



LAW REFORM COMMISSION  
*of*  
WESTERN AUSTRALIA

**PROJECT 107**

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

**FINAL REPORT**

## THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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## Abbreviations used

**CVC:**

Commissioner for Victims of Crime;

**FCA**

*Family Court Act 1997 (WA)*;

**FCWA**

Family Court of Western Australia;

**FLA**

*Family Law Act 1975 (WA)*;

**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";

**Supreme Court:**

Supreme Court of Western Australia;

**TLA:**

*Transfer of Land Act 1893 (WA)*.

## Acknowledgements

Dane Chandler, Barrister at Francis Burt Chambers, undertook the research and wrote the Final Report.

Dominic Fernandes and Dave Major edited and prepared the Final Report 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.

## Foreword

On 8 October 2015, the FLPAWA presented to the previous Attorney General a detailed 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 FCWA jurisdiction to extend the operation of caveats.

The FLPAWA propose these legislative 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 FCWA being determined; and
- b) to avoid the need for a spouse who has lodged a caveat to commence proceedings in the Supreme Court to apply to extend that caveat, whilst also needing to commence proceedings in the FCWA for a property alteration order.

On 2 August 2016, the Attorney General responded to the Submission by referring the matter to the Commission under section 11(2) of the *Law Reform Commission Act 1972* (WA). The terms of reference have been set out in full above.

The Commission published the Discussion Paper on 12 May 2017 inviting submissions and requesting comments in relation to seven questions which were aimed to direct discussion. The Commission received six submissions, four of which were substantial. The Commission consulted with the FCWA, FLPAWA and Landgate and these consultations and the submissions proved invaluable in shaping and informing the Final Report.

It is apparent from the submissions received and the matters raised in consultations, that the inability for people contemplating the termination of their relationships to simply, efficiently and cost-effectively protect property interests arising out of those relationships is a material issue for those practising and affected by Family Law in Western Australia.

The Commission recommends the creation of the new “spousal caveat” and there was unanimous support of this proposal from stakeholders. While there may be some who would lodge this new caveat for frivolous or vexatious purposes and while there may be an increase in the number of lodgements at Landgate, this new category of caveat will assist in protecting vulnerable partners in de facto and marital breakdowns, including those who hold no legal interest in the relevant property or who has not managed and is not familiar with the assets of the relationship.

The Commission also recommends granting the FCWA jurisdiction to deal with this new type of “spousal caveat”. Applications to extend the operation of a “spousal caveat” will need to be complemented with an application to FCWA to alter interests in the property of the relationship. The Commission considers that the FCWA is the most appropriate jurisdiction to hear such applications due to its expertise in applying the Family Law principles of what is “just and equitable” when determining final orders. Further, the FCWA has access to counselling and alternative dispute resolution support services.

Discussions with FLPAWA and Landgate highlighted the need to address some practical considerations which were not addressed in the Discussion Paper to facilitate the introduction of this new caveat; these matters have been included in this Final Report which include for example the way in which this new caveat could be removed from Landgate’s system if not proceeded with.

I thank all stakeholders who made submissions and who consulted with the Commission on this reference. The input you provided was invaluable to the Commission.

The Commission is grateful to its project writer, Mr Dane Chandler, Barrister at Francis Burt Chambers, for his diligence in researching and writing the Discussion Paper and this Final Report.

I wish to thank other Commission Members, Dr Augusto Zimmerman and Ms Fiona Seaward for their input and work on this reference. Over the course of the reference the project management and executive support to the Commission was provided by Dominic Fernandes and Dave Major. To each of Dominic and Dave, the Commission recognises your efforts and is truly grateful for them. The Commission also thanks the Acting Director General of the Department of Justice, Dr Adam Tomison, for his continuing support of the Commission.

Finally, the Commission thanks the previous Attorney General, Hon Michael Mischin for providing this reference and the current Attorney General, Hon John Quigley for his continued support of the Commission's work.

