



New South Wales

# Succession Amendment (Intestacy) Bill 2009

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The New South Wales Law Reform Commission Report 116 *Uniform succession laws: intestacy* was endorsed by the National Committee for Uniform Succession Laws (*the National Committee*) and submitted to the Standing Committee of Attorneys-General in April 2007. The report sets out draft model laws to implement the recommendations of the National Committee. The model laws provide for the distribution of the property of deceased persons who have not executed a will or who have failed to execute a will that disposes of some or all of their property effectively. The objects of this Bill are:

- (a) to amend the *Succession Act 2006* (*the 2006 Act*) to enact, with some modifications, the model provisions as a new Chapter 4 of that Act, and
- (b) to repeal those provisions of the *Probate and Administration Act 1898* which currently provide for intestate succession (*the 1898 Act intestacy provisions*), and
- (c) to make various provisions of a savings, transitional or consequential nature.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** repeals the *Inheritance Act of 1901*. The provisions of that Act identify the heir at common law for the purposes of succession to land and are unnecessary (see section 33 of the *Conveyancing Act 1919*).

## **Schedule 1      Amendment of Succession Act 2006 No 80**

**Schedule 1 [4]** inserts a new Chapter 4 into the 2006 Act and makes a consequential amendment to existing Chapter 4 to renumber it (and the sections it contains) as Chapter 5 and sections 141–145, respectively. **Schedule 1 [2]** inserts an interpretation provision into section 3 of the 2006 Act for the purposes of the new Chapter 4.

Proposed new Chapter 4 contains the following provisions:

### **Part 4.1 Preliminary**

**New section 101** inserts definitions for the purposes of the new Chapter 4. Definitions inserted include a definition of *personal effects*. The surviving spouse of an intestate is entitled to these items. Section 61A (2) of the 1898 Act intestacy provisions currently define these as *household chattels*. They are essentially articles of household or personal use.

**New section 102** defines *intestate* as a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property. The 1898 Act intestacy provisions do not define intestate.

**New section 103** makes it clear that references in the new Chapter 4 to an entitlement to the whole of an intestate's estate are references to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate. The provision is based on section 61B of the 1898 Act intestacy provisions.

**New sections 104 and 105** define the meaning of *spouse* and *domestic partnership*, respectively, in the new Chapter 4. A spouse is a person who was married to the intestate, or was a party to a domestic relationship with the intestate, immediately before the intestate's death. A domestic relationship is a de facto relationship that has been in existence for a continuous period of at least 2 years or has resulted in the birth of a child. Unlike section 61B (9) of the 1898 Act intestacy provisions, the new Chapter does not state that spouses should be treated as separate persons. The National Committee recommended that there is no need to make such a statement.

**New section 106** sets out the method for determining and adjusting the spouse's statutory legacy. This is the amount that a spouse (as defined) is entitled to in addition to the household or personal effects.

**New sections 107 and 108** set out the rules relating to survivorship for intestate succession. A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.

**New section 109** describes the effect of adoption for the purposes of distribution on intestacy.

## **Part 4.2 Spouse's entitlements**

Part 4.2 sets out the entitlements of the intestate's surviving spouse (as defined).

### **Division 1 Entitlement of surviving spouse**

**New section 110** states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

**New section 111** provides that a surviving spouse should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

**New sections 112 and 113** provide that where the intestate is survived by a spouse and issue, the spouse is entitled to the whole intestate estate except in cases where some of the issue are issue of the intestate from another relationship. In the latter case the intestate estate is to be shared between the surviving spouse and the issue (see also new section 127 (2)).

### **Division 2 Spouse's preferential right to acquire property from the estate**

**New section 114** states that the Division applies where the intestate leaves a spouse (but not more than one spouse).

**New section 115** gives the spouse (as defined) an entitlement to elect to obtain any property (subject to some restrictions) in the intestate's estate. The election will require Supreme Court authorisation if the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult. This replaces sections 61A (2), 61B (13), 61D and 61E of, and the Fourth Schedule to, the 1898 Act intestacy provisions. Under these provisions surviving spouses are currently given a conditional right to obtain the intestate's interest in the home they shared with the intestate before the intestate's death.

**New section 116** requires the intestate's personal representative to give a spouse of the intestate notice of the right of election conferred by new section 115 and how it may be exercised.

**New section 117** specifies the time in which a spouse of the intestate must exercise the right of election and enables the Supreme Court to extend it.

**New section 118** sets out the procedural requirements for making an election, including requiring notice of the election to be given to other persons entitled to a share in the intestate estate.

**New section 119** sets the price for which a spouse may elect to acquire property as the market value of the property as at the date of the intestate's death (reduced by any liability secured by a mortgage, charge or encumbrance on the property assumed by the spouse) (the *exercise price*). It also requires the personal representative to obtain a valuation of the property from a registered valuer unless all the beneficiaries entitled to a share in the intestate estate waive this requirement.

**New section 120** sets out the way in which a spouse who elects to acquire property can satisfy the exercise price. The spouse is able to provide satisfaction by relying on the share of the intestate estate to which the spouse is entitled and, if the share is insufficient to cover the value, by paying the difference from other resources available to the spouse. The latter aspect differs from section 61B (13) of the 1898 Act intestacy provisions which enable the difference to be met from the share of the estate to which any issue of the intestate are entitled.

**New section 121** places certain restrictions on the personal representative's power to dispose of property (except to a spouse who has elected to acquire it). In particular it restricts the power to do so before the time for making an election by the spouse has elapsed. It is similar in this respect to the relevant 1898 Act intestacy provisions.

