2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAMILY LAW AMENDMENT (FINANCIAL AGREEMENTS AND OTHER MEASURES) BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Honourable George Brandis QC)

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FAMILY LAW AMENDMENT (FINANCIAL AGREEMENTS AND OTHER MEASURES) BILL 2015

GENERAL OUTLINE

1. The *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (the Bill) would enhance the capacity of the family law system to provide effective outcomes for users of the system. In particular, it aims to provide greater clarity and certainty to separating couples attempting to resolve their financial affairs without resorting to a court, enable the courts to offer better protection to victims of family violence, and improve the efficiency and operation of the family law courts.

2. Financial agreements are an important tool that can be used by couples to make decisions on financial and maintenance matters in the event of a relationship breakdown. The Bill is aimed at strengthening the primary public policy objective underlying the financial agreement provisions, which is to allow prospective, current or former parties to a marriage or de facto relationship to take responsibility for resolving their financial and maintenance matters without involving a court. The Bill would do this by removing existing uncertainties around the requirements for entering, interpreting and enforcing financial agreements.

3. It is the Government's firm view that family violence and child abuse is unacceptable and requires a strong legislative response. In line with this view, the Bill would make a number of amendments to strengthen protections against family violence. The Bill would also strengthen Australia's response to international parental child abduction, and improves the efficiency and operation of the family law courts to benefit all those who come into contact with the family law system.

4. This Bill would amend the financial agreement regime in the *Family Law Act 1975* (the Act) to:

- remove existing uncertainties around requirements for entering, interpreting and enforcing agreements
- make changes to the coverage of spousal maintenance matters in agreements
- introduce a statement of principles to outline their binding nature, and
- reinforce the binding nature of the agreements to offer certainty to parties.

5. The Bill would also amend the Act to:

- strengthen protections from violence in certain procedural matters
- strengthen Australia's response to international parental child abduction
- assist the operation of the family law courts, and
- make minor and technical amendments, including clarifying definitions and removing redundant provisions.

FINANCIAL IMPACT

6. There are no financial implications from implementing these amendments.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

7. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

8. The Bill would amend the *Family Law Act 1975* (the Act) to make changes to provisions governing financial agreements, and to make a range of other changes to the Act.

9. Financial agreements are out-of-court, private agreements between people that outline how property and other financial matters will be dealt with in the event of the breakdown of a marriage or de facto relationship.

10. This Bill would amend the financial agreement regime in the Act to:

- remove existing uncertainties around requirements for entering, interpreting and enforcing agreements
- make changes to the coverage of spousal maintenance matters in agreements
- introduce a statement of principles to outline their binding nature, and
- reinforce the binding nature of the agreements to offer certainty to parties.

11. The aim of the amendments is to ensure that prospective, current or former parties to a marriage or de facto relationship can take responsibility for resolving their financial and maintenance matters without involving a court.

12. The Bill would also amend the Act to:

- strengthen protections from violence in certain procedural matters
- strengthen Australia's response to international parental child abduction
- modernise the arrest powers of the family court
- assist the operation of the family law courts, and
- make other minor and technical amendments, including clarifying definitions and removing redundant provisions.

Human rights implications

13. The Bill engages the following human rights:

- Right to freedom from interference with the family and protection of the family: Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 (especially paragraph 1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Right to protection from exploitation, violence and abuse: In relation to children: article 19(1) of the Convention on the Rights of the Child (CRC), and article 24(1) of the ICCPR and in relation to persons with disabilities, article 16(1) of the CRPD
- Best interests of the child: Article 3(1) of the CRC
- Illicit transfer of children: Article 11 of the CRC
- The right to life; the right to security of the person; and the prohibition on torture and other cruel, inhuman or degrading treatment or punishment: article 6 of the ICCPR; article 9 of the ICCPR; and article 7 of the ICCPR and the Convention

Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

- The right to privacy: Article 17 of the ICCPR
- Prohibition on retrospective Criminal Laws: Article 15 of the ICCPR

14. While the Bill introduces new offences, these offences do not affect a person's right to a free and public trial, so the Bill does not engage the rights contained in Article 14 of the ICCPR.

Right to freedom from interference with the family and protection of the family: Articles 17 and 23 of the ICCPR, article 10 of the ICESCR

15. Article 17(1) of the ICCPR states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. Article 23(1) states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Article 10(1) of the ICESCR provides that the 'widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'

16. The Bill promotes the right to freedom from interference with the family by ensuring a proper and effective system for financial agreements to empower families to take responsibility for their own affairs without interference of a court. A binding financial agreement ousts the jurisdiction of the family law courts to make an order for property settlement or spousal maintenance following a breakdown of a marriage or de facto relationship. The existing financial agreement provisions in the Act are insufficiently certain in their operation, which has enabled parties to unreasonably challenge the validity and enforceability of financial agreements.

17. In order to support families choosing to make these agreements, the Bill would remove the uncertainties around entering, interpreting and enforcing these private arrangements. To further support this, the Bill would also insert a provision outlining the objects of the financial agreement regime as including the principle that prospective, current or former parties to a marriage should be able to take responsibility for resolving their financial and maintenance matters without involving a court.

18. However, the autonomy afforded to parties would be subject to appropriate safeguards. An agreement would only be binding if each party has received independent legal advice prior to entering into the arrangement, or a court has declared the agreement to be binding. The court would also have the power to set aside a binding financial agreement in the case of a material change of circumstances or exceptional circumstances (depending on when the agreement was entered into). This provides the appropriate balance between respect for the family unit and appropriate safeguards and protections for vulnerable parties. The amendments would make clear that, where parties have been provided with legal advice as to the relevant matters, and entered into the agreement in good faith, the agreement will generally be binding and enforceable. This intends to provide finality to parties in respect of the resolution of their financial affairs and supports families to make decisions about what is best for their family without undue interference from the judiciary.

19. The measure thus promotes the right to freedom from interference with the family and protection of the family.

Protection from exploitation, violence and abuse: in relation to children: article 19(1) of the Convention on the Rights of the Child (CRC), and article 24(1) of the ICCPR and in relation to persons with disabilities, article 16(1) of the CRPD

20. The Bill promotes women and children's right to protection from exploitation, violence and abuse as contained in article 24(1) of the ICCPR, article 19(1) of the CRC and article 16(1) of the CRPD.

21. Article 24(1) of the ICCPR provides for protection of the child as required by his/her status as a minor. Article 19(1) of the CRC requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person'.

22. Article 16(1) of the CRPD requires States to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

23. The Bill would make amendments to protect women and children from family violence. The key change is to sections 68R and 68T of the Act, which provide that a state and territory court making an interim family violence order may revive, suspend, vary or discharge a parenting (or other) order to the extent to which that order provides for a child to spend time with a person. This power is designed to protect children by removing any inconsistency between family violence orders and other orders. However, there is currently a strict 21 day time limit on the court's power to revive vary, suspend or discharge orders. The Bill would strengthen the court's ability to protect children from violence by removing this 21 day time limit and instead allowing judicial officers to set timeframes according to the particular circumstances of the case.

24. As such, the measure promotes the right to protection from exploitation, violence and abuse for children and people with disability, and generally increases the protection from violence for women.

Best interests of the child: Convention on the Rights of the Child, Article 3(1)

25. Article 3(1) of the CRC provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. At present, the Act requires the court to explain orders or injunctions that are inconsistent with an existing family violence order to children, irrespective of their best interests.

26. The Bill supports the best interests of the child as a primary consideration by removing the requirement for the court to explain orders or injunctions that are inconsistent with an existing family violence order to a child where:

- it would not be in the child's best interest, or
- the child would be too young to understand the explanation.

27. Although in most cases, it will be in a child's best interests to understand the application of court orders to their family, this may not always be the case. In particular, it may not be in the child's interest in all cases to be exposed to the parental controversy to the extent necessary for courts to comply with this section. The Bill would provide an appropriate discretion for courts to dispense with this requirement provided that to do so would be in the child's best interest.

Illicit transfer of children: Article 11 of the CRC

28. Article 11 of the CRC requires States to take measures to combat the illicit transfer and non-return of children abroad. The *travaux préparatoires* indicate that this article of the CRC is particularly concerned with international parental child abduction.

29. The measures of the Bill related to international parental child abduction create two new offences. These offences would make it unlawful to retain a child outside of Australia in breach of a court order or written consent of all parties to a parenting order related to that child, when a parental order exists or is pending. These offences will complement existing provisions that make it an offence to remove such a child from Australia.

30. The measures would also allow a person to request a location order for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention). This explicitly includes a person appointed as the Central Authority for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention.

31. While aspects of international parental child abduction are generally a private civil issue between parents, the Australian Government has responsibilities arising under the CRC and under the Child Abduction Convention. The Australian Government has a broader interest in ensuring that children are not wrongfully removed from Australia regardless of whether that removal is to a Convention or non-Convention country.

32. The gravity of the effects of abduction and wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child.

33. The proposed amendments aim to address the wrongful removal or retention of children regardless of the intended country of destination or the country of retention.

34. By protecting the interests of the child, the amendments positively engage with the rights of a child.

35. These new offences will assist Australia in fulfilling its international obligations including its obligations under Article 11 of the CRC which provides that State Parties shall take measures to combat the illicit transfer and non-return of children abroad.

36. By introducing offences related to retaining a child overseas and by making location orders available for the purpose of the Child Abduction Convention, Australia is fulfilling its responsibilities under that treaty and increasing protections in accordance with Article 11 of the CRC.

The right to life; the right to security of the person; and the prohibition on torture and other cruel, inhuman or degrading treatment or punishment: article 6 of the ICCPR; article 9 of the ICCPR; and article 7 of the ICCPR and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

37. Article 6 of the ICCPR provides that everyone has the inherent right to life and that no one shall be arbitrarily deprived of life. Article 9 of the ICCPR provides that everyone has the right to liberty and security of the person and that no one shall be subjected to arbitrary arrest or detention. It also provides for further protections in the course of arrest, including to be informed of the reason for arrest, to be brought promptly before a judge, to habeas corpus, and to take proceedings before a court.