Dr David Cox

## Recommendations

Following an analysis of the submissions received, consultations conducted, and its own research, the Commission recommends that:

1. A new category of “spousal caveat” be created under the TLA which may be lodged in circumstances where the caveator is the husband, wife or de facto partner of the registered proprietor of land and where the caveator is intending to, or has commenced proceedings in the FCWA to alter the interests in the property of the relationship, including the subject land.
2. The FCWA has exclusive original jurisdiction to make orders with respect to the “spousal caveat”.
3. The existing legislative power of the Supreme Court regarding other categories of caveats be retained.
4. The effective duration of the “spousal caveat” be limited by reference to the current limitation periods that apply for an order altering interests in the property of a relationship; two years from the end of a relationship for a de facto spouse and 12 months from any divorce order.
5. In circumstances where a couple has separated and a “spousal caveat” has been lodged to protect the interests of a spouse but the “spousal caveat” has since expired or been withdrawn, there should be no prohibition on subsequent “spousal caveats” being lodged should the couple reconcile and subsequently separate again. In this circumstance, the spouse who lodged the subsequent “spousal caveat” should be required to bring substantive proceedings in the FCWA for a property alteration order within 21 days of filing the further “spousal caveat” and should they fail to do this, the further “spousal caveat” will expire.
6. Where the caveator fails to agree to withdraw a caveat after the expiration of the relevant period, the registered proprietor can use the existing show cause notice procedure to remove the caveat. The Commission does not propose that Landgate be responsible for enforcing such a provision.
7. Legislative amendments to implement these recommendations should take into account appeal jurisdiction in relation to “spousal caveat” matters; in the exercise of non-federal jurisdiction an appeal is to the Western Australian Court of Appeal, and in respect of the exercise of federal jurisdiction, to the Commonwealth Family Court.
8. The operation and effectiveness of the implementation of these recommendations be reviewed after a certain period of time, including the assessment of the impact (if any) on victims of family violence.
9. A new standard form for a “spousal caveat” be made available. The standard form should contain, in the equivalent “interest in land” section, 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 FCWA within a specified period of time to alter the interests in the property of the relationship, including the subject land. The form necessitates putting the parties on notice of the consequences of lodging and challenging a caveat.

## Scope

The scope of this reference is narrow in that it is focused 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.

## Methodology

The Commission met with key representatives of the FCWA in March 2017 to obtain their views prior to the preparation of the Discussion Paper. The Commission published a Discussion Paper on 12 May 2017 inviting submissions by 12 June 2017 and setting out a number of questions for consideration in relation to the Terms of Reference. It was not surprising that, due to the narrow scope and legally technical nature of this reference, there were not many submissions. Notwithstanding, four of the six submissions that were received were comprehensive and of great assistance in completing the Final Report.

The Commission met with the FLPAWA in June 2017, and with officers from Landgate in July 2017 to discuss matters raised in the Discussion Paper. Direct consultations with the FCWA, FLPAWA and Landgate were very informative and assisted the Commission in formulating its recommendations.

## Overview

1. Caveats operate as a form of statutory injunction to maintain the status quo of registered interests in land.
2. 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 FCWA making orders for the division of assets.
3. 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.
4. It is well established that the mere application for a property alteration order by the FCWA is not enough to support a caveat.
5. 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.
6. 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 statement<sup>1</sup>:
 

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.

<sup>1</sup> Allen v Snyder [1977] 2 NSWLR 685 at 688, 689.

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. [...]

7. Similarly, 25 years ago, Kirby P then of the New South Wales Court of Appeal said the following<sup>2</sup>:

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.

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. [...]

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

8. Generally, the Commission’s view is that there are several reasons supporting the creation of a new form of “spousal caveat” and giving the FCWA exclusive power to extend this new type of caveat at first instance. Further, these reasons outweigh any material risks arising out of the same.
9. In this Final Report, 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 FLPAWA, the submissions received in response to the Discussion Paper and the Commission’s views follow.