### **Division 3      Multiple spouses**

New Division 3 provides for the division of entitlement to shares in an intestate estate when an intestate is survived by more than one spouse. For example, where the intestate is married and also has a de facto partner. This differs from section 61B (3A) of the 1898 Act intestacy provisions under which a de facto partner of at least 2 years will take the spouse's entitlement exclusively (subject to certain conditions).

**New section 122** provides that if an intestate leaves more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

**New section 123** provides that if an intestate leaves more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with the new Division.

**New section 124** provides that if an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse, the spouses are entitled to share the personal effects, the statutory legacy and half of the residue in accordance with the new Division and the issue of the intestate are entitled to an equal share of the remaining residue.

**New section 125** sets out the ways in which property may be shared between spouses under the new Division. The property may be shared equally or in accordance with a distribution agreement between the spouses or a distribution order made by the Supreme Court.

**New section 126** provides for the making of distribution orders by the Supreme Court.

### **Part 4.3 Distribution among relatives**

**New section 127** sets out the entitlements of children to an intestate estate.

**New section 128** sets out the entitlements of parents to an intestate estate.

**New section 129** sets out the entitlements of brothers and sisters to an intestate estate.

**New section 130** sets out the entitlements of grandparents to an intestate estate.

**New section 131** sets out the entitlements of aunts and uncles to an intestate estate.

**New section 132** provides for a person entitled to take in more than one capacity to take in each capacity.

### **Part 4.4 Indigenous persons' estates**

**New sections 133–135** make special provision for the distribution of the estates of intestate persons of Aboriginal or Torres Strait Islander descent. This recognises the broader concepts of family relationships that apply in some Aboriginal and Torres Strait Islander communities.

### **Part 4.5 Absence of persons entitled**

**New sections 136 and 137** provide for the situation where an intestate dies leaving no person entitled to the intestate estate. They provide for a bona vacantia estate to vest in the State but enable the Minister to waive the rights of the State in favour of dependants of the intestate and certain other specified persons and organisations for whom the intestate might reasonably have been expected to make provision. This discretion is similar to that currently contained in section 61B (8) of the 1898 Act intestacy provisions.

### **Part 4.6 Miscellaneous**

**New section 138** provides for the immediate vesting of the entitlement of a minor in an intestate's estate.

**New section 139** provides for the disclaimer of an interest in an intestate estate. It treats the person who disclaims an interest as being deceased. This means his or her issue will be able to take their share in the interest by representation.

**New section 140** reflects the current position in New South Wales that there is no account to be taken of benefits given by the intestate before his or her death. (This rule, known as the Hotchpot rule, was abolished in New South Wales in 1977).

**Schedule 1 [1]** makes a consequential amendment to the long title of the 2006 Act and **Schedule 1 [3]** amends section 3 (2) for consistency with proposed new section 107. The definition encompasses persons who are born as a result of in vitro fertilisation after a period of gestation in the uterus that commenced before a person's death and who survive the person for at least 30 days after birth.

**Schedule 1 [5]** amends the power to make rules of court in the 2006 Act.

**Schedule 1 [6] and [10]** amend Schedule 1 to the 2006 Act to enable the making of savings and transitional regulations and to insert a savings provisions consequent on the repeal of the 1898 Act intestacy provisions.

**Schedule 1 [7], [8] and [9]** amend Schedule 1 to the 2006 Act to clarify the effect of savings provisions in the light of the repeal of Schedule 2.

## **Schedule 2      Amendment of other Acts**

**Schedule 2** makes consequential amendments to various Acts and the amendments described below.

**Schedule 2.5** contains the repeals of the 1898 Act intestacy provisions described in the Overview. **Schedule 2.5 [9]** amends section 84A of the *Probate and Administration Act 1898* to make the rates of interest payable on legacies and annuities prescribed by that section consistent with the rates contained in proposed new section 106 (5) of the 2006 Act.

First print



New South Wales

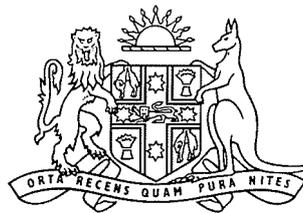
# Succession Amendment (Intestacy) Bill 2009

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New South Wales

# Succession Amendment (Intestacy) Bill 2009

No. , 2009

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## A Bill for

An Act to amend the *Succession Act 2006* and the *Probate and Administration Act 1898* to revise and re-state the rules for distribution on intestacy; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Succession Amendment (Intestacy) Act 2009</i> .	3
<b>2 Commencement</b>	4
This Act commences on a day or days to be appointed by proclamation.	5
<b>3 Repeal of Inheritance Act of 1901 No 19</b>	6
The <i>Inheritance Act of 1901</i> is repealed.	7

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<b>Schedule 1</b>	<b>Amendment of Succession Act 2006</b>	1
	<b>No 80</b>	2
<b>[1] Long title</b>		3
	Insert “to make provision for the distribution of intestate estates;” after “deceased person;”.	4 5
<b>[2] Section 3 Definitions</b>		6
	Insert in alphabetical order in section 3 (1):	7
	<i>intestate</i> is defined in section 102.	8
<b>[3] Section 3 (2)</b>		9
	Omit “en ventre sa mere at the death of the person, provided such child or issue is born alive and remains alive for a period of 30 days”.	10 11
	Insert instead “who is born after the person’s death after a period of gestation in the uterus that commenced before the person’s death and survives the person for at least 30 days after birth”.	12 13 14
<b>[4] Chapter 4</b>		15
	Insert after section 100 and renumber existing Chapter 4 as Chapter 5 and sections 101–106 as appropriate:	16 17
	<b>Chapter 4 Intestacy</b>	18
	<b>Part 4.1 Preliminary</b>	19
<b>101 Definitions</b>		20
	In this Chapter:	21
	<i>brother or sister</i> —a person is the <i>brother or sister</i> of another if they have one or both parents in common.	22 23
	<i>deceased person</i> —a <i>deceased person</i> is one who did not survive the intestate.	24 25
	<i>domestic partnership</i> —see section 105.	26
	<i>eligible relative</i> means a relative of the intestate who is entitled to share in the distribution of the intestate estate under Part 4.3.	27 28
	<i>entitlement to the whole of the intestate estate</i> —see section 103.	29
	<i>Indigenous person</i> is a person who:	30
	(a) is of Aboriginal or Torres Strait Islander descent, and	31

