first court that —

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the other of the courts referred to in paragraph (a) and it is more appropriate that the relevant proceeding be determined by that other court;

(ii) having regard to —

(A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in that other court; and

(B) the interests of justice,

it is more appropriate that the relevant proceeding be determined by that other court; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by that other court,

the first court shall transfer the relevant proceeding to that other court.

...

(8) A court may transfer a proceeding under this section on the application of a party to the proceeding, of its own motion or on the application of the Attorney-General of the Commonwealth or of a State or Territory.

...

(10) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.

...

9. Exercise of jurisdiction pursuant to cross-vesting laws

The Supreme Court or the State Family Court —

(a) may exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of the Commonwealth or a State relating to cross-vesting of jurisdiction; and

(b) may hear and determine a proceeding transferred to that court under such a provision.

Schedule 7 - FLPAWA Proposed Amendments

Appendix “B”: Proposed Amendments to *Transfer of Land Act 1893 (WA)*

- (1) In this schedule, references to sections and sub-sections are to the *Transfer of Land Act 1893 (WA)* unless otherwise indicated.
- (2) Insert a new sub-section (5) into section 136K:
Sections 138(3) and (4) and 141A do not apply to caveats lodged under section 137(3).
- (3) It is relevant to note that section 5 of the *Interpretation Act 1984 (WA)* provides: “In... every written law **Family Court** or **Family Court of Western Australia** means the Family Court of Western Australia continued by the *Family Court Act 1997*”.
- (4) Amend sub-section (1A) of section 137 to insert “Family Court of Western Australia” after “Supreme Court”.
- (5) Insert a new sub-section (3) into section 137:
A person who has, or is entitled to, institute proceedings in the Family Court of Western Australia claiming relief:
 (a) *under the Relevant Family Law Legislation; and*
 (b) *which includes the adjustment of property interests in land under the operation of this Act,*
may lodge a caveat under subsection (1) as if the person were claiming an interest in land.
- (6) Insert a new sub-section (4) into section 137:
*In this section, **Relevant Family Law Legislation** means each of the following:*
- (a) *Part VIII and Part VIII A of the Family Law Act 1975 (Commonwealth); and*
- (b) *Part 5A of the Family Court Act 1997 (including but not limited to Divisions 2 and 2A thereof).*
- (7) Amend the start of sub-section (2) to read:
Subject to subsection (5), any such applicant, proprietor or judgment creditor, or...
- (8) Amend the start of sub-section (4) to read:
Subject to subsection (5), a caveat shall not be renewed...
- (9) Insert a new sub-section (5) into section 138:
Subsections (2) and (4) only apply to caveats other than a caveat lodged under section 137(3).
- (10) Insert a new sub-section (6) into section 138:
In respect of a caveat lodged under section 137(3), any applicant, proprietor or judgment creditor referred to in subsection (1), or any person claiming under any transfer or other instrument signed by the proprietor may make an application to the Family Court of Western Australia requiring the caveator to show cause why such caveat should not be removed; and the Family Court of Western Australia may upon proof that such caveator has been summoned make such order in the premises either ex parte or otherwise as to the Family Court of Western Australia may seem fit.

(11) Insert a new sub-section (7) into section 138:

A caveat lodged under section 137(3) shall not be renewed by or on behalf of the same person in respect of the same estate or interest except subject to the state of the Register at the time of the renewal of such caveat; but if before the expiration of the said period of 14 days or such further period as shall be specified in any order made under this section the caveator or his agent appears before the Family Court of Western Australia and gives such undertaking or security or lodges such sum in court as the Family Court of Western Australia may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed then and in such case the Family Court of Western Australia may direct the Registrar to delay registering any dealing with the land lease mortgage or charge for a further period to be specified in such order or may make such other order as may be just.

(12) Amend the heading to read:

Supreme Court's and Family Court's powers on application by caveator

(13) Amend the start of sub-section (1) to read:

Subject to subsections (5) and (6), a caveator...

(14) Amend sub-section (1) to insert "Family Court of Western Australia" after "Supreme Court".