## Caveat System - Supreme Court of Western Australia

10. The caveat system in Western Australia is set out in Part V of the TLA, relevant excerpts of which are provided in Schedule 1 of the Discussion Paper.
11. 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).<sup>3</sup>
12. 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 FCWA 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.<sup>4</sup>
13. The role of the Registrar is merely to ensure a caveat is in the proper form; it is an administrative function only.<sup>5</sup>
14. 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.<sup>6</sup>
15. The caveatable interest must exist at the time the caveat is lodged; it cannot protect a potential, future interest.<sup>7</sup>
16. 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.<sup>8</sup>
17. After a caveat has been lodged and accepted, the Registrar will give notice of this to (relevantly) the registered proprietor of the land.<sup>9</sup>
18. There are then several ways in which the validity of the caveat may fall to be considered by the Supreme Court.<sup>10</sup> 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.<sup>11</sup>

<sup>3</sup> TLA, ss 137(1), 139(1); Form C1

<sup>4</sup> 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].

<sup>5</sup> Jandric v Jandric [1999] WASC 22 at [39].

<sup>6</sup> 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].

<sup>7</sup> Gangemi v Gangemi at [40].

<sup>8</sup> 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]

<sup>9</sup> TLA, ss 138(1), 141(2).

<sup>10</sup> 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).

<sup>11</sup> TLA, ss 138(2), (3), 138B(1), (2), 141(2).

19. An application for extension of a caveat is made by originating summons and ordinarily requires an undertaking as to damages.<sup>12</sup>
20. 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.<sup>13</sup>
21. There is a twofold test to be applied when determining whether to order the extension of a caveat.
22. 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?<sup>14</sup>
23. 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.<sup>15</sup>
24. 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.
25. 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.<sup>16</sup>
26. Parties may also apply to the Supreme Court for injunctive relief in caveat-based disputes.
27. 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.<sup>17</sup>
28. In circumstances requiring urgent action, a registered proprietor of land may apply for injunctive relief to order the removal of the caveat, or restrain the lodgement of any future caveat.<sup>18</sup>

<sup>12</sup> 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.

<sup>13</sup> 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].

<sup>14</sup> 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].

<sup>15</sup> 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].

<sup>16</sup> 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].

<sup>17</sup> Myra Pty Ltd v Thompson [2011] WASC 230.

<sup>18</sup> Bacardi Holdings Pty Ltd v Greenteak Pty Ltd & Ors [2005] WASC 222; Walthamstow Pty Ltd v Saliba [No 2] [2010] WASC 140.

## Family Law System - FCWA

29. The FCWA is established under the FCA, relevant excerpts of which are in Schedule 3 of the Discussion Paper.
30. The FCWA has been vested with federal jurisdiction through proclamations made under the FLA. Relevant excerpts of the FLA and proclamations are in Schedules 4 and 5 of the Discussion Paper.<sup>19</sup>
31. The FCWA has express statutory power to make orders it considers appropriate to alter interests in the property of married and de facto couples. The FCWA may only make orders if satisfied that in all of the circumstances it is just and equitable to do so. The FCWA 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.<sup>20</sup>
32. Any application to alter spousal property interests requires the FCWA 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 FCWA has power to make only one order for property settlement.<sup>21</sup>
33. The High Court has described the test for altering property rights in the following way<sup>22</sup>:

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. [...]

<sup>19</sup> FCA, ss 35, 36, 205ZG; FLA, ss 31, 33, 39, 41, 78, 79; Proclamations made 04/11/1991.

<sup>20</sup> FCA, s 205ZG; FLA, s 79.

<sup>21</sup> In the Marriage of Hickey (2003) 30 Fam LR 355; [2003] FamCA 395 at [40], [47], [48].

<sup>22</sup> 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).

34. 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.<sup>23</sup>
35. 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.<sup>24</sup>

<sup>23</sup> Bilous v Mudaliar (2006) 65 NSWLR 615; [2006] NSWCA 38 at [167].

<sup>24</sup> Bilous v Mudaliar at [22].