38. Article 7 of the ICCPR contains the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The CAT also prohibits torture and other cruel, inhuman or degrading treatment of punishment.

39. The Bill would modernise the existing arrest provisions in the Act to bring them in line with the similar powers of the Federal Court and the Federal Circuit Court to provide for when force may be used by an arrester when exercising his or her powers of arrest. It would also limit, in line with similar powers in the *Crimes Act 1914*, an arrester's power to enter and search premises and stop and detain conveyances (which include a vehicle, a vessel and an aircraft) for the purposes of making an arrest.

40. The amendments would not change the established grounds and procedures for arrest under the Act.

41. The proposed amendments engage the right to security of the person in article 9 and the right to life in article 6 of the ICCPR and require the provision of reasonable measures to protect a person's physical security. They also engage the prohibition on torture and cruel, inhumane and degrading treatment or punishment in article 7 of the ICCPR and in CAT.

42. These amendments are necessary to achieve the legitimate aim of ensuring that an arrestee can be arrested and brought before a court for the administration of justice. This will allow an arrester to, for example, disrupt an attempted international parental child abduction by searching the vehicle on which the arrestee intended to leave the country. This engages Australia's obligations in regard to the illicit transfer of children under Article 10 of the CRC.

43. The proposed amendments are reasonable and proportionate to this objective. The powers of the arresters would be appropriately and proportionately limited in that:

- only people authorised by the Act can exercise the powers, which includes, for example, police officers and Marshals of the Family Court. This is a significant additional limitation compared to the Court's existing arrest powers
- the arrester must not use more force than is necessary and reasonable to make the arrest or to prevent the arrestee's escape after the arrest
- the arrester must not do anything that is likely to cause death or grievous bodily harm unless the arrester reasonably believes that doing so is necessary to protect life or prevent serious injury, and
- the arrester must only enter premises, using only such force as is necessary and reasonable in the circumstances, when they reasonably believe that the arrestee is on the premises.

44. Arresters who do not comply with these restrictions may face criminal charges, particularly if they are found to have used more than is necessary.

45. These amendments are consistent with the rights to life, security of the person and the prohibition on torture and cruel, inhumane and degrading treatment and punishment because they are aimed at the legitimate and lawful objective of bringing a person who is the subject of an arrest warrant before a Court for the administration of justice and they are necessary, reasonable and proportionate to this objective.

<u>The right to privacy: Article 17 of the ICCPR</u>

46. Article 17 of the ICCPR provides for the right not to be subjected to arbitrary or unlawful interferences with privacy. In order for the interference not to be arbitrary, any interference must be reasonable in the particular circumstances. Reasonableness, in this

context, incorporates notions of proportionality to the end sought and necessity in the circumstances.

47. The Bill would authorise an arrester to enter and search premises and stop and detain conveyances (which includes a vehicle, a vessel and an aircraft) for the purposes of making an arrest.

48. The amendments would not change the established grounds and procedures for arrest under the Act.

49. While the amendments do limit the right to privacy, this limitation is in accordance with the law. The amendments are necessary to achieve the legitimate aim of ensuring that an arrestee can be arrested and brought before a Court for the administration of justice where they would otherwise attempt to evade arrest by staying inside premises.

50. The proposed amendments are reasonable and proportionate to this objective. An arrester can only enter premises, using such force as is necessary and reasonable, if the arrester reasonably believes that the arrestee is on the premises. Furthermore, the arrester must not enter premises between 9pm one day and 6am the next day, unless he or she reasonably believes that it would not be practicable to make the arrest at another time. This is an appropriate safeguard on the unnecessary interference with an arrestee's place of residence.

51. These amendments are not an arbitrary interference with privacy because they are necessary, reasonable and proportionate to the legitimate and lawful objective of bringing a person who is the subject of an arrest warrant before the Court for the administration of justice.

Prohibition on retrospective Criminal Laws: Article 15 of the ICCPR

52. Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence or subject to a higher penalty than was provided for under national or international law, at the time when the act or omission in question was committed.

53. The new offences created by this measure in relation to international parental child abduction will apply to a parent abductor of a child who left Australia on, after or before commencement of the measure. As the manner in which the child left Australia is a physical element of the offence this may mean that past conduct will retroactively become part of the offence.

54. However the retroactive nature of the offence only applies to when the child was removed from Australia. This element of the offence is only a circumstance in which the unlawful conduct may occur. Conduct that makes up the offence, that is, retaining the child beyond the specified period, will only be an element of the offence if the child is retained on or after commencement. Retention from prior to commencement would not make up part of an offence.

55. As such, despite the retroactive application of one element of the offence, there is no possibility that a person will be guilty of the offences due to conduct undertaken prior to the commencement of the offence. As all convictions would necessarily be due to conduct undertaken after commencement, there is no substantial injustice that arises from the retroactive nature of this element of the offence.

Conclusion

56. The Bill is compatible with human rights because it promotes the protection of human rights, and because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Preliminary

Clause 1—Short title

57. Clause 1 would provide that the Act may be cited as the *Family Law Amendment (Financial Agreements and Other Measures) Act 2015*.

Clause 2—Commencement

58. Clause 2 would provide for the commencement of each provision of the Bill.

59. Certain provisions will commence on Proclamation, or after six months (whichever is earlier). This will allow time to prepare for implementation of legislative changes before the provisions commence.

Clause 3—Schedules

60. Clause 3 would provide that any legislation specified in a Schedule to this Act is amended or repealed as set out in the Schedule and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Binding financial agreements

Overview

61. A binding financial agreement ousts the jurisdiction of the family law courts to make an order under the property settlement or spousal maintenance provisions of the Act about the financial matters to which the agreement applies.

62. Part VIIIA of the Act sets out the requirements for financial agreements made in relation to marriage, or in the contemplation of marriage. Division 4 of Part VIIIAB of the Act sets out the requirements for financial agreements made in relation to, or in contemplation of, de facto relationships.

63. There have been a number of cases challenging the validity of the provisions in the Act relating to financial agreements, in particular the requirements for entering into, interpreting and enforcing these out-of-court private arrangements.

64. The amendments in Schedule 1 to the Bill would address these uncertainties around the requirements for entering, interpreting and enforcing financial agreements. The amendments would also make changes to the coverage of spousal maintenance matters in financial agreements and introduce a statement of principles to outline the binding nature of financial agreements and reinforce that the intention of the regime is to offer certainty to parties.

Item 1—Before section 90A

65. Item 1 would insert new sections 90AL and 90AM into the Act to provide a simplified outline of Part VIIIA of the Act and explain the object of Part VIIIA and the principles underlying it.

66. The new sections are intended to:

- instruct legal practitioners in developing the scope and content of their advice to their clients
- inform parties who turn to the Act as part of the process of investigating the possibility of developing a financial agreement
- remind parties that financial agreements, which are entered into in accordance with the requirements of the Act, are binding, and
- guide the court's consideration of financial agreements that are under challenge.

New section 90AL—Simplified outline of this Part

67. Item 1 would insert a new section 90AL to provide an outline of Part VIIIA, which provides for financial agreements in relation to marriage.

New section 90AM—Object of this Part and principles underlying it

68. Item 1 would insert a new section 90AM into the Act which would outline the object of Part VIIIA and the principles underlying this object.

69. The new section would reinforce that parties to a marriage should be able to take responsibility for resolving their financial affairs, and that the intention and purpose of financial agreements is to provide certainty and finality to these parties about the resolution of their financial affairs.

70. In accordance with section 15AA of the *Acts Interpretation Act 1901*, the interpretation that best achieves the purpose or object of an Act is to be preferred to each other interpretation.

Item 2—Section 90E

71. Item 2 would insert '(1)' before 'a provision' in section 90E as a consequence of the insertion of new subsection 90E(2) by Item 4.

Item 3—Paragraph 90E(b)

72. Existing section 90E of the Act sets out the requirements for provisions in financial agreements relating to the maintenance of a spouse or child. Specifically, a provision in a financial agreement that relates to the maintenance of a spouse or a child is void unless it specifies the party for whose maintenance provision is made and the amount of, or value of the portion of property attributable to, the maintenance for the spouse or child.

73. Item 3 would replace the requirement in existing paragraph 90E(b) for a financial agreement to provide 'the value of the portion' of the relevant property with a requirement for the financial agreement to provide for 'the amount or proportion of the value' of the relevant property attributable to the maintenance of the party or child.

74. Currently, existing paragraph 90E(b) requires a financial agreement to contain an amount or value of the maintenance. This implies that an actual figure must be placed on the maintenance to be provided. However, there are practical difficulties associated with ascribing an actual figure to maintenance that is being provided by way of an entitlement to property in the event of relationship breakdown at an unspecified time in the future. In particular, it is impractical to put an actual figure to the value of an interest at the time the agreement is entered into as, in some cases, the 'value of the portion' of the property to be used for maintenance cannot be quantified at that time.

75. The amendment would mean that there is no longer a requirement for an agreement to nominate a specific value to a maintenance provision when maintenance is being made by way of entitlement to property. This would give parties the option either to nominate a specific value to the relevant property attributable to maintenance or to nominate a proportion of the relevant property attributable to maintenance.

Item 4—At the end of section 90E

76. Item 4 would insert new subsection 90E(2) to clarify that any amount, or proportion of the value of the relevant property attributable to the maintenance of a party or a child, may be nil in relation to a person or in circumstances as outlined in the agreement.

77. This would enable parties to waive spousal maintenance rights where parties are not dependent upon Government assistance, enabling parties to opt out of spousal maintenance entitlements and obligations without adverse impact on the community.

78. Existing section 90F of the Act would still apply to ensure that no provision of a financial agreement excludes or limits the court's power to make an order in relation to the maintenance of a party to a marriage if the court is satisfied that the party was unable to support themselves without Government assistance when the agreement came into effect.

Item 5—Application of amendments of section 90E

79. Subitem 5(1) would provide that the amendments to section 90E apply to all financial agreements made before, on, or after the commencement of the amendments. This means that the amendments would apply to provisions in existing financial agreements that:

- waive spousal maintenance, or

- specify an unvalued amount, or proportion of the relevant property, attributable to the maintenance of a party or child, instead of the value of the portion of the relevant property.