- (b) identifies as an Aboriginal person or Torres Strait Islander, and
1  
2
- (c) is accepted as an Aboriginal person by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community.
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- intestate estate** means:
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- (a) in the case of an intestate who leaves a will—property that is not effectively disposed of by will, and
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8
- (b) in any other case—all the property left by the intestate.
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- leave**—a person *leaves* another if the person dies and is survived by the other.
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- personal effects** of an intestate means the intestate’s tangible personal property except the following:
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- (a) property used exclusively for business purposes,
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- (b) banknotes or coins (unless forming a collection made in pursuit of a hobby or for some other non-commercial purpose),
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17
- (c) property held as a pledge or other form of security,
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- (d) property (such as gold bullion or uncut diamonds):
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- (i) in which the intestate has invested as a hedge against inflation or adverse currency movements, and
20  
21
- (ii) which is not an object of household, or personal, use, decoration or adornment,
22  
23
- (e) an interest in land (whether freehold or leasehold).
24
- predecease**—a person is taken to *predecease* the intestate if the person does not survive the intestate.
25  
26
- presumptive share** of an intestate estate of a deceased eligible relative of the intestate means the entitlement the relative would have had if he or she had survived the intestate.
27  
28  
29
- registered valuer** has the same meaning as it has in the *Valuers Act 2003*.
30  
31
- spouse**—see section 104.
32
- statutory legacy** for a spouse—see section 106.
33
- survive**—see section 107.
34

**102 Intestate** 35

An intestate is a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property. 36  
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38

<b>103</b>	<b>Entitlement to the whole of the intestate estate</b>	1
	A reference in this Chapter to an entitlement to the whole of the intestate estate is a reference to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate.	2 3 4 5 6
<b>104</b>	<b>Spouse</b>	7
	A spouse of an intestate is a person:	8
	(a) who was married to the intestate immediately before the intestate's death, or	9 10
	(b) who was a party to a domestic partnership with the intestate immediately before the intestate's death.	11 12
<b>105</b>	<b>Domestic partnership</b>	13
	A domestic partnership is a relationship (other than marriage) between the intestate and another person:	14 15
	(a) that is a de facto relationship, and	16
	(b) that:	17
	(i) has been in existence for a continuous period of at least 2 years, or	18 19
	(ii) has resulted in the birth of a child.	20
<b>106</b>	<b>Spouse's statutory legacy</b>	21
	(1) The statutory legacy for a spouse consists of:	22
	(a) the CPI adjusted legacy, and	23
	(b) if the statutory legacy is not paid, or not paid in full, within 1 year after the intestate's death—interest at the relevant rate on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full.	24 25 26 27 28 29
	(2) The <i>CPI adjusted legacy</i> is to be determined in accordance with the following formula:	30 31
	$R = A \times \frac{C}{D}$	
	where:	32
	<i>R</i> represents the CPI adjusted legacy.	33
	<i>A</i> is \$350,000.	34

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	<i>C</i> represents the Consumer Price Index number for the last quarter for which such a number was published before the date on which the intestate died.	1 2 3
	<i>D</i> represents the Consumer Price Index number for the December 2005 quarter.	4 5
(3)	If, however, a spouse is entitled to a statutory legacy under this Act and under the law of another Australian jurisdiction or jurisdictions:	6 7 8
	(a) the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including this Act), but	9 10 11
	(b) the following qualifications apply:	12
	(i) amounts received by the spouse, by way of statutory legacy, under any of the other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under this Act,	13 14 15 16
	(ii) if any of the relevant laws contain no provision corresponding to subparagraph (i), no amount is payable by way of statutory legacy under this Act until the spouse's entitlement under that law is satisfied, or the spouse renounces the spouse's entitlement to payment, or further payment, by way of statutory legacy, under that law.	17 18 19 20 21 22 23
(4)	If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or statutory legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate ratably.	24 25 26 27
(5)	The <i>relevant rate</i> of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.	28 29 30
(6)	If the Australian Statistician publishes a Consumer Price Index number in respect of a particular quarter in substitution for a Consumer Price Index number previously published in respect of that quarter:	31 32 33 34
	(a) except as provided by paragraph (b)—the publication of the later Index number is to be disregarded, or	35 36
	(b) if the Minister so directs—regard is to be had to the later and not to the earlier Index number.	37 38
(7)	If the reference base for the Consumer Price Index is changed, regard is to be had only to Index numbers published in terms of the new reference base or to Index numbers converted to the new	39 40 41