36. 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 FCWA from disposing of relevant property; that is, the FCWA 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.<sup>25</sup>
37. 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.<sup>26</sup>
38. 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.
39. Separate to the specific statutory power to make “just and equitable” property adjustment orders, the FCWA has a general power to make declarations as to the interests of spouses in property; that is, the FCWA may determine and declare that interests in property are held on trust by one spouse for the other.<sup>27</sup>
40. 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.<sup>28</sup>
41. 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.<sup>29</sup>
42. 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.<sup>30</sup>
43. 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.<sup>31</sup>
44. 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.<sup>32</sup>

25 *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].

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

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

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

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

30 *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].

31 *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.

32 *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.

45. 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.<sup>33</sup>
46. 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.<sup>34</sup>
47. 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.<sup>35</sup>
48. 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.<sup>36</sup>
49. For example, a constructive trust may arise where the conduct and words of one spouse has led the other spouse to believe that with the continuation of the relationship they would obtain an interest in the property and thereafter they acted on this expectation in continuing the relationship by contributing to joint living expenses and bearing children.<sup>37</sup>
50. 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.<sup>38</sup>
51. 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.<sup>39</sup>
52. 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.<sup>40</sup>
53. Third parties affected by any property alteration order or declaration may apply to be a party to the proceedings.<sup>41</sup>

33 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].

34 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].

35 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].

36 Tracey v Bifield at 263.

37 Bennett v Tairua at 322, 323.

38 Baumgartner v Baumgartner at 149, 150, 156.

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

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

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

54. Ordinarily, where there are simultaneous property alteration proceedings in the FCWA and trust proceedings in the Supreme Court, it will be appropriate for the Supreme Court matter to be transferred to the FCWA under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA), even where the interests of third parties in the subject property are involved; relevant excerpts of the cross-vesting legislation are in Schedule 6 of the Discussion Paper.<sup>42</sup>
55. There is authority for the FCWA 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.<sup>43</sup>

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<sup>42</sup> *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.

<sup>43</sup> *In Marriage of Finlayson* (2002) 174 FLR 165; [2002] FamCA 898 at [84], [119], [120], [122]-[124].

## Consideration of FLPAWA Submission

56. 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 FCWA power to make orders with respect to such caveats.
57. The amendments proposed by the FLPAWA 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 FCWA.
58. As a practical matter, the amendments appear to benefit only a discrete class of people, in limited circumstances.
59. That is, the amendments are not for the benefit of a spouse who holds a legal interest in land.
60. The amendments are also not necessary to permit a spouse who 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.<sup>44</sup>
61. The FLPAWA amendments appear to be directed to protect a spouse who 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 statistics as to the size or numbers of persons falling within this class due to the difficult nature of recording the interpretation of complex Court Orders.
62. The anecdotal evidence from the Commission’s consultation with the FCWA is that the Court hears approximately one to two applications a week by a spouse for an injunction seeking to restrain the other spouse from dealing with “property of the relationship”. In response to the Discussion Paper, the FLPAWA estimate that 10 to 20 percent of couples are adversely affected by an inability to lodge a caveat.
63. 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.
64. The FCWA 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 FCWA 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 FCWA would apply the existing law relating to caveats, and spouses in dispute need not commence additional proceedings in the Supreme Court.

<sup>44</sup> *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].

65. Whilst this option addresses the FLPAWA's concerns regarding the need to commence proceedings in both the FCWA and the Supreme Court, it does not address the lawful ability of a spouse to lodge (or extend) a caveat.
66. Further, the Commission understands from its consultation with the FCWA, 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 FCWA representatives made the compelling point that if the FCWA 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 FCWA ought to develop its own jurisprudence and rules.
67. 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 is issued and an application for orders extending the caveat has been made, the FCWA 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.
68. The balance of convenience test at this interlocutory stage would remain to protect the interests of the registered proprietor and third parties.
69. The Commission holds various concerns about the consequences that could flow from the creation of a “spousal caveat”.
70. 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.
71. 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.
72. Obviously, an increase in the lodgement and challenge of caveats would mean an increased demand on the limited resources of parties and the FCWA.
73. The Commission is also cognisant of the difficult position the FCWA 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.
74. 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.
75. However, there are counterpoints to these concerns and the Commission was comforted by its consultation with the FCWA and FLPAWA representatives.