80. Many parties have made consensual agreements on the understanding that this was possible, and it would be contrary to public policy to cast uncertainty on the validity of those agreements.

81. Subitem 5(2) would clarify that the amendments would not validate a provision in a financial agreement if a court, prior to the commencement of the amendments, has made an order under the Act on the basis that the provision was void because of existing section 90E.

Item 6—Section 90G

82. Existing section 90G of the Act specifies when a financial agreement is binding on the parties to the agreement. The wording of existing section 90G is confusing and has led to differing judicial interpretations, and has been further complicated by two sets of amendments following its initial introduction. Item 6 of the Bill would repeal existing section 90G and substitute new sections 90G, 90GA, and 90GB to improve the clarity of the rules relating to when financial agreements are binding.

83. Since its introduction on 27 December 2000, section 90G has been substantially amended by the *Family Law Amendment Act 2003* (Cth) (Amendment Act 2003) and the *Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009* (Cth) (Efficiency Measures Amendment Act).

84. On 14 January 2005, the Amendment Act 2003 amended the section to reduce the number of matters on which the parties had to receive legal advice (from four to two) and altered the nature of one of the remaining matters. Requirements for an agreement to contain a statement about the advice provided to the parties, as well as for annexing a certificate, were retained.

85. On 4 January 2010, the Efficiency Measures Amendment Act made prospective and retrospective changes (back to the date of introduction) to the section. The primary reason for the substantial retrospective changes was to respond to the Full Court of the Family Court's decision in *Black v Black* [2008] FamCAFC 7, which held that a financial agreement entered into under Part VIIIA of the Act was not binding if it did not strictly comply with the technical requirements set out in section 90G.

86. In *Black v Black*, the Court declared the financial agreement at issue to be non-binding on the basis that, although certificates by both lawyers stating each of the parties had been provided with independent legal advice about the matters in the then paragraph 90G(1)(b) were annexed to the financial agreement, the financial agreement did not satisfy the requirement that it 'contain, in relation to each party… a statement to the effect that' each party had been provided with such advice. The Court held that strict compliance with the legislative provisions was required given that a valid financial agreement ousts the jurisdiction of the court to make adjudicative orders under section 79 of the Act about matters covered in the financial agreement.

87. The retrospective amendments in the Efficiency Measures Amendment Act aimed to ensure that no existing financial agreements were inadvertently invalidated by this technicality. The Explanatory Memorandum to the Efficiency Measures Amendment Act noted that the Family Law Council had provided advice confirming amendments to section 90G of the Act were required to restore confidence in the binding nature of financial agreements. The amendments relaxed the technical requirements for an agreement to be

binding and included special transitional provisions addressing issues raised by legal practitioners continuing to rely on old precedent documents (for example, providing independent legal advice on the matters as they applied post-14 January 2004, but annexing certificates stating that the matters on which each party had been provided advice concerned the matters on which advice was required pre-14 January 2004).

88. As a result of the amendments in the Amendment Act 2003 and the Efficiency Measures Amendment Act, there are effectively three forms of section 90G that apply to financial agreements depending on when the agreement was made. These are:

- the first section 90G—applying to financial agreements made from 27 December 2000 to 13 January 2004
- the second section 90G—applying to financial agreements made from 14 January 2004 to 3 January 2010, and
- the current section 90G—applying to financial agreements made from 4 January 2010 to present.

89. This is undesirable and unnecessarily complex. It has led to difficulty in interpreting section 90G and made it difficult for legal practitioners to advise their clients.

90. Accordingly, the Bill would repeal existing section 90G and replace it with new sections 90G, 90GA and 90GB.

New section 90G—When financial agreements are binding

91. New section 90G would set out when financial agreements made after 26 December 2000 (when provision was first made in the Act for binding financial agreements) are binding.

92. New subsection 90G(1) would provide that, for the purposes of the Act, a financial agreement is only binding on the parties where the following conditions are met:

- the agreement is signed by all parties
- either,
  - all conditions in new section 90GA that are relevant to the agreement are met, or
  - a court has made an order under new section 90GB declaring that the agreement is binding
- the agreement has not been terminated, and
- the agreement has not been set aside by a court.

93. This general rule would apply to financial agreements made after 26 December 2000. This is because Part VIIIA of the Act commenced on 27 December 2000 and, consequently, financial agreements made before this date cannot be binding on the parties under the Act.

94. New subsection 90G(2) would provide that a court may make orders for the enforcement of a financial agreement as it considers necessary. This re-enacts existing subsection 90G(2) without change.

95. The notes to the section provide guidance to the reader about related provisions, including sections 90J (termination of a financial agreement) and 90K (circumstances in which court may set aside a financial agreement or termination agreement) of the Act, and section 48 of the *Evidence Act 1995* (for the manner in which contents of a financial agreement may be proved).

Section 90GA—Conditions relating to legal advice for financial agreement or termination agreement to be binding

96. New subsection 90GA would clarify the conditions relating to legal advice for a financial agreement or termination agreement to be binding, and ensure that the requirements for financial agreements and termination agreements are consistent. New subsection 90GA is also intended to make it as clear as possible what conditions apply to which agreements, depending on the time they were entered into. Two groups of conditions would apply:

- new subsection 90GA(2) would provide that a legal practitioner must provide each spouse party with a statement that, before the agreement was signed, the legal practitioner provided that party with independent legal advice about certain matters
- new subsection 90GA(3) would provide further conditions relating to the statement of independent legal advice.

97. Statement about legal advice given before agreement signed: new subsection 90GA(2) would provide that a condition to be met (for an agreement made after 26 December 2000) is that each spouse party must have been provided with a signed statement by a legal practitioner that, before the agreement was signed, he or she provided that party with independent legal advice about certain matters. The statement is able to be provided either before or after the agreement was signed.

98. The table following new subsection 90GA(2) would outline the matters to be covered by the independent legal advice given by the legal practitioner, depending on when the agreement was entered into. The table sets out all of the different matters that legal advice has been required to cover at different periods under the Act (due to the amendments and transitional provisions outlined above). There is no policy change in respect of the legal advice requirements for pre-commencement agreements.

99. Table Items (1)–(3) would provide that for agreements entered into before commencement of the Bill, a legal practitioner must have provided a statement that the independent legal advice provided covered the following matters:

- for agreements entered into between 27 December 2000 and 13 January 2004, inclusive:
  - the effect of the agreement on the rights of the party receiving the advice
  - whether or not it was to the advantage (financially or otherwise) of that party to make the agreement (at the time the advice was provided)
  - whether or not it was prudent for that party to make the agreement (at that time); and
  - whether or not, at that time and in light of such circumstances as were, at the time, reasonably foreseeable, the provisions of the agreement were fair and reasonable
- for agreements entered into between 14 January 2004 and 3 January 2010, inclusive: either the matters spelt out in Table Item (1) (outlined above), or the matters spelt out in the Table Item (3) (outlined below).
- for agreements entered into between 4 January 2010 and the day before commencement of these proposed amendments, inclusive: the effect of the agreement on the rights of the party receiving the advice; and the advantages and disadvantages to that party of making the agreement (at the time the advice was provided)

100. As set out in Note 1, these requirements reflect the requirements applicable in the relevant time periods. Note 3 to new subsection 90GA(2) explains that for agreements made before 4 January 2010, the statement may have been provided by the legal practitioner in the form of a certificate annexed to the agreement.

101. Table Item (4) provides that for financial agreements entered into after or when new section 90GA commences, a legal practitioner is required to provide a statement that he or she has provided independent legal advice about the effect of the agreement on the rights of the party under the Act. This policy change would substantially simplify the obligation on legal practitioners by limiting the requirement for independent legal advice to the effects of the agreement on the rights of the party under the Act.

102. Extra conditions for agreements made after 3 January 2010: the table following new subsection 90GA(3) would set out additional conditions to be met for agreements made after 3 January 2010.

103. Table Item (1) provides that, for agreements made prior to the commencement of the proposed new subsection, the statement provided to a spouse party under subsection 90GA(2) must also be given to the other spouse party or to a legal practitioner acting for the other spouse party. This was not a requirement in relation to financial agreements prior to 4 January 2010. It was introduced by the Efficiency Measures Amendment Act, which commenced on 4 January 2010.

104. Table Item (2) provides that, for agreements made on or after the commencement of the proposed new subsection:

- the statement provided to a spouse party under subsection 90GA(2) must also be given to the other spouse party or to a legal practitioner for the other spouse party
- the spouse party must make a written acknowledgement that he or she was provided with independent legal advice about the effect of the agreement on his or her rights under the Act before signing the agreement (this written acknowledgment can be made either before or after signing the agreement), and
- the acknowledgement must be given to the other spouse party or to a legal practitioner for the other spouse party.

105. The new condition requiring spouse parties to make a written acknowledgement about independent legal advice, and provide that acknowledgement to the other spouse party or their legal practitioner, is intended to increase certainty by limiting the potential for parties to dispute the validity of financial agreements on the basis that they were not provided with independent legal advice.

106. Agreement, statement and acknowledgement may be separate: new subsection 90GA(4) would provide that, for the purposes of new subsections 90GA(2) and (3), it does not matter whether the statement is annexed to the financial agreement, or, where relevant, that the acknowledgement is in the same document as, or annexed to, either the statement or the agreement. This is consistent with existing paragraph 90G(1)(c) which provides that the statement does not need to be annexed to the agreement.

107. Court not to consider provision of independent legal advice: new subsection 90GA(5) would provide that, in determining whether an agreement is binding, the court is not to consider whether the legal advice described in new subsection 90GA(2) has actually been provided. This means that the court should not go behind the statement provided by a legal practitioner to examine the content of advice. This would increase certainty for parties and for legal practitioners, by making it clear that if the conditions relating to statements about

legal advice, as well as the extra conditions for agreements made after 3 January 2010 if applicable, are met, then that legal advice is taken to have been provided.