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	reference base in accordance with an arithmetical conversion factor specified by the Australian Statistician.	1 2
(8)	An adjustment under subsection (3) is to be made to the nearest whole dollar.	3 4
(9)	In this section: <i>Consumer Price Index number</i> , for a quarter, means the All Groups Consumer Price index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.	5 6 7 8 9
<b>107</b>	<b>Survivorship</b>	10
(1)	A person will not be regarded as having survived an intestate unless:	11 12
(a)	the person is born before the intestate's death and survives the intestate by at least 30 days, or	13 14
(b)	the person is born after the intestate's death after a period of gestation in the uterus that commenced before the intestate's death and survives the intestate for at least 30 days after birth.	15 16 17 18
(2)	The rules stated in subsection (1) are not to be applied if, as a result of their application, the intestate estate would pass to the State.	19 20 21
<b>108</b>	<b>General limitation of non-spousal entitlements</b>	22
(1)	A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.	23 24
(2)	A reference in this Act to a child, issue, relative, or issue of a relative, of an intestate is limited to a person of the relevant description whose entitlement to share in the distribution of the intestate estate is not excluded under subsection (1).	25 26 27 28
<b>109</b>	<b>Adoption</b>	29
	An adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents and:	30 31 32
(a)	the child's family relationships are to be determined accordingly, and	33 34
(b)	family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.	35 36 37

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## **Part 4.2 Spouse's entitlements**

**Note.** In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

### **Division 1 Entitlement of surviving spouse**

#### **110 Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

#### **111 Spouse's entitlement where no issue**

If an intestate leaves a spouse but no issue, the spouse is entitled to the whole of the intestate estate.

#### **112 Spouse's entitlement where issue are also issue of the spouse**

If an intestate leaves a spouse and issue and the issue are all also issue of the spouse, the spouse is entitled to the whole of the intestate estate.

#### **113 Spouse's entitlement where any issue are not issue of the spouse**

If an intestate leaves a spouse and any issue who are not issue of the spouse, the spouse is entitled to:

- (a) the intestate's personal effects, and
- (b) a statutory legacy, and
- (c) one-half of the remainder (if any) of the intestate estate.

### **Division 2 Spouse's preferential right to acquire property from the estate**

#### **114 Application of this Division**

This Division applies where the intestate leaves a spouse (but not more than one spouse).

#### **115 Spouse's right of election**

- (1) A spouse is entitled to elect to acquire property from an intestate estate.
- (2) A spouse's election to acquire property from an intestate estate requires the Court's authorisation if:
  - (a) the property forms part of a larger aggregate, and

- 
- (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult. 1  
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- Note.** For example: 4
- (a) The acquisition of a single item from a group of items might substantially diminish the value of the remainder of the group or make it substantially more difficult to dispose of the remainder of the group. 5  
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- (b) The acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder of the farming property or make it substantially more difficult to dispose of it. 9  
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- (3) The Court may grant an authorisation under subsection (2) and may impose such conditions as it considers just and equitable to address the matters referred to in that subsection, including a condition that the spouse pay compensation to the estate in addition to consideration to be given for the property under this Division and a condition as to costs. 13  
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- (4) The Court must refuse authorisation if it considers that the matters referred to in subsection (2) cannot be adequately addressed by granting an authorisation subject to such conditions. 19  
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- (5) A spouse is not entitled to elect to acquire property from an intestate estate if the transfer or conveyance by the personal representative to the spouse of the interest of the intestate in the property would require compliance with the mandatory provisions unless those provisions would be complied with and the costs of complying with the provisions are paid by the spouse. 23  
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- (6) A spouse who is a personal representative of the intestate is not prevented from making an election to acquire property from the intestate estate by the fact that the spouse is a trustee of the intestate estate. 29  
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- (7) Nothing in this section confers on a spouse any right against a person who in good faith purchased for value from the personal representative of the intestate any property of the intestate. 33  
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- (8) In this section: 36
- mandatory provisions** means the following: 37
- (a) the *Environmental Planning and Assessment Act 1979*, the *Conveyancing Act 1919* and any other Act with respect to the manner of dividing land into parts, and with respect to any requirement incidental to the manner of dividing land into parts, 38  
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(b)	the <i>Strata Schemes (Freehold Development) Act 1973</i> with respect to the manner of subdividing land within the meaning of section 7 (1) of that Act or of any lot within the meaning of section 5 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot,	1 2 3 4 5 6
(c)	the <i>Strata Schemes (Leasehold Development) Act 1986</i> , with respect to the manner of subdividing land within the meaning of section 6 (1) of that Act or of any lot within the meaning of section 4 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot.	7 8 9 10 11 12
<b>116</b>	<b>Notice to be given to spouse of right of election</b>	13
(1)	An intestate’s personal representative must, within one month of the grant of administration of the intestate estate, give notice to the intestate’s spouse of the spouse’s right of election stating:	14 15 16
(a)	how the right is to be exercised, and	17
(b)	the fact that the election may be subject to the Court’s authorisation and the circumstances in which such an authorisation is required, and	18 19 20
(c)	that the right must be exercised within 3 months (or a longer period allowed by the Court) after the date of the notice.	21 22 23
(2)	Notice is not required under this section if the spouse is the personal representative, or one of the personal representatives, of the intestate.	24 25 26
<b>117</b>	<b>Time for making election</b>	27
(1)	The election must be made:	28
(a)	if the spouse is entitled to notice of the right of election—within 3 months after the date of the notice, or	29 30
(b)	if the spouse is the intestate’s personal representative (or one of the personal representatives)—within 3 months after the grant of administration of the intestate estate.	31 32 33
(2)	The Court may, however, if it considers there is sufficient cause for doing so, extend the time for making the election.	34 35
	<b>Note.</b> The Court might, for example, extend the period for making an election if the Court’s authorisation for making the election is required or if a question remains unresolved regarding the existence, or the nature, of a person’s interest in the intestate estate.	36 37 38 39