76. 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.
77. Third parties affected by caveats may intervene in proceedings in the FCWA.<sup>45</sup> The Commission understands from its consultation with representatives from the FCWA that banks regularly intervene in disputes concerning land in which they hold a security interest.
78. 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.
79. The Commission considers that the FCWA 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 FCWA 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 FCWA to direct the spouses towards its counselling and alternative dispute resolution support services.
80. Similarly, it makes good policy sense for judicial officers of the FCWA 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 FCWA 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 FCWA deals every day.

<sup>45</sup> FCA, s 208; FLA, s 92.

## Submissions Received in Response to the Discussion Paper

81. The Commission received six submissions in response to its Discussion Paper of 12 May 2017.
82. Two of these submissions were merely to give notice that the relevant parties did not wish to make submissions on any aspect of the Paper.<sup>46</sup>
83. The Commission received substantive submissions from the FLPWA<sup>47</sup>, FCWA<sup>48</sup>, Landgate<sup>49</sup> and the CVC.<sup>50</sup>
84. The Commission met with the FLPWA in June 2017, and in July 2017 the Commission met with Landgate to discuss matters raised in the Discussion Paper. All stakeholders who interacted with the Commission supported the creation of a “spousal caveat” and the giving of jurisdiction to the FCWA to determine associated matters.
85. While Landgate supported the introduction of a “spousal caveat” category it identified a number of practical considerations which were discussed with the Commission and taken into account in finalising the Commission’s recommendations.
86. The following substantive issues were identified in the FLPWA, FCWA, CVC and Landgate submissions and consultations.
87. The CVC suggests that a spousal caveat may have the capacity to benefit victims of family violence by being a measure toward family related disputes being integrated into one court jurisdiction, and that a spousal caveat will most likely be of benefit to vulnerable people in relationship breakdowns.
88. The FCWA identified in its submission the potential practical benefits a spousal caveat, and the FCWA being given exclusive jurisdiction over such caveats, may offer vulnerable claimants. The FCWA notes that the present inability of a spouse to properly secure any interest they may have in property of the relationship unless they can establish a traditional equitable interest, produces the potential undesirable outcomes of:
  - a) that spouse not having his or her interests protected;
  - b) a need or perceived need to commence litigation to protect interests where it might not otherwise be required; and
  - c) the knowing lodgement of an unsustainable caveat.
89. The FLPWA suggest that 10 to 20 percent of separated couples are at present adversely affected by not being able to protect any interest they may have in property of the relationship. However, it is acknowledged by the FLPWA and Landgate that it is likely that a material number of caveats, in the nature of the proposed “spousal caveat”, have already been inappropriately lodged against properties in Western Australia. Given the time and place for testing caveatable interests is on application of the caveator to extend the operation of a caveat in the Supreme Court, not at the time of lodgement at Landgate, many are never tested.
90. Landgate identifies in its submission the potential for a spousal caveat to encourage the immediate lodgement of caveats upon the breakdown of a relationship, including for vexatious or frivolous purposes.

46 Letter from the Hon Wayne Martin AC, Chief Justice of Western Australia dated 7 June 2017; Letter from the Hon Justice Jeremy Curthoys, President of State Administrative Tribunal dated 24 May 2017.

47 Letter from Linda Richardson, Vice President FLPWA dated 12 June 2017.

48 Letter from Rick O’Brien, Judge Family Court of Western Australia dated 12 June 2017.

49 Letter from Jodi Cant, Chief Executive dated 12 June 2017.

50 Letter from Jennifer Hoffman, Commissioner for Victims of Crime dated 9 June 2017. The views in this submission are stated to be supported by the Women’s Council for Family and Domestic Violence Services WA, and the Family and Domestic Violence Policy Unit, Department for Child Protection and Family Support.