New section 90GB—Court declaring financial agreement or termination agreement to be binding

108. New section 90GB would provide that, on application by a spouse party, a court must make an order declaring that a financial agreement or a termination agreement is binding on the parties to the agreement, even if all of the relevant conditions in section 90GA for the agreement to be binding have not been met, unless it is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made).

109. This reflects the policy of existing subsection 90G(1A) of the Act.

110. New subsection 90GB(3) would clarify that existing section 90KA of the Act (which outlines the powers of the court in proceedings relating to whether a financial agreement or a termination agreement is valid, enforceable or effective, and that the proceedings are to be determined according to the principles of law and equity) applies in relation to such an application (an enforcement application).

Item 7—Section 90H

111. Item 7 would insert '(1)' before 'A financial' in section 90H, as a consequence of the insertion of new subsection 90H(2) by Item 8.

Item 8—At the end of section 90H

112. Existing section 90H of the Act provides that a financial agreement will continue to operate despite the death of a party to the agreement and will be binding on the legal personal representative of the deceased party.

113. Item 8 would insert four new subsections into section 90H to provide that, although a financial agreement continues to operate despite the death of a party to the agreement, a provision for ongoing spousal maintenance in a financial agreement would terminate unless the agreement specifically provides for the maintenance to continue.

114. New subsections 90H(2)–(4) would cover issues around the maintenance obligations in the circumstances of the death of the payee or payer. A provision in a financial agreement for the maintenance of a spouse party would cease to have effect on the death of the spouse party (payee) or the person liable to pay maintenance (payer), except if the agreement otherwise provides. The death of the payee or payer would not prevent the recovery of arrears of maintenance due before the death. This is consistent with existing subsection 82(8) of the Act, which deals with the recovery of arrears under a court order for spousal maintenance which has ceased to have effect. This would ensure that the mechanism for the recovery of arrears in relation to a financial agreement is consistent with that for court-ordered maintenance.

115. New subsection 90H(5) would allow for the recovery of maintenance paid after the provision for the payment of maintenance ceases to have effect because of the death of either the payee or the payer, by providing that if an amount is paid under the maintenance provision after it ceases to have effect, the payer or their legal personal representative if the payer has died, may apply to the court to recover the overpayments from the payee. This is consistent with existing subsection 82(7) of the Act, which deals with the recovery of monies paid after the cessation of court-ordered spousal maintenance. This would ensure that the mechanism for the recovery of overpayments in relation to a financial agreement is consistent

with that for court-ordered maintenance. A note to the subsection would inform readers that the courts specified in section 39 of the Act have jurisdiction to hear such applications, subject to the provisions in Part V of the Act.

Item 9—Application of amendments of section 90H

116. Item 9 would provide that new subsections 90H(2), (3), (4) and (5) apply to financial agreements made on or after the commencement of those subsections.

Item 10—After section 90H

117. Item 10 would insert new section 90HA into the Act.

118. Section 90HA would specify that ongoing spousal maintenance obligations under a financial agreement terminate in the event of the party receiving the maintenance (the payee) entering into a de facto relationship with a person other than the other party to the agreement receiving the maintenance or remarrying, unless the agreement specifically provides otherwise.

119. The section uses the phrases 'marries again' and 'later marriage' to attract the definition of marriage (including a void marriage) in section 90A of the Act. The heading to section 90HA uses 'remarries' and the heading to subsection 90HA(4) uses 'remarriage' for brevity.

120. Maintenance of spouse party who remarries or enters into de facto relationship: new subsections 90HA(1)–(2) would provide that ongoing spousal maintenance obligations under a financial agreement terminate in the event of the payee marrying again, or entering into a de facto relationship with someone other than the other spouse party, unless the agreement provides otherwise.

121. The re-entry of a party into a de facto relationship with the other spouse party would not terminate ongoing maintenance obligations under a financial agreement because it is not uncommon for parties to resume cohabitation in an attempt to reconcile. If this resumption of cohabitation extinguished ongoing maintenance obligations, and the couple then separated again, the payee would have no remedy by virtue of his or her maintenance being an issue dealt with by a financial agreement.

122. New subsection 90HA (3) would provide that the termination of the provision by virtue of a remarriage or re-partnering would not prevent the recovery of arrears of maintenance due prior to the remarriage or re-partnering. This is consistent with existing subsection 82(8) of the Act, which deals with the recovery of arrears under a court order for spousal maintenance which has ceased to have effect, and ensures that the mechanism for the recovery of arrears in relation to a financial agreement is consistent with arrangements for court-ordered maintenance.

123. Notice of remarriage or entry into de facto relationship: new subsection 90HA(4) would provide that if a maintenance provision ceases to have effect due to the remarriage or de facto partnering of the payee, the payee must inform the spouse party liable for paying the maintenance (payer) of the date of the remarriage or de-facto partnering without delay.

124. Recovery of amount paid after cessation: new subsection 90HA(5) would provide that a payer, or their legal personal representative if they have died, may apply to a court to recover overpayments of maintenance from the payee. This would allow for the recovery of maintenance paid after the obligations ceased to have effect because of the remarriage or de facto partnering of the payee. This is consistent with existing subsection 82(7) of the Act, which deals with the recovery of monies paid after the cessation of court orders for spousal

maintenance, and ensures that the mechanism for the recovery of overpayments in relation to a financial agreement is consistent with arrangements for court-ordered maintenance. It is also consistent with new subsection 90H(5).

125. A note to the subsection would inform readers that the courts specified in section 39 of the Act have jurisdiction to hear such applications, subject to the provisions in Part V of the Act.

Item 11—Application of section 90HA

126. Item 11 would provide that new section 90HA applies to financial agreements made on or after the commencement of the section.

Item 12—Section 90J

127. Existing section 90J of the Act sets out when an agreement to terminate a financial agreement will be binding.

128. Item 12 would repeal existing section 90J of the Act and substitute a new section 90J to clarify when a financial agreement may be terminated and when a termination agreement will be binding. The section would only apply to termination agreements made after 26 December 2000. This is because Part VIIIA of the Act commenced on 27 December 2000 and, consequently, termination agreements made before this date cannot be binding on the parties.

129. The current drafting of existing section 90J, like existing section 90G, has led to confusion, different judicial interpretations and unintended consequences. The requirements for both financial agreements and termination agreements should be as consistent as possible.

130. Termination only by agreement: new subsection 90J(1) would preserve the policy of current subsection 90J(1) by providing that parties to a financial agreement may only terminate the agreement by including a provision to that effect in another financial agreement (as mentioned in existing subsections 90B(4), 90C(4) or 90D(4)), or by making a written agreement (a termination agreement) to that effect.

131. Conditions for termination agreement to be binding: new subsection 90J(2) would provide that a termination agreement (made after 26 December 2000) is only binding if:

- the agreement is signed by all parties to the agreement, and
- either,
  - all conditions in new section 90GA that are relevant to the agreement are met, or
  - a court has made an order under new section 90GB declaring that the agreement is binding, and
- the agreement has not been set aside by a court.

132. These conditions reflect those applying to financial agreements generally.

133. Court orders after termination of financial agreement: new subsection 90J(3) would reproduce current subsection 90J(3) without change. It would provide that, on application by a party to the financial agreement that has been terminated, or any other interested person, a court may make such an order (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

134. A note to the subsection would assist readers by directing them to section 48 of the Evidence Act for rules for how the contents of a financial agreement may be proved.

Item 13—Transitional and saving provisions relating to sections 90G and 90J of the Family Law Act 1975

135. Item 13 would provide transitional and savings provisions for the amendments to sections 90G and 90J. These provisions are intended to ensure that decisions of courts made under previous provisions cannot be relitigated because of amendments that would be made by the Bill.

136. Subitem 13(1) provides that:

- a court order made under subsections 90G(1B) or 90J(2B) of the Act before the repeal of those sections by these amendments has effect on and after the repeal as if the order had been made under new section 90GB
- the repeal and substitution of section 90G of the Act by these amendments does not affect the validity of a court order made under subsection 90G(2) of the Act before its repeal, and
- the repeal and substitution of section 90J of the Act by these amendments does not affect the validity of a court order made under subsection 90J(3) of the Act before its repeal.

137. In relation to the effect of other court orders made on the basis that the financial agreement was not binding, subitem 13(2) provides that despite new sections 90G, 90GA, 90GB and 90J of the Act, a financial agreement made before the commencement of those sections does not bind the parties to the agreement for the purposes of the Act if, before the commencement of the amendments, a court order was made under sections 79 or 83 of the Act on the basis that the agreement did not bind the parties.

Items 14—Paragraph 90K(1)(d); 17—After subsection 90K(2)

138. Existing section 90K of the Act sets out a number of circumstances in which a court may set aside a financial agreement or termination agreement. Existing paragraph 90K(1)(d) provides that a court can set aside either type of agreement if, since making the agreement, there has been a material change in circumstances relation to the care, welfare and development of the child, and, as a result, a child would suffer hardship if the court does not set the agreement aside.

139. Items 14 and 17 would amend this rule with the effect that, for agreements entered into after a relationship breakdown, agreements could only be set aside in exceptional circumstances relating to the care, welfare, and development of the child of the marriage. This test is consistent with that for setting aside court orders relating to property under existing paragraph 79A(1)(d) of the Act.

140. Item 14 would repeal existing paragraph 90K(1)(d) and replace it with a new paragraph that would provide that the court can only set aside an agreement where, if the court did not set aside the agreement, a child would suffer hardship for a reason described in new subsection 90K(2A), which would be inserted by Item 17.

141. New subsection 90K(2A) would provide that the relevant reason for the hardship would depend upon when the financial agreement was entered into.

- for agreements entered into before a separation declaration is made, the test for hardship would be a ‘material change in circumstances that relate to the care, welfare and development of the child of the marriage’.
- for agreements entered into at the same time as or after making a declaration of separation, the test for determining hardship would be “circumstances of an

‘exceptional nature’ that relate to the care, welfare and development of the child of the marriage”.

142. The difference in tests reflects the possibility that, for agreements made prior to separation, a substantial period of time may have elapsed and the circumstances of the couple have changed in ways not contemplated by the original financial agreement. For example, a couple may have had a child since making the agreement whose needs may not be appropriately reflected in the agreement.