(15) Amend sub-section (2) to insert "Family Court of Western Australia" after "Supreme Court".

(16) Insert a new sub-section (5) into section 18C:

Notwithstanding subsection (1), any application for an order extending the operation of a caveat under section 137(3):

- (a) shall only be made to the Family Court of Western Australia; and*
- (b) must not be made to the Supreme Court.*

(17) Insert a new sub-section (6) into section 138C:

Notwithstanding subsection (1), any application for an order extending the operation of a caveat other than a caveat lodged under section 137(3):

- (a) shall only be made to the Supreme Court; and*
- (b) must not be made to the Family Court of Western Australia.*

(18) Amend the start of sub-section (1) to read:

Subject to subsections (3) and (4), if a section 138A caveat -

(19) Amend sub-section (2)(c) to insert "Family Court of Western Australia" after "Supreme Court".

(20) Amend sub-section (2)(e) to insert "Family Court of Western Australia" after "Supreme Court".

(21) Insert a new sub-section (3) into section 138D:

Notwithstanding subsection (1)(e), any application for an order giving leave to lodge a further caveat under section 137(3):

- (a) shall only be made to the Family Court of Western Australia; and*
- (b) must not be made to the Supreme Court.*

(22) Insert a new sub-section (4) into section 138D:

Notwithstanding subsection (1)(e), any application for an order giving leave to lodge a further caveat other than a caveat under section 137(3):

(a) shall only be made to the Supreme Court; and

(b) must not be made to the Family Court of Western Australia.

(23) Insert a new section 138E after the existing section 138D:

(1) Subject to subsection (2), the costs of an incidental to all proceedings in the Family Court of Western Australia under sections 138, 138C and 138D shall be in the discretion of the Family Court of Western Australia.

(2) The Family Court of Western Australia shall exercise the discretion as to costs referred to in subsection (1) in accordance with sections 237 and 242 of the Family Court Act 1997.

(24) Amend section 140 to read:

(1) Subject to subsection (2), any person lodging any caveat with the Registrar either against bringing land under this Act or otherwise without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as a judge on a summons in chambers shall deem just and order.

(2) Any person who claims compensation under this section in respect of a caveat lodged under section 137(3):

(a) shall make such claim in the Family Court of Western Australia in accordance with the rules of that court; and

(b) must not claim such compensation in proceedings in the Supreme Court.

(25) Amend section 141(1)(b) to insert “Family Court of Western Australia” after “Supreme Court”.

(26) Amend the heading to section 212 to read:

Rules of Court and rights of appeal

(27) Amend the start of section 212(1) to read:

Subject to subsections (2), (3) and (4), in the conduct of actions under this Act...

(28) Insert a sub-section (3) into section 212:

Despite subsection (1), rules and orders under the Family Court Act 1997 may from time to time be made and amended for regulating proceedings in the Family Court of Western Australia under this Act.

(29) Insert a sub-section (4) into section 212:

Any appeal or application for leave to appeal in respect of an order made by the Family Court of Western Australia on an application under sections 138, 138C or 138D or a judgment or order on a proceeding under section 140 shall be governed by and made in accordance with Part 7, other than section 210, of the Family Court Act 1997.

“C”: Proposed Amendments to Family Court Act 1997 (WA)

1. In this schedule, references to sections and sub-sections are to the *Family Court Act 1997 (WA)* unless otherwise indicated.
2. Insert a sub-section (9) into section 36:
This section has effect subject to sections 137, 138, 138C, 138D, 140 and 212 of the Transfer of Land Act 1893.
3. Amend section 39 to insert “Transfer of Land Act 1893” after “Surrogacy Act 2008”.
4. Insert a sub-section (3) into section 44:
Notwithstanding subsection (1), proceedings in the Court under the Transfer of Land Act 1893 must remain in the Court and not be transferred to the Magistrates Court.
5. Insert a sub-section (3)(eb) into section 244:
proceedings under the Transfer of Land Act 1893;



LAW REFORM COMMISSION
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WESTERN AUSTRALIA