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(3)	The Court may extend the time for making the election whether or not the time for making the election has passed, but not after the administration of the estate has been completed.	1 2 3
<b>118</b>	<b>How election to be made</b>	4
(1)	A spouse's election is made by written notice identifying, with reasonable particularity, the property the spouse elects to acquire.	5 6
(2)	Except as provided by subsection (3), the notice of election must be given:	7 8
(a)	to each person, apart from the spouse, who is a personal representative of the intestate, and	9 10
(b)	to each person, apart from the spouse, who is entitled to share in the intestate estate.	11 12
(3)	The Court may direct that any of the persons referred to in subsection (2) need not be given the notice of election if it considers that giving the notice is unnecessary, unreasonable or impracticable in the circumstances of the case.	13 14 15 16
(4)	A spouse who has not reached the age of majority may make an election as validly and effectively as an adult.	17 18
(5)	A spouse may revoke his or her election at any time before the transfer of the property to the spouse.	19 20
(6)	A revocation is made by written notice of revocation given to the same persons as the notice of election.	21 22
<b>119</b>	<b>Basis of the election</b>	23
(1)	The price for which a spouse may elect to acquire property from the intestate estate (the <i>exercise price</i> ) is the market value of the property as at the date of the intestate's death.	24 25 26
(2)	If, however, the spouse and the holder of a mortgage, charge or encumbrance over property that the spouse has elected to acquire agree to the assumption by the spouse of the liability secured by the mortgage, charge or encumbrance the exercise price is to be reduced by the amount of the liability (as at the date of transfer) secured by the mortgage, charge or encumbrance, but:	27 28 29 30 31 32
(a)	the spouse takes the property subject to the mortgage, charge or encumbrance, and	33 34
(b)	on the transfer of the property, the liability passes to the spouse and the estate is exonerated from it.	35 36

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(3)	The personal representative of an intestate must obtain a valuation from a registered valuer of property forming part of the intestate estate if:	1 2 3
(a)	a spouse elects to acquire the property, or	4
(b)	a spouse asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it.	5 6 7
(4)	The personal representative must give a copy of the valuation to the spouse and to the other beneficiaries entitled to share in the intestate estate.	8 9 10
(5)	The requirement for a personal representative to obtain a valuation under subsection (3) may be waived with the consent of all the beneficiaries entitled to share in the intestate estate.	11 12 13
<b>120</b>	<b>Exercise price—how satisfied</b>	<b>14</b>
	If a spouse elects to acquire property from the intestate estate, the exercise price is to be satisfied:	15 16
(a)	first from money to which the spouse is entitled from the intestate estate, and	17 18
(b)	if that is insufficient, from money paid by the spouse to the estate on or before the date of transfer.	19 20
<b>121</b>	<b>Restriction on disposal of property from intestate estate</b>	<b>21</b>
(1)	The personal representative of an intestate must not dispose of property from the intestate estate (except to a spouse who has elected to acquire it) unless:	22 23 24
(a)	the personal representative is the spouse entitled to make the election, or	25 26
(b)	the time for exercising the election has elapsed and no election has been made, or	27 28
(c)	the election requires the Court’s authorisation but:	29
(i)	the necessary authorisation has been refused, or	30
(ii)	the application for authorisation has been withdrawn, or	31 32
(d)	the spouse has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate, or	33 34 35
(e)	sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate, or	36 37 38

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(f) the property is perishable or likely to decrease rapidly in value.	1 2
(2) A transaction entered into contrary to this section is not invalid.	3
<b>Division 3 Multiple spouses</b>	4
<b>122 Spouses' entitlement where there are more than one spouse but no issue</b>	5 6
If an intestate leaves more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.	7 8 9
<b>123 Spouses' entitlement where issue are also issue of one or more of the spouses</b>	10 11
If an intestate leaves more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.	12 13 14 15
<b>124 Spouses' entitlement where any issue are not issue of a surviving spouse</b>	16 17
If an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse:	18 19
(a) the spouses are entitled to share the intestate's personal effects in accordance with this Division, and	20 21
(b) each spouse is entitled to share the statutory legacy that would be payable if the intestate had left only one surviving spouse, and	22 23 24
(c) the spouses are entitled to share one-half of the remainder (if any) of the intestate estate in accordance with this Division.	25 26 27
<b>125 Sharing between spouses</b>	28
(1) If property is to be shared between spouses under this Division, the property is to be shared:	29 30
(a) in accordance with a written agreement between the spouses (a <i>distribution agreement</i> ), or	31 32
(b) in accordance with an order of the Court (a <i>distribution order</i> ), or	33 34
(c) if the conditions prescribed by subsection (2) are satisfied—in equal shares.	35 36

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- (2) The following conditions must be satisfied if the personal representative is to make an equal division of property between spouses under subsection (1) (c):
    - (a) the personal representative has given each spouse a notice in writing stating that the personal representative may distribute the property equally between the spouses unless, within 3 months after the date of the notice:
      - (i) they enter into a distribution agreement and submit the agreement to the personal representative, or
      - (ii) at least one of the spouses applies to the Court for a distribution order,
    - (b) at least 3 months have elapsed since the giving of the notices and:
      - (i) the personal representative has not received a distribution agreement or notice of an application for a distribution order, or
      - (ii) an application for a distribution order has been made but the application has been dismissed or discontinued.
  - (3) If a spouse asks the personal representative to initiate the process for making an equal division of property under subsection (1) (c), the personal representative must, as soon as practicable:
    - (a) give the notices required under subsection (2) (a), or
    - (b) make an application to the Court for a distribution order.