143. For agreements entered into at the time of or after separation, it is appropriate the test be set at a higher bar as the couple should be in a position to anticipate their future financial needs relating to children the time of making the agreement. This amendment would also improve consistency between section 90K and section 79A of the Act (which provides for the setting aside of court orders altering property interests).

Item 15—Paragraph 90K(1)(f)

144. Item 15 would omit ‘Part; or’ and substitute ‘Part’ from paragraph 90K(1)(f) as a consequence of the repeal of paragraph 90K(1)(g) by Item 16.

Item 16—Paragraph 90K(1)(g)

145. Existing paragraph 90K(1)(g) of the Act allows the court to set aside an entire financial or termination agreement if it covers a superannuation interest that is an ‘unsplittable interest’ under Part VIIIB (Superannuation interests), even if this is an insignificant part of the agreement.

146. This item would repeal paragraph 90K(1)(g).

147. Existing section 90MD in Part VIIIB of the Act defines ‘unsplittable interest’ as ‘a superannuation interest described by the regulations for the purposes of this definition’. Regulations 11(1A) and 11(1B) of the *Family Law (Superannuation) Regulations 2001* describe certain minimal interests as an ‘unsplittable interest’.

148. While it might not be cost effective to split superannuation of minimal value in family law matters, it should not follow that an entire financial agreement can be set aside on the basis that it includes an ‘unsplittable interest’. This item would remove an ‘unsplittable interest’ from the circumstances in which a court may set aside a financial agreement or termination agreement so that financial agreements cannot be set aside solely on the basis that it includes an ‘unsplittable interest’.

149. The repeal of paragraph 90K(1)(g) means that the treatment of ‘unsplittable interests’ will be consistent across financial agreements and superannuation agreements (a part of a financial agreement under Part VIIIA that deals with superannuation interests). Superannuation agreements cannot be set aside on the basis that they contain an ‘unsplittable interest’ because existing subsection 90MH(3) of the Act already provides that a superannuation agreement cannot be enforced under Part VIIIA, and the operative provisions of Part VIIIB for splitting (existing sections 90MJ and 90MS and 90MT) expressly do not apply to unsplittable interests (see existing paragraph 90MJ(1)(e) and subsections 90MS(2) and 90MT(1)).

Item 18—Application of amendments of section 90K

150. Subitem 18(1) would provide that the amendments to section 90K of the Act apply to financial agreements made on or after the commencement of the amendments. Subitem 18(2) would provide that the repeal of paragraph 90K(1)(g) also applies to agreements made before

the repeal. This would mean that parties with existing financial agreements cannot challenge their validity solely on the basis that the agreement includes an 'unsplittable interest'.

151. Subitem 18(3) would provide that, notwithstanding these amendments, a court order to set aside a financial agreement or termination agreement on the basis of the circumstances outlined in paragraphs 90K(1)(d) and (g), before the commencement of the amendments, will be valid.

Part VIIIAB

152. Division 4 (Financial Agreements) of Part VIIIAB (Financial Matters Relating to De facto Relationships) of the Act provides for financial agreements between parties to a de facto relationship (Part VIIIAB financial agreements). A Part VIIIAB financial agreement can only deal with matters after the de facto relationship to which the agreement relates has broken down. This is because the operation of the provisions is confined by the specific terms of referred state powers that provide the Commonwealth with the jurisdiction over de facto financial matters.

153. A Part VIIIAB financial agreement is binding when it is made in compliance with section 90UJ of the Act. The agreement will not, however, have force or effect for the purposes of the Act, to the extent that it deals with the property or financial resources of the spouse parties, unless a section 90UF separation declaration is made.

Item 19—Before section 90UA

154. Item 19 would insert new sections 90UAA and 90UAB to provide a simplified outline of Part VIIIAB of the Act and explain the objects and the principles underlying it.

155. The new sections are intended to:

- instruct legal practitioners in developing the scope and content of their advice to their clients
- inform parties who turn to the Act as part of the process of investigating the possibility of developing a financial agreement
- remind parties that financial agreements, which are entered into in accordance with the requirements of the Act, are binding, and
- guide the court's consideration of financial agreements that are under challenge.

New section 90UAA—Simplified outline of this Division

156. Item 19 would insert a new section 90UAA into the Act to provide an outline of Part VIIIAB, which provides for financial agreements in relation to de facto relationships.

New section 90UAB—Object of this Division and principles underlying it

157. Item 19 would insert a new section 90UAB into the Act which would outline the object of Division 4 of Part VIIIAB and the principles underlying this object.

158. New section 90UAB would reinforce that parties to a de facto relationship should be able to take responsibility for resolving their financial affairs, and that the intention and purpose of financial agreements is to provide certainty and finality to these parties about the resolution of their financial affairs.

159. In accordance with section 15AA of the *Acts Interpretation Act 1901*, the interpretation that best achieves the purpose or object of an Act is to be preferred to each other interpretation.

Item 20—Paragraph 90UH(1)(b)

160. Existing section 90UH of the Act sets out the requirements for provisions in a Part VIIAB financial agreements relating to the maintenance of a party or a child. A provision in a financial agreement that relates to the maintenance of a spouse or a child is void unless it specifies the party for whose maintenance provision is made and the amount of, or value of the portion property attributable to, the maintenance for the spouse or child.

161. Item 20 would replace the requirement in existing paragraph 90UH(1)(b) for a Part VIIAB financial agreement to provide the 'value of the portion' of the relevant property with a requirement for the Part VIIAB financial agreement to provide for 'the amount or proportion of the value' of the relevant property attributable to the maintenance of the party or child.

162. Existing paragraph 90UH(1)(b) requires a financial agreement to contain an amount or value of the maintenance. This implies that an actual figure must be placed on the maintenance to be provided. However, there are practical difficulties associated with ascribing an actual figure to maintenance that is being provided by way of an entitlement to property in the event of relationship breakdown at an unspecified time in the future. In particular, it is impractical to put an actual figure to the value of an interest at the time the agreement is entered into as, in some cases, the 'value of the portion' of the property to be used for maintenance cannot be quantified at that time.

163. The amendment would mean that there is no longer a requirement for an agreement to nominate a specific value to a maintenance provision when maintenance is being made by way of entitlement to property. This would give parties the option either to nominate a specific value to the relevant property attributable to maintenance or to nominate a proportion of the relevant property attributable to maintenance.

Item 21—After subsection 90UH(1)

164. Item 20 would insert a new subsection 90UH(1A) to clarify that any amount, or proportion of the value of the relevant property attributable to the maintenance of a party or a child may be nil in relation to a person or in circumstances as outlined in the Part VIIIAB agreement.

165. This would enable parties to waive spousal maintenance rights where parties are not dependent upon Government assistance and can accordingly opt out of spousal maintenance entitlements and obligations without adverse impact on the community.

166. Existing section 90UI of the Act would still apply to ensure that a Part VIIIAB financial agreement does not exclude or limit the court's power to make an order for maintenance of a party if the court is satisfied that a party would be unable to support themselves without Government assistance when the agreement came into effect.

Item 22—Application of amendments of section 90UH

167. Subitem 22(1) would provide that the amendments to section 90UH apply to all Part VIIIAB financial agreements made before, on, or after the commencement of the amendments. This means that the amendments would apply to provisions in existing Part VIIIAB financial agreements that:

- waive spousal maintenance, or
- specify an unvalued amount or proportion of the relevant property attributable to the maintenance of a party or child instead of the value of the portion of the relevant property.

168. Many parties have made consensual agreements on the understanding that this was possible, and it would be contrary to public policy to cast uncertainty on the validity of those agreements.

169. Subitem 22(2) would clarify that the amendments would not invalidate a provision in a Part VIIIAB financial agreement if a court, prior to the commencement of the amendments, has made an order under the Act on the basis that the provision was void because of existing section 90UH of the Act.

Item 23—Section 90UJ

170. Item 23 would repeal existing section 90UJ and replace it with new sections 90UJ, 90UJA, and 90UJB.

171. Existing section 90UJ of the Act specifies when a Part VIIIAB financial agreement is binding on the parties to the agreement. In a similar way to existing section 90G of the Act, the current wording of section 90UJ of the Act is confusing and has led to differing judicial interpretations. Item 23 would repeal existing section 90UJ and substitute new sections 90UJA and 90UJB to improve the clarity of the rules relating to when financial agreements are binding.

172. Since its introduction on 1 March 2009, section 90UJ of the Act has been amended by the Efficiency Measures Amendment Act. The primary reason for the changes was to respond to the Full Court of the Family Court's decision in *Black v Black*, which held that a financial agreement entered into under Part VIIIA of the Act was not binding if it did not strictly comply with the technical requirements set out in section 90G.

173. The amendments relaxed the technical requirements for an agreement to be binding and included special transitional provisions addressing issues raised by legal practitioners continuing to rely on old precedent documents.

174. Existing section 90UJ was subject to transitional provisions following the amendments made by the Efficiency Measures Amendment Act, and can be confusing and difficult to interpret.

New section 90UJ—When financial agreements are binding

175. New section 90UJ would set out when Part VIIIAB financial agreements made after 28 February 2009 (when provision was first made in the Act for Part VIIIAB financial agreements) are binding.

176. New subsection 90UJ(1) would provide that, for the purposes of the Act, a Part VIIAB financial agreement (unless it is covered by existing section 90UE) is only binding on the parties to the agreement if:

- the agreement is signed by all parties,
- either,
  - all conditions in new section 90UJB that are relevant to the agreement are met, or
  - a court has made an order under new section 90UJB declaring that the agreement is binding,
- the agreement has not been terminated, and
- the agreement has not been set aside by a court.

177. This general rule would apply to financial agreements made after 28 February 2009. This is because Division 4 of Part VIIIAB of the Act commenced on 1 March 2009 and, consequently, financial agreements in relation to de facto relationships made before this date

cannot be binding on the parties under the Act. The rule does not apply to financial agreements covered by existing section 90UE as such agreements have been made under legislation in non-referring states and have later become financial agreements covered by the Act, and therefore do not need to meet the same requirements to be held to be binding.