91. Landgate also makes the point that the FCWA can presently provide injunctive relief sufficient to prevent an interest in real property from being subject to improper dealings or fraud. FLPAWA suggests that the creation of a spousal caveat would reduce the frequency of applications by spouses for urgent injunctive relief over property of the relationship. The FLPAWA, in its discussion with the Commission, noted that the process of seeking injunctive relief is more involved from both a time and cost perspective as it involves the demonstration of the strength of the applicant's ultimate claim for a property order. The FLPAWA submitted that this process was a far greater escalation of matters between separating / divorcing couples than the simpler process of lodging a caveat. The Commission sees merit in this submission, and is comforted in relation to its concerns that a spousal caveat may elicit an escalation in disputes. The FLPAWA confirmed in its submission in response to the Discussion Paper that its original proposal of a spousal caveat was intended as an alternative to a spouse seeking injunctive relief.
92. The Commission does not comment on the accuracy or significance of the size of the estimate by the FLPAWA, or the likelihood of spousal caveats being lodged for vexatious or frivolous purposes. No reliable statistics are available. The creation of a new spousal caveat may result in an increased number of caveats lodged with Landgate and applications to the FCWA to extend the operation of such caveats, but these are matters on which the Commission can only speculate.
93. It is apparent from the events leading up to the reference being given to the Commission, and the matters raised by interested parties in consultation and submissions, that the inability of recently separated spouses to simply, efficiently and cost-effectively protect their interests in property of the relationship is a material issue for those practising and affected by Family Law in Western Australia. In response to the risks identified by Landgate, these matters have been considered by the Commission in this Final Report and the Commission concludes that, on balance, there are more potential benefits than risks in the creation of a spousal caveat.
94. The FCWA supports the view of the Commission that it be given exclusive jurisdiction over matters arising from lodgement of spousal caveats, and suggests that power be given to both judges and Family Law magistrates.
95. The Commission does not express a view on whether power should be given to a FCWA judge or magistrate in any particular instance, but agrees with the suggestion that both be given power to deal with spousal caveats. The Commission is comfortable with an outcome where both judges and magistrates have power and whether a particular matter be heard by a judge or magistrate be determined in the ordinary course of the administration of the FCWA court lists.
96. Landgate suggests that the Supreme Court also be given jurisdiction over "spousal caveats", particularly for the purpose of protecting the interests of third parties potentially affected by the lodgement of spousal caveats such as mortgagees.

97. The granting of jurisdiction to the Supreme Court over “spousal caveats” may be a matter relevant to any appeals from decisions affecting “spousal caveats”, but the Commission is of the view that there is no sound policy reason to support the Supreme Court also having first instance jurisdiction over “spousal caveats”. It is apparent from consultation with the FCWA that interested third parties already regularly appear in matters affecting the interests of spouses in property of their relationship. Appeals from decisions of the FCWA in respect of the exercise of non-federal jurisdiction are to the Western Australian Court of Appeal, and in respect of the exercise of federal jurisdiction to the Commonwealth Family Court.<sup>51</sup> The Commission considers it appropriate that appeals be contemplated in any legislative amendments made to the TLA and jurisdiction be given to these appeal courts.
98. The FCWA does not support a proposal that the mere lodgement of a spousal caveat would trigger an obligation to commence substantive proceedings for the alteration of property interests between spouses. As observed elsewhere in this Final Report, the commencement of substantive proceedings is a necessary condition of any application for injunctive relief.
99. The FLPWA raised the matter of limiting the effective duration of a “spousal caveat”. A de facto spouse has two years from the end of a relationship to apply for an order altering interests in the property of a relationship, and a formerly married spouse has 12 months from any divorce order to make application.<sup>52</sup>
100. The Commission agrees it is appropriate that the effective operation of a spousal caveat be limited by reference to these limitation periods. The Commission does not propose that Landgate be responsible for enforcing such a provision. Instead, the Commission suggests an amendment to the TLA to the effect that in the event of the caveator not agreeing to withdraw a caveat after the expiration of the relevant period, the registered proprietor can use the existing show cause notice procedure.