**126 Distribution orders**

- (1) An intestate’s spouse or personal representative may apply to the Court for a distribution order.
- (2) If, however, the personal representative has given written notice under section 125 (3), the application cannot (unless the Court otherwise allows) be made more than 3 months after the date of the notice.
- (3) On an application under this section, the Court may order that the property be distributed between the spouses in any way it considers just and equitable.
- (4) If the Court considers it just and equitable to do so, it may allocate the whole of the property to one of the spouses to the exclusion of the other or others.
- (5) A distribution order may include conditions.

## Part 4.3 Distribution among relatives

**Note.** In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

### 127 Entitlement of children

- (1) If an intestate leaves no spouse but leaves issue, the intestate's children are entitled to the whole of the intestate estate.
- (2) If:
  - (a) an intestate leaves:
    - (i) a spouse or spouses, and
    - (ii) any issue who are not also issue of a surviving spouse, and
  - (b) a part of the estate remains after satisfying the spouse's entitlement, or the spouses' entitlements,  
the intestate's children are entitled to the remaining part of the intestate estate.
- (3) If no child predeceased the intestate leaving issue who survived the intestate, then:
  - (a) if there is only one surviving child—the entitlement vests in the child, or
  - (b) if there are 2 or more surviving children—the entitlement vests in them in equal shares.
- (4) If one or more of the intestate's children predeceased the intestate leaving issue who survived the intestate:
  - (a) allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child, and
  - (b) the presumptive share of any such deceased child is to be divided between that child's children and, if any of these grandchildren (of the intestate) predeceased the intestate leaving issue who survived the intestate, the deceased grandchild's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.

<b>128</b>	<b>Parents</b>	1
(1)	The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves:	2
		3
	(a) no spouse, and	4
	(b) no issue.	5
(2)	If there is only one surviving parent, the entitlement vests in the parent and, if both survive, it vests in equal shares.	6
		7
<b>129</b>	<b>Brothers and sisters</b>	8
(1)	The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves:	9
		10
	(a) no spouse, and	11
	(b) no issue, and	12
	(c) no parent.	13
(2)	If no brother or sister predeceased the intestate leaving issue who survived the intestate, then:	14
		15
	(a) if only one survives—the entitlement vests in the surviving brother or sister, or	16
		17
	(b) if 2 or more survive—the entitlement vests in them in equal shares.	18
		19
(3)	If a brother or sister predeceased the intestate leaving issue who survived the intestate:	20
		21
	(a) allowance must be made in the division of the estate between brothers and sisters for the presumptive share of any such deceased brother or sister, and	22
		23
		24
	(b) the presumptive share of any such deceased brother or sister is to be divided between the brother’s or sister’s children and, if any of these children predeceased the intestate leaving issue who survived the intestate, the deceased child’s presumptive share is to be divided between the child’s children (again allowing for the presumptive share of a grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.	25
		26
		27
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<b>130</b>	<b>Grandparents</b>	34
(1)	The grandparents of an intestate are entitled to the whole of an intestate estate if the intestate leaves:	35
		36
	(a) no spouse, and	37

(b) no issue, and	1
(c) no parent, and	2
(d) no brother or sister, or issue of a deceased brother or sister.	3
(2) If there is only one surviving grandparent, the entitlement vests in the grandparent and, if 2 or more survive, it vests in them in equal shares.	4 5 6
<b>131 Aunts and uncles</b>	<b>7</b>
(1) The brothers and sisters of each of an intestate’s parents are entitled to the whole of the intestate estate if the intestate leaves:	8 9
(a) no spouse, and	10
(b) no issue, and	11
(c) no parent, and	12
(d) no brother or sister, or issue of a deceased brother or sister, and	13 14
(e) no grandparent.	15
(2) If no brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, then:	16 17
(a) if only one survives—the entitlement vests in the surviving brother or sister, or	18 19
(b) if 2 or more survive—the entitlement vests in them in equal shares.	20 21
(3) If a brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, the child is entitled to the deceased parent’s presumptive share and, if there are 2 or more children, they share equally.	22 23 24 25
<b>132 Entitlement to take in separate capacities</b>	<b>26</b>
A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.	27 28
<b>Note.</b> For example, suppose that an intestate dies leaving no spouse and no surviving relatives except children of a deceased maternal aunt and paternal uncle who had a child in common as well as children of other unions. In this case, the child of the union between the maternal aunt and the paternal uncle would be entitled to participate in the estate both as representative of the maternal aunt and as representative of the paternal uncle.	29 30 31 32 33 34 35

<b>Part 4.4 Indigenous persons' estates</b>	1
<b>133 Application for distribution order</b>	2
(1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.	3 4 5 6 7 8
(2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.	9 10 11 12
(3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.	13 14 15 16
(4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:	17 18 19 20
(a) the application has been determined, or	21
(b) the Court authorises the distribution.	22
<b>134 Distribution orders</b>	23
(1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.	24 25 26
(2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).	27 28 29 30 31 32 33 34
<b>Note.</b> For example, a distribution may have been made under section 92A of the <i>Probate and Administration Act 1898</i> or section 94 of this Act.	35 36
(3) In formulating an order under this Part, the Court must have regard to:	37 38
(a) the scheme for distribution submitted by the applicant, and	39