178. New subsection 90UJ(2) re-enacts existing subsection 90UJ(2) without change and provides that a Part VIIIAB financial agreement covered by existing section 90UE is only binding on the parties to the agreement if the agreement has not been terminated or set aside by a court. State laws applying to de facto financial agreements, in substitution for justiciable remedies in relation to maintenance and property adjustment, have varying degrees of procedural requirements that do not readily align with the formalities required under section 90UJ. Paragraph 90UM(1)(k) and subsection 90UM(5) allow a court in certain circumstances to set aside a Part VIIIAB financial agreement covered by section 90UE if the procedural requirements under which it was made are not similar to those under section 90UJ. This aims to apply federal law as widely as possible, consistent with the scope of the powers referred by states. It also attempts to maintain any reasonable expectation by parties to agreements made outside the scope of federal law that their agreement will continue to be binding, even if federal law later applies to regulate the legal effect of their agreements.

179. The notes to new subsection 90UJ(2) point out that new subsection 90UJ(2) (instead of subsection 90UJ(1)) also applies to an agreement that is treated as a Part VIIIAB financial agreement because of Items 87, 88, 91 or 92 of Schedule 1 to the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (De Facto Amendment Act). These items are transitional provisions relating to the application of federal law under the amendments made by the De Facto Amendment Act in relation to certain agreements made in a state or territory that were participating jurisdictions at the commencement of Part VIIIAB (Items 87 and 88), and to the application of the amendments made by the De Facto Amendment Act to de facto relationships to which the law of a state that was not a participating jurisdiction at commencement of Part VIIIAB applied, but which subsequently becomes a participating jurisdiction (Items 91 and 92). Such a state would become a participating jurisdiction following its referral of power to the Parliament of the Commonwealth of financial matters relating to parties to de facto relationships arising out of the breakdown of those relationships.

180. New subsection 90UJ(3) would re-enact existing subsection 90UJ(3) without change, and provides that a Part VIIIAB financial agreement ceases to be binding if, after the making of the agreement, the parties to the agreement marry each other.

181. New subsection 90UJ(4) would re-enact existing subsection 90UJ(4) without change, which clarifies that a court may make orders for the enforcement of a Part VIIIAB financial agreement as it considers necessary.

New section 90UJA—Conditions relating to legal advice for financial agreement or termination agreement to be binding

182. New section 90UJA would outline the conditions relating to legal advice that need to be met for a Part VIIIAB financial agreement (except for an agreement covered by existing section 90UE) or termination agreement to be binding, and ensure that the requirements for Part VIIAB financial agreements and termination agreements are consistent. New section 90UJA is also intended to make it as clear as possible what conditions apply to which agreements, depending on the time they were entered into. Two groups of conditions would apply:

- New subsection 90UJA(2) would provide that a legal practitioner must provide each spouse party with a statement that, before the agreement was signed, the legal practitioner provided that party with independent legal advice about certain matters
- New subsection 90UJA(3) would provide further conditions relating to the statement of independent legal advice.

183. Statement about legal advice given before agreement signed: new subsection 90UJA(2) would provide that a condition to be met (for an agreement made after 28 February 2009) is that each spouse party must have been provided with a signed statement by a legal practitioner that, before the agreement was signed, he or she provided that party with independent legal advice about certain matters. The statement can be provided either before or after the agreement was signed.

184. The table following new subsection 90UJA(2) would outline the matters to be covered by the independent legal advice given by the legal practitioner, depending on when the agreement was entered into. The table sets out the different matters that legal advice is required to cover depending on when the agreement was made.

185. For Part VIIIAB financial agreements entered into after or when new section 90UJA commences, the independent legal advice would be required to cover the effect of the agreement on the rights of that party under the Act. This policy change would substantially simplify the obligation on legal practitioners by limiting the requirement for independent legal advice to the effects of the agreement on the rights of the party under the Act.

186. For agreements entered into between 1 March 2009 and the commencement of the new section inclusive, legal advice must have covered the effect of the agreement on the rights of the party receiving the advice, and the advantages and disadvantages to that party of making the agreement (at the time the advice was provided). As Note 1 explains, these requirements reflect the requirements applicable during that time period.

187. Note 3 to new subsection 90UJA(2) explains that for agreements made before 4 January 2010, the statement may have been provided by the legal practitioner in the form of a certificate annexed to the agreement. This reflects the language used by the precursors to new subsection 90UJA(2).

188. Extra conditions for agreements made after 3 January 2010: the table following new subsection 90UJA(3) would set out additional conditions to be met for Part VIIIAB financial agreements made after 3 January 2010.

189. Table Item (1) provides that, for agreements made prior to the commencement of the new subsection, the statement provided to a spouse party under subsection 90UJA(2) must also be given to the other spouse party or to a legal practitioner for the other spouse party. This was not a requirement in relation to Part VIIIAB financial agreements prior to 4 January 2010. It was introduced by the Efficiency Measures Amendment Act, which commenced on 4 January 2010.

190. Table Item (2) provides that, for agreements made on or after the commencement of the proposed new subsection:

- the statement provided to a spouse party under subsection 90UJA(2) must also be given to the other spouse party or to a legal practitioner for the other spouse party
- the spouse party must make a written acknowledgement that he or she was provided with independent legal advice about the effect of the agreement on his or her rights under the Act before signing the agreement (this written acknowledgment can be made either before or after signing the agreement), and

- the acknowledgement must be given to the other spouse party or to a legal practitioner for the other spouse party.

191. The new condition requiring spouse parties to make a written acknowledgement about independent legal advice, and provide that acknowledgement to the other spouse party or their legal practitioner, would increase certainty by limiting the potential for parties to dispute the validity of financial agreements on the basis that they were not provided with independent legal advice.

192. Agreement, statement and acknowledgement may be separate: new subsection 90UJA(4) would provide that, for the purposes of new subsections 90UJA(2) and (3), it does not matter whether the statement is annexed to the Part VIIIAB financial agreement, or, where relevant, that the acknowledgement is in the same document as, or annexed to, either the statement or the agreement. This is consistent with existing paragraph 90UJ(1)(c) which provides that the statement does not need to be annexed to the agreement.

193. Court not to consider provision of independent legal advice: new subsection 90UJA(5) would provide that, in determining whether an agreement is binding, the court is not to consider whether the legal advice described in new subsection 90UJA(2) has actually been provided. This means that the court should not go behind the statement provided by a legal practitioner to examine the content of advice. This would increase certainty for parties and for legal practitioners, by making it clear that if the conditions relating to statements about legal advice, as well as the extra conditions for agreements made after 3 January 2010 if applicable, are met, then that legal advice is taken to have been provided.

New section 90UJB—Court declaring financial agreement or termination agreement to be binding

194. New section 90UJB would provide that, on application by a spouse party, a court must make an order declaring that a Part VIIIAB financial agreement or termination agreement is binding on the parties to the agreement, even if not all of the relevant conditions in section 90UJA for the agreement to be binding are met, unless the court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made). This reflects the policy of existing paragraph 90UJ(1A)(c).

195. New subsection 90UJB(3) would clarify that existing section 90UN of the Act (which outlines the powers of the court in proceedings relating to whether a financial agreement in relation to a de facto relationship or termination agreement is valid, enforceable or effective, and that the proceedings are to be determined according to the principles of law and equity) would apply in relation to such an application (an enforcement application).

Item 24—Section 90UK

196. Item 24 would insert '(1)' before 'A Part' in section 90UK, as a consequence of the insertion of new subsection 90UK(2) by Item 25.

Item 25—At the end of section 90UK

197. Existing section 90UK of the Act provides that a Part VIIIAB financial agreement will continue to operate despite the death of a party to the agreement and will be binding on the legal personal representative of the deceased party.

198. Item 25 would insert four new subsections at the end of section 90UK to provide that, although a Part VIIIAB financial agreement continues to operate despite the death of a party

to the agreement, a provision for ongoing spousal maintenance in the agreement would terminate unless the agreement specifically provides for the maintenance obligation to continue.

199. Cessation of maintenance on death of payee or payer: new subsections 90UK(2)–(4) would cover issues around the maintenance obligations in the circumstances of the death of the payer or payee. A provision for maintenance of a spouse party in a Part VIIIAB financial agreement would cease to have effect on the death of either the spouse party (payee) or the person liable under the agreement for the maintenance (payer), except if the agreement otherwise provides. The death of the payee or payer would not prevent the recovery of arrears or maintenance due before the death. This is in keeping with existing subsection 82(8) of the Act, which deals with the recovery of arrears under a court order for spousal maintenance which has ceased to have effect. This would ensure that the mechanism for the recovery of arrears in relation to a Part VIIIAB financial agreement is consistent with that for court-ordered maintenance.

200. New subsection 90UK(5) would allow for the recovery of maintenance paid after the provision for the payment of maintenance ceases to have effect because of the death of either the payee or the payer, by providing that if an amount is paid under the maintenance provision after it ceases to have effect, the payer or their legal personal representative if the payer has died, may apply to the court to recover the overpayments from the payee. This is consistent with existing subsection 82(7) of the Act, which deals with the recovery of monies paid after the cessation of court-ordered spousal maintenance. This would ensure that the mechanism for the recovery of overpayments under a Part VIIIAB financial agreement is consistent with that for court-ordered maintenance. A note to the subsection would inform readers that the courts specified in existing section 39B of the Act have jurisdiction to hear such applications, subject to the provisions in Part V of the Act.

Item 26—Application of amendments of section 90UK

201. Item 26 would provide that new subsections 90UK(2), (3), (4) and (5) would apply to Part VIIIAB financial agreements made on or after the commencement of those subsections.

Item 27—After section 90UK

202. Item 27 would insert a new section 90UKA into the Act.

203. Maintenance of spouse party who enters into another de facto relationship or marries: new subsections 90UKA(1)–(2) would provide that ongoing spousal maintenance obligations under a Part VIIIAB financial agreement terminate when the payee enters into a de facto relationship with someone other than the other spouse party, or marries, unless the agreement provides otherwise.

