

# MARKS & SANDS

*L a w y e r s*

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## Urgent and Important Legal Alert for Financial Institution, Financial Advisory and Accounting Clients

As and from this Saturday 18 December 2004, amendments to the Family Law Act, which were enacted in December 2003 will come into force.

In broad terms, the Family Court will now have extensive **primary** powers to allow the Court in relation to property of a party to a marriage to make orders and grant injunctions that **is directed to or alters the rights, liabilities and/or property interests of third parties.**

Section 90AC of the Act specifically provides that these new amendments will override any other law of the Commonwealth, a State or Territory and anything in any deed or other instrument.

Prior to the enactment of this legislation, the Family Court had very limited power to deal with the underlying substantive rights of third parties and this has been the position since the High Court decision of **Ascot Investments v Harper** in 1981.

The amendments redefine the term "debt" on the basis that the property of the parties to a marriage now includes a debt owed by a party to a marriage.

**The Family Court now has the power to make binding orders on third parties that:**

1. Direct a creditor of the parties to a marriage (eg a financial institution) to substitute one party for both parties in relation to a debt owed to the creditor;
2. Direct a creditor of **one party** of the marriage to substitute the other party or both parties to the marriage for that party in relation to a debt owed to the creditor;
3. Direct a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor that the proportion that the parties are liable to before the order is made;
4. Direct a director of a company or a company to register a transfer of shares from one party of the marriage to the other party.

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**The legislation then goes further to confirm that the Family Court is now vested with primary power to :**

1. Direct a third party to do a thing in relation to the property of a party to a marriage; or
2. Alter the rights, liabilities or property interests of a third party in relation to the marriage.

The legislation goes on to apply a number of limitations that it must consider before making orders of this nature against third parties, but it is fair to say that these will involve their own difficulties of interpretation and application.

This represents groundbreaking legislation with far-reaching legal, social and economic consequences that must be taken into account by all advisers and institutions that are placing themselves into the situation of having a significant fiscal interest in parties to a marriage.

For further information, advice and our views on the success of a likely constitutional challenge please contact

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