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(b)	the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.	1 2 3
(4)	The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.	4 5 6
<b>135</b>	<b>Effect of distribution order under this Part</b>	7
	A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.	8 9 10
	<b>Part 4.5 Absence of persons entitled</b>	11
<b>136</b>	<b>Intestate leaving no persons entitled</b>	12
	If an intestate dies leaving no person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate.	13 14 15
<b>137</b>	<b>State has discretion to make provision out of property to which it becomes entitled</b>	16 17
(1)	If the State is entitled to an intestate estate under this Part, the Minister may, on application in accordance with subsection (3) for a waiver of the State's rights, waive the State's rights in whole or part in favour of:	18 19 20 21
(a)	dependants of the intestate, or	22
(b)	any persons who have, in the Minister's opinion, a just or moral claim on the intestate, or	23 24
(c)	any organisation or person for whom the intestate might reasonably be expected to have made provision, or	25 26
(d)	the trustees for any person or organisation mentioned in paragraph (a), (b) or (c).	27 28
(2)	The Minister may grant a waiver under this section on conditions the Minister considers appropriate.	29 30
(3)	Application for a waiver of the State's rights to an intestate estate under this Part is to be made in writing to the Crown Solicitor.	31 32

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<b>Part 4.6 Miscellaneous</b>	1
<b>138 Non-deferral of the interest of a minor</b>	2
The entitlement of a minor to an interest in an intestate estate vests immediately (that is, it is not deferred until the minor reaches majority or marries).	3 4 5
<b>139 Effect of disclaimer etc</b>	6
For the purposes of the distribution of an intestate estate, a person will be treated as having predeceased the intestate if the person:	7 8
(a) disclaims an interest, to which he or she would otherwise be entitled, in the intestate estate, or	9 10
(b) is disqualified from taking an interest in the intestate estate for any reason.	11 12
<b>Note.</b> It follows that, if the person has issue, they may be entitled to take the person's presumptive share of the intestate estate by representation.	13 14
<b>140 Effect of testamentary and other gifts</b>	15
The distribution of an intestate estate is not affected by gifts made by the intestate to persons entitled:	16 17
(a) during the intestate's lifetime, or	18
(b) in the case of a partial intestacy—by will.	19
<b>[5] Existing section 102 Rules of Court</b>	20
Insert at the end of section 102 (2):	21
(h) the making of elections by the spouses of intestates under Chapter 4.	22 23
<b>[6] Schedule 1 Savings, transitional and other provisions</b>	24
Insert at the end of clause 1 (1):	25
<i>Succession Amendment (Intestacy) Act 2009</i>	26
<b>[7] Schedule 1, clause 2, definition of "repealed provisions"</b>	27
Insert "to this Act (as in force immediately before Schedule 2 was repealed by the <i>Statute Law (Miscellaneous Provisions) Act (No 2) 2008</i> )" after "Schedule 2".	28 29 30

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<b>[8] Schedule 1, Part 3</b>	1
Insert in appropriate order at the end of clause 9:	2
<i>the 1916 provisions</i> means Part 2 of the <i>Testator's Family Maintenance and Guardianship of Infants Act 1916</i> as in force before its repeal by the <i>Succession Amendment (Intestacy) Act 2009</i> .	3 4 5 6
<b>[9] Schedule 1, Part 3</b>	7
Insert after clause 11 (4):	8
(5) The 1916 provisions continue to apply in relation to any estate of a person who died before the repeal of the provisions to which those provisions would have applied but for the repeal.	9 10 11
<b>[10] Schedule 1, Part 4</b>	12
Insert after clause 11:	13
<b>Part 4 Provisions consequent on enactment of Succession Amendment (Intestacy) Act 2009</b>	14 15 16
<b>12 Definition</b>	17
In this Part:	18
<i>amending Act</i> means the <i>Succession Amendment (Intestacy) Act 2009</i> .	19 20
<b>13 Transitional provision—intestacy</b>	21
(1) Chapter 4 (Intestacy) applies to the distribution of the intestate estate of a person who dies intestate on or after the commencement of this clause.	22 23 24
(2) The distribution of the intestate estate of a person who died intestate before the commencement of this clause is governed by the law of this State as in force at the date of death.	25 26 27

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<b>Schedule 2</b>	<b>Amendment of other Acts</b>	1
<b>2.1</b>	<b>Adoption Act 2000 No 75</b>	2
<b>[1]</b>	<b>Section 95 General effect of adoption orders</b>	3
	Insert at the end of section 95 (2):	4
	<b>Note.</b> For example, for the purposes of a distribution on intestacy, an adopted child is regarded as a child of the adoptive parent or parents and the child's family relationships are determined accordingly. See section 109 of the <i>Succession Act 2006</i> .	5 6 7 8
<b>[2]</b>	<b>Section 97 Effect of orders as regards property</b>	9
	Omit section 97 (2) and the note to the subsection.	10
<b>[3]</b>	<b>Section 99 Relationship of adopted child to other children of the adopter</b>	11
	Omit " <i>Probate and Administration Act 1898</i> " from section 99 (1) (a).	12
	Insert instead " <i>Succession Act 2006</i> ".	13
<b>[4]</b>	<b>Schedule 3 Savings, transitional and other provisions</b>	14
	Insert at the end of clause 1 (1):	15
	<i>Succession Amendment (Intestacy) Act 2009</i> , to the extent that it amends this Act	16 17
<b>[5]</b>	<b>Schedule 3, Part 5</b>	18
	Insert after Part 4:	19
	<b>Part 5 Provision consequent on enactment of Succession Amendment (Intestacy) Act 2009</b>	20 21 22
<b>23</b>	<b>Persons dying wholly or partially intestate before commencement of Succession Amendment (Intestacy) Act 2009</b>	23 24
	The repeal of section 97 (2) by the <i>Succession Amendment (Intestacy) Act 2009</i> does not apply to or in respect of the estate of a person who died wholly or partially intestate before that repeal, and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.	25 26 27 28 29 30