204. The re-entry of a party into a de facto relationship with the other spouse party would not terminate ongoing maintenance obligations under a financial agreement because it is not uncommon for parties to resume cohabitation in an attempt to reconcile. If this resumption of cohabitation extinguished ongoing maintenance obligations, and the couple then separated again, the payee would have no remedy by virtue of his or her maintenance being an issue dealt with by a financial agreement.

205. New subsection 90UKA(3) would provide that the termination of the provision by virtue of a marriage or re-partnering would not prevent the recovery of arrears of maintenance due prior to the remarriage or re-partnering. This is consistent with existing subsection 82(8) of the Act, which deals with the recovery of arrears under a court order for spousal maintenance which has ceased to have effect, and ensures that the mechanism for the

recovery of arrears in relation to a Part VIIIAB financial agreement is consistent with arrangements for court-ordered maintenance.

206. Notice of later entry into de facto relationship or marriage: new subsection 90UKA(4) would provide that if a maintenance provision ceases to have effect due to the later de facto partnering or marriage of the payee, the payee must inform the payer of the date of the later de facto partnering or marriage without delay.

207. Recovery of amount paid after cessation: new subsection 90UKA(5) would provide that a payer, or their legal personal representative if the payer was deceased, may apply to a court to recover overpayments of maintenance from the payee, or their legal personal representative if the payee has died. This allows for the recovery of maintenance paid after the obligations ceased to have effect because of the later de facto partnering or marriage of the payee. This is consistent with existing subsection 82(7) of the Act, which deals with the recovery of moneys paid after the cessation of court-ordered spousal maintenance, and ensures that the mechanism for the recovery of overpayments in relation to a Part VIIIAB financial agreement is consistent with arrangements for court-ordered maintenance. It would also be consistent with new subsections 90HA(5) and 90H(5).

208. A note to the new subsection would inform readers that the courts specified in existing section 39B of the Act have jurisdiction to hear such matters, subject to the rest of Part V of the Act.

Item 28—Application of section 90UKA

209. Item 28 would provide that new section 90UKA applies to Part VIIIAB financial agreements made on or after the commencement of the section.

Item 29—Section 90UL

210. Existing section 90UL of the Act sets out when an agreement to terminate a Part VIIIAB financial agreement will be binding.

211. Item 29 would repeal existing section 90UL of the Act and substitute a new section 90UL to clarify when a Part VIIIAB financial agreement may be terminated and when a termination agreement will be binding.

212. The current drafting of existing section 90UL of the Act, like the current wording of existing sections 90G, 90J and 90UJ, has led to confusion, different judicial interpretations and unintended consequences. The requirements for both financial agreements and termination agreements should be as consistent as possible.

213. Termination only by agreement: new subsection 90UL(1) would preserve the existing policy of current subsection 90UL(1) by providing that parties to a Part VIIIAB financial agreement may only terminate the agreement by including a provision to that effect in another Part VIIIAB financial agreement (as mentioned in subsections 90UB(4), 90UC(4) or 90UD(4)), or by making a written termination agreement to that effect.

214. Conditions for termination agreement to be binding: new subsection 90UL(2) would provide that a Part VIIIAB termination agreement (made after 28 February 2009) is only binding if:

- the agreement is signed by all parties to the agreement, and
- either,
  - all conditions in section 90UJA that are relevant to the agreement are met, or

- a court has made an order under section 90UJB declaring that the agreement is binding, and

- the agreement has not been set aside by a court.

215. The conditions apply in relation to Part VIIIAB termination agreements made after 28 February 2009. Division 4 of Part VIIIAB of the Act commenced on 1 March 2009, so Part VIIIAB termination agreements made before this date cannot be binding.

216. These conditions reflect those applying to financial agreements generally.

217. Court orders after termination of financial agreement: new subsection 90UL(3) would reproduce existing subsection 90UL(3) without change. It would provide that, on application by a party to the Part VIIIAB financial agreement that has been terminated, or any other interested person, a court may make such an order (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that agreement and any other interested persons.

218. A note to the subsection would assist readers by directing them to section 48 of the Evidence Act for rules for how the contents of a financial agreement may be proved.

Item 30—Transitional and saving provisions relating to sections 90UJ and 90UL of the Family Law Act 1975

219. Item 30 would provide transitional and savings provisions for the amendments to sections 90UJ and 90UL, and would provide that:

- a court order made under subsections 90UJ(1B) or 90UL(2B) of the Act before the repeal of those subsections by these amendments has effect on and after the repeal as if the order had been made under new section 90UJB
- the repeal and substitution of section 90UJ of the Act by the Schedule does not affect the validity of a court order made under subsection 90UJ(4) of the Act before its repeal, and
- the repeal and substitution of section 90UL of the Act by the Schedule does not affect the validity of a court order made under subsection 90UL(3) of the Act before its repeal.

220. In relation to the effect of other court orders made on the basis that the Part VIIIAB financial agreement was not binding, subitem 30(4) would provide that despite proposed new sections 90UJ, 90UJA, 90UJB and 90UL of the Act, a Part VIIIAB financial agreement made before the commencement of those sections does not bind the parties to the agreement for the purposes of the Act if, before the commencement of the amendments, a court order was made under sections 90SI or 90SM of the Act on the basis that the agreement did not bind the parties.

Items 31—Paragraph 90UM(1)(g); 33—After subsection 90UM(4)

221. Existing section 90UM of the Act sets out a number of circumstances in which a court may set aside a Part VIIIAB financial agreement or termination agreement. Existing paragraph 90UM(1)(g) provides that a court can set aside either type of agreement if, since making the agreement, there has been a material change in circumstances relation to the care, welfare and development of the child, and, as a result, a child would suffer hardship if the court does not set the agreement aside.

222. Items 31 and 33 would amend this rule with the effect that, for agreements entered into after a relationship breakdown, agreements could only be set aside in exceptional circumstances relating to the care, welfare, and development of the child of the marriage.

This test is consistent with that for setting aside court orders relating to property under paragraph 90SN(1)(d) of the Act.

223. Item 31 would repeal existing paragraph 90UM(1)(g) and replace it with a new paragraph that would provide that the court can only set aside an agreement where, if the court did not set aside the agreement, a child would suffer hardship for a reason described in new subsection 90UM(4A), which would be inserted by Item 33.

224. New subsection 90UM(4A) would provide that the relevant reason for the hardship would depend upon when the financial agreement was entered into:

- For agreements entered into before a separation declaration is made, the test for hardship would be a 'material change in circumstances that relate to the care, welfare and development of the child of the marriage'.
- For agreements entered into at the same time as or after making a declaration of separation, the test for determining hardship would be "circumstances of an 'exceptional nature' that relate to the care, welfare and development of the child of the marriage".

225. The difference in tests reflects the possibility that, for agreements made prior to separation, a substantial period of time may have elapsed and the circumstances of the couple may have changed in ways not contemplated by the original financial agreement. For example, a couple may have had a child since making the agreement whose needs may not be appropriately reflected in the agreement.

226. For agreements entered into at the time of or after separation, it is appropriate the test be set at a higher bar as the couple should be in a position to anticipate their future financial needs relating to children at the time of making the agreement. This amendment would also improve consistency between section 90UM and section 90SN of the Act (which provides for the setting aside of court orders altering property interests).

Item 32—Paragraph 90UM(1)(j)

227. Existing paragraph 90UM(1)(j) of the Act allows the court to set aside an entire Part VIIIAB financial agreement or termination agreement if it covers a superannuation interest that is an 'unsplittable interest' under Part VIIIB (Superannuation interests), even if this is an insignificant part of the agreement.

228. Item 32 would repeal paragraph 90UM(1)(j).

229. Existing section 90MD in Part VIIIB of the Act defines 'unsplittable interest' as 'a superannuation interest described by the regulations for the purposes of this definition'. Regulations 11(1A) and 11(1B) of the Family Law Superannuation Regulations describe certain minimal interests as an 'unsplittable interest'. While it might not be cost effective to split superannuation of minimal value in family law matters, it should not follow that an entire Part VIIIAB financial agreement can be set aside on the basis that it includes an 'unsplittable interest'. This item would remove an 'unsplittable interest' from the circumstances in which a court may set aside a Part VIIIAB financial agreement or termination agreement, so that a financial agreement cannot be set aside solely on the basis that it includes an 'unsplittable interest'.

230. The repeal of paragraph 90UM(1)(j) means that the treatment of 'unsplittable interests' will be consistent across financial agreements and superannuation agreements (a financial agreement under Part VIIIAB that deals with superannuation interests). Superannuation agreements cannot be set aside on the basis that they contain an 'unsplittable interest' because existing subsection 90MHA(3) of the Act already provides that a superannuation agreement

cannot be enforced under Part VIIIAB, and the operative provisions of Part VIIIB for splitting (existing sections 90MJ and 90MS and 90MT) expressly do not apply to unsplittable interests (see existing paragraph 90MJ(1)(e) and subsections 90MS(2) and 90MT(1)).

Item 34—Application of amendments of section 90UM

231. Subitem 32(1) would provide that the amendments to section 90UM of the Act apply to Part VIIIAB financial agreements made on or after the commencement of the amendments. Subitem 32(2) would provide that the repeal of paragraph 90UM(1)(j) also applies to agreements made before the repeal. This would mean that parties with existing Part VIIAB financial agreements cannot challenge their validity solely on the basis that the agreement includes an 'unsplittable interest'.

232. Subitem 32(3) would provide that, notwithstanding these amendments, a court order to set aside a Part VIIIAB financial agreement or termination agreement on the basis of the circumstances outlined in paragraphs 90UM(1)(g) and (j), before the commencement of the amendments, will be valid.

Part VIIIB

Item 35—Paragraph 90MG(3)(a)

233. Part VIIIB of the Act (Superannuation interests) applies to superannuation agreements (a part of a financial agreement under Part VIIIA or Part VIIIAB that deals with superannuation interests). Flags set out in superannuation agreements are effectively injunctions imposed on the trustee of a superannuation fund not to make a splittable payment. A flag lifting agreement lifts the flag and may allow for the superannuation interest to be split.

234. Existing paragraph 90MG(3)(a) of the Act provides that a flag lifting agreement is in force if it meets the requirements set out in subsection 90MN(3).