51 FCA, Part 7; FLA, Part X.

52 FCA, s 205ZB; FLA, s 44.

101. Landgate questioned whether the prohibition on lodging further caveats over the same land, in the absence of consent from the registered holder or leave from the Supreme Court, would apply to circumstances in which a couple separates, a spouse lodges a caveat against property, the couple reconcile, the caveat is removed and then the couple separate again.<sup>53</sup> This prohibition is aimed at preventing vexatious and otherwise improper caveating practices and the serious impact that such practices can have on the registered land owner. Landgate expressed the view that absent a mechanism such as the prohibition, spousal caveats are likely to be abused. The Commission agrees. While there is a clear need to avoid vexatious and otherwise improper caveating practices, it is also important to ensure protection of the interests of vulnerable spouses in circumstances of reconciliation and subsequent re-separation. The Commission's view is that the protection of the vulnerable must be given primacy and thus the blanket prohibition on further caveats over the same land should not apply in the case of spousal caveats. While the protection of the vulnerable spouse is of critical importance, the rights of the land-owning spouse should not be ignored. In order to achieve the required balance to protect the interests of both parties, the Commission's preferred view is that in circumstances where the vulnerable spouse has previously sought to protect their interests by lodging an expired or withdrawn spousal caveat, there be an additional requirement on a vulnerable spouse to bring substantive proceedings in the FCWA for a property alteration order within 21 days of filing the further spousal caveat and should they fail to do this, the further spousal caveat will expire.
102. The CVC suggests that two years from any legislative change taking effect there be a review to determine whether the changes are having any adverse impact on victims of family violence. The Commission agrees that a review of the effect of any legislative changes of this nature is to generally be recommended. The Commission does not express a view on whether, say, two or five years is a better period for the review to take place.

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53 TLA, s 138D.

## Conclusion

103. The Commission is grateful to have had the benefit of the comprehensive and considered Submission made by the FLPAWA to the previous Attorney General that prompted this reference, the submissions received in response to the Discussion Paper, and the opportunity to consult with representatives of the FCWA, FLPAWA, and Landgate.
104. The Commission recommends that a new category of “spousal caveat” be created and the FCWA be given express power to extend the operation of spousal caveats.
105. The proposal to give the FCWA 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 jurisdictionally-based Family Court.<sup>54</sup>
106. The case of *Jandric v Jandric* offers a good example of how giving the FCWA power to extend this type of “spousal 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 FCWA, it was not appropriate that he order an injunction made conditional on substantive proceedings being commenced in that (other) court.<sup>55</sup>
107. There can be little doubt that the underlying claims of the caveator in *Jandric v Jandric* fall within the existing jurisdiction of the FCWA and that the most efficient way for the dispute between the parties to be resolved would be in a single court and, perhaps more relevantly, a court specialising in family and property disputes. Instead, the caveator in *Jandric v Jandric* had no option other than to seek orders extending his caveat in the Supreme Court, and commencing an action in the FCWA for a property alteration order.

<sup>54</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 at [108]-[111], [113], [119]-[122], [126], [127].

<sup>55</sup> [1999] WASC 22.

108. Also, the caveator had to claim an interest in land based on equitable principles of trusts to seek to support his caveat. The Commission has been informed that in the FCWA, 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.
109. The Commission supports the creation of a new type of “spousal caveat” and vesting the FCWA with the exclusive original jurisdiction to make orders with respect to this new form of caveat only, subject to the appeal provisions already in the FCA. Amendments to the TLA and the FCA will be needed to accommodate such a change.
110. The Commission’s 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 FCWA the jurisdiction to make orders with respect to any other caveats. Rather, the Commission considers that jurisdiction for caveats other than the new “spousal caveat” more properly align with the jurisdiction and expertise of the Supreme Court.
111. Finally, it is the Commission’s 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 FCWA 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.



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