<b>2.2</b>	<b>Conveyancing Act 1919 No 6</b>	1
[1]	<b>Section 33 Meaning of heir, next of kin, or statutory next of kin of any person</b>	2 3
	Omit “Division 2A of Part 2 of the <i>Probate and Administration Act 1898</i> (as in force after that commencement)” from section 33 (1).	4 5
	Insert instead “the applicable intestacy rules”.	6
[2]	<b>Section 33 (4)</b>	7
	Insert after section 33 (3):	8
	(4) In subsection (1):	9
	<i>applicable intestacy rules</i> means:	10
	(a) for a will coming into operation, or an instrument made, before the repeal of Division 2A of Part 2 of the <i>Probate and Administration Act 1898</i> —that Division as in force immediately before its repeal, and	11 12 13 14
	(b) for a will coming into operation, or an instrument made, after the repeal of that Division—Chapter 4 (Intestacy) of the <i>Succession Act 2006</i> .	15 16 17
<b>2.3</b>	<b>District Court Act 1973 No 9</b>	18
	<b>Section 134 Jurisdiction in equity proceedings</b>	19
	Insert “(as in force immediately before that Act was amended by the <i>Succession Amendment (Intestacy) Act 2009</i> )” after “1916” wherever occurring.	20 21 22
<b>2.4</b>	<b>Powers of Attorney Act 2003 No 53</b>	23
[1]	<b>Section 24 Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy</b>	24 25
	Omit the section.	26

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<b>[2] Schedule 5 Savings, transitional and other provisions</b>	1
Insert after Part 2:	2
<b>Part 3 Provision consequent on Succession Amendment (Intestacy) Act 2009</b>	3
	4
<b>4 Effect of disposal of home shared by spouses under enduring power of attorney</b>	5
	6
Section 24, as in force immediately before its repeal by the <i>Succession Amendment (Intestacy) Act 2009</i> , continues to apply to a spouse of a principal under an enduring power of attorney who dies intestate before the repeal and to whom it would have applied before the repeal as if it had not been repealed.	7 8 9 10 11
<b>2.5 Probate and Administration Act 1898 No 13</b>	12
<b>[1] Section 32G Interpretation</b>	13
Omit the definition of <i>de facto spouse</i> from section 32G (1). Insert instead:	14
<i>de facto spouse</i> , in relation to a person dying wholly or partly intestate, means someone who was a partner in a de facto relationship with the person.	15 16 17
<b>[2] Section 40A Evidence or presumption of death</b>	18
Omit “ <i>Testator’s Family Maintenance and</i> ” from section 40A (2).	19
<b>[3] Section 40A</b>	20
Omit “Chapter 3 of” from section 40A (2).	21
<b>[4] Section 53 Value to be accepted instead of partition</b>	22
Omit “in a dwelling-house in respect of which the spouse has exercised the right conferred by section 61D”.	23 24
Insert instead “in real estate the spouse has elected to acquire under section 115 (Spouse’s right of election) of the <i>Succession Act 2006</i> ”.	25 26
<b>[5] Part 2, Division 2A Distribution of intestate estates</b>	27
Omit the Division.	28
<b>[6] Section 62 Practice as to granting administration of real and personal estate of intestate</b>	29
	30
Insert “or Chapter 4 of the <i>Succession Act 2006</i> ” after “rules”.	31

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<b>[7] Section 62 (2)</b>	1
Insert at the end of section 62:	2
(2) Without limiting subsection (1), if a person dies wholly intestate the real and personal estate of the person is to be distributed or held in trust in accordance with Chapter 4 of the <i>Succession Act 2006</i> , and the real estate of that person is to be held as if it were devised to the persons for whom it is held in trust.	3 4 5 6 7
<b>[8] Section 84A Interest on legacies and annuities</b>	8
Omit “6 per cent per year” from section 84A (1). Insert instead “the relevant rate”.	9 10
<b>[9] Section 84A (3)</b>	11
Insert after section 84A (2):	12
(3) In this section, <i>relevant rate</i> of interest means the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.	13 14 15 16
<b>[10] Section 92 Distribution of assets after notice given by executor or administrator</b>	17 18
Insert “or section 125 (Sharing between spouses) or 126 (Distribution orders) or Part 4.4 (Indigenous persons’ estates)” after “rectified” in section 92 (2).	19 20
<b>[11] Fourth Schedule Rights of surviving spouse of intestate with respect to acquisition of the shared home</b>	21 22
Omit the Schedule.	23
<b>[12] Fifth Schedule Savings and transitional provisions arising from amendments to this Act</b>	24 25
Insert after Part 2:	26
 <b>Part 3 Provision consequent on enactment of Succession Amendment (Intestacy) Act 2009</b>	 27 28 29
<b>9 Persons dying wholly or partially intestate before commencement of Succession Amendment (Intestacy) Act 2009</b>	30 31
The amendments made to this Act by the <i>Succession Amendment (Intestacy) Act 2009</i> do not apply to or in respect of the estate of a person who died wholly or partially intestate before the	32 33 34

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Succession Amendment (Intestacy) Bill 2009

Schedule 2      Amendment of other Acts

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commencement of those amendments, and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.	1 2 3
<b>2.6 Testator’s Family Maintenance and Guardianship of Infants Act 1916 No 41</b>	4 5
<b>[1] Section 1 Name of Act</b>	6
Omit “ <i>Testator’s Family Maintenance and</i> ”.	7
<b>[2] Part 2 Testator’s family maintenance</b>	8
Omit the Part.	9