235. Item 35 would repeal existing paragraph 90MG(3)(a) and substitute a new paragraph which provides that a flag lifting agreement is in force if it meets the requirements set out in either subsection 90MN(3) or (3A) (whichever is applicable).

236. This is a technical amendment that reflects the insertion of new subsection 90MN(3A) by Item 38, which provides new requirements for flag lifting agreements or termination agreements made on or after the commencement of new subsection 90MN(3A).

Item 36—Subsection 90MN(3)

237. Item 36 is a technical amendment to reflect the insertion of new subsection 90MN(3A) by Item 38, which provides new requirements for flag lifting agreements or termination agreements made on or after the commencement of new subsection 90MN(3A).

Item 37—At the end of subsection 90MN(3)

238. Item 37 would insert a note at the end of subsection 90MN(3) that would inform readers that new subsection 90MN(3A), inserted by Item 38 of the Bill, commences on the commencement of Schedule 1 to the Bill.

Item 38—After subsection 90MN(3)

239. Existing subsection 90MN(3) outlines the requirements for entering into superannuation flag lifting agreements or termination agreements.

240. Item 38 would insert a new subsection 90MN(3A) to introduce new requirements for flag lifting agreements or termination agreements made on or after the commencement of new subsection 90MN(3A) to have effect.

241. New subsection 90MN(3A) would provide that a flag lifting agreement or termination agreement made on or after commencement of the subsection would not have effect unless:

- the agreement is signed by both spouses
- after it is signed by the spouses, each spouse is provided with a copy of the agreement
- either before or after signing the agreement, each spouse is provided with a signed statement by a legal practitioner that, before the agreement was signed, he or she provided the spouse with independent legal advice about the effect of the agreement on the rights of the spouse under the Act
- the statement must also be given to the other spouse or to their legal practitioner
- either before or after signing the agreement, each spouse must also make a written acknowledgement that, before signing the agreement, he or she was provided with independent legal advice about the effect of the agreement on his or her rights under the Act, and
- the acknowledgement must also be given to the other spouse or to their legal practitioner.

242. These new requirements would promote consistency and streamlining within the Act, by being consistent with the new requirements for financial agreements and Part VIIIAB financial agreements to be binding.

Schedule 2—Other measures

Part 1—Amendments commencing soon after Royal Assent

Division 1—Revival, variation and suspension of certain orders etc. by family violence orders

Item 1—Subsection 68T(1)

243. Item 1 would omit the word 'earlier' and substitute 'earliest' to reflect the greater number of paragraphs in subsection 68T(1) after the amendment that would be made by Item 2.

Item 2—Paragraph 68T(1)(b)

244. Existing section 68R of the Act provides that a state or territory court making a family violence order may revive, vary, discharge or suspend a parenting order, recovery order, injunction or other arrangement (together, 'Order') to the extent to which they provide for a child to spend time with a person. Existing subsection 68R(4) restricts the court's power in relation to interim family violence orders to revival, variation or suspension of an Order.

245. Existing section 68T places a strict 21 day time limit on the operation of a state or territory court's revival, variation or suspension of an Order under section 68R, where that revival, variation or suspension occurs in the context of proceedings to make an interim family violence order or an interim variation of a family violence order.

246. The existing strict 21 day time limit can result in inconsistent orders about parent-child contact. For example, if a party is unable to have their parenting matter heard in the family courts within 21 days, the parenting order that was varied or suspended by the state or territory court is revived. This can result in two valid, yet inconsistent, orders— an interim family violence order prohibiting or limiting the other party's contact with a child, and a parenting order providing for the party's contact with the child. This outcome has the potential to put children and their carers at risk of further family violence.

247. To address these issues, Item 2 would remove the 21 day time limit and instead provide that the court's revival, variation or suspension under section 68R ceases to have effect at the earliest of:

- the time the interim family violence order stops being in force
- the time specified in the interim order as the time at which the revival, variation or suspension ceases to have effect, and
- the time that the order, injunction or arrangement is affected by an order made by a court, under section 68R or otherwise, after the revival, variation or suspension.

248. This would mean that any revival, variation or suspension of an Order would always cease upon the expiration of the interim protection order, but judicial officers would have the flexibility to determine timeframes and relist matters to manage cases according to their particular circumstances.

249. The use of the term 'affected' in new paragraph 68T(1)(c) is intended to include orders made by a court that directly impact on the relevant Order or interim family violence order. The paragraph is not intended to include orders, injunctions or arrangements involving the parties that do not have direct relevance to the Order or interim family violence order.

250. The amendment would not affect existing subsection 68T(2), which provides that parties cannot appeal orders as to the revival, variation or suspension of an Order. Section 68T applies in relation to proceedings for interim family violence orders or interim

variations of family violence orders. Therefore, if a respondent is unhappy with the terms of the revival, variation or suspension, he or she may challenge it at the next or a later hearing of the protection order proceeding. The respondent may also challenge the interim protection order itself.

251. This amendment would implement recommendation 4 of the Family Law Council's *Interim Report on families with complex needs and in the intersection of the Family Law and Child Protection Systems*. The amendment is also consistent with the recommendation made by the State Coroner in the findings of the inquest into the death of Luke Batty.

Item 3—Application

252. Item 3 would provide that the amendments to section 68T only apply to revivals, variations and suspensions made under section 68R on or after the commencement of this Division.

Division 2—Status of Family Court of Australia

Item 4—After subsection 21(2)

253. Existing subsection 21(2) of the Act establishes the Family Court of Australia as a superior court of record.

254. Item 4 would insert a new subsection 21(2A) to clarify that the Family Court of Australia is a court of law and equity, as well as a superior court of record.

255. This would ensure consistency with equivalent provisions relating to the Federal Court of Australia and the Federal Circuit Court, both of which are explicitly created as courts of law and equity. The constitution of the court is relevant in considering the scope of the court's implied powers—for example, the types of orders that a court can make in the absence of a specific statutory authority.

256. New subsection 21(2A) would provide that the Family Court is taken always to have been a court of law and equity. This reflects the long standing view of the Court's jurisdiction, and ensures finality of matters for parties who have been involved in proceedings before the Family Court.

Division 3—Registries of the Family Court of Australia

Item 5—Subsection 36(1)

257. Item 5 would omit '(1)' from existing subsection 36(1) as a consequence of the repeal of existing subsection 36(2) by Item 6.

Item 6—Subsection 36(2)

258. Existing subsection 36(2) of the Act provides that, unless and until the regulations otherwise provide, the Principal Registry of the Family Court of Australia shall be located in Sydney.

259. Item 6 would repeal this subsection.

260. It is unnecessary to specify a location for the Principal Registry in the Act. This approach is consistent with equivalent provisions for the Federal Court of Australia.

Division 4—Offers of settlement

Item 7—Subsection 117C(2)

261. Existing section 117C of the Act prohibits parties in certain proceedings from disclosing to the family law courts the fact that an offer of settlement has been made and the

terms of any such offer, except for the purpose of considering a costs order under existing subsection 117(2). An offer to settle is a factor that must be taken into account when the court exercises its discretion in relation to costs (see existing paragraph 117(2A)(f) of the Act).

262. As specified in existing subsection 117C(1) of the Act, section 117C does not apply to proceedings in relation to divorce and nullity of marriage in Part V, or proceedings in relation to parenting orders other than child maintenance orders (Division 6), injunctions (Division 9) and State, Territory and overseas orders (Division 13) in Part VII.

263. Item 7 would omit 'the fact that the offer has been made, or the terms of the offer' and substitute 'the terms of the offer' in subsection 117C(2). This amendment would allow parties to disclose to the courts the fact that an offer to settle has been made. Disclosing the terms of the offer would remain prohibited.

264. This amendment is intended to promote early settlement of matters.

Item 8—Subsection 117C(3)

265. Existing subsection 117C(3) provides that a judge of the court is not disqualified from sitting in the proceedings only because the fact that an offer has been made is disclosed to the court.

266. Item 8 would repeal this subsection.

267. As Item 7 would remove the prohibition on disclosing to the court that an offer has been made, existing subsection 117C(3) would serve no function and should be repealed.

Item 9—Application

268. Item 9 would provide that the amendments made by Division 4 of Part 1 of Schedule 2 apply to offers made before, on or after the commencement of this Division. Where a matter is currently on foot before the family law courts, it is appropriate to allow the court to consider whether an offer to settle has been made for case management and similar purposes.

Division 5—Legal aid

Item 10—Section 116C

269. Existing section 116C of the Act provides that regulations may fix or limit, or provide for the fixing or limiting of, the amounts that may be paid by relevant authorities to legal practitioners acting in such matters.

270. Item 10 would repeal section 116C.

271. Existing section 116C is redundant because legal aid commissions are independent bodies with boards that agree fees. Accordingly, the section should be repealed.

Division 6—Injunctions

Item 11—Subsection 114(2)

272. Existing subsection 114(2) of the Act permits the court to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

273. Item 11 would repeal this subsection.

274. Existing subsection 114(2) implies that there is a continuing obligation to render conjugal rights or perform marital services. This does not reflect current law, and is repugnant to modern principles of autonomy and equality within relationships.

275. The amendment would implement the Australia Law Reform Commission's recommendation 17-6 in its *Family Violence—A National Legal Response* report.

Division 7—Explanations of orders etc. inconsistent with family violence orders

Item 12—At the end of subsection 60CC(1)

276. Item 12 would add a note to the end of existing subsection 60CC(1) to alert the reader to the fact that the court is not required (but may choose) to consider the matters listed in existing subsections 60CC(2) and (3) when determining what is in the child's best interests for the purposes of new paragraphs 68P(2A)(b) and 69P(2B)(b), inserted by Item 13 below.

Item 13—After subsection 68P(2)

277. Existing subsection 68P sets out the obligations of a court when making an order, or granting an injunction under the Act, that is inconsistent with an existing family violence order.

278. Existing subparagraph 68P(2)(c)(iii) requires the court, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child, to explain the order or injunction to the person protected by the family violence order (if that person is not the applicant or respondent). In some circumstances the person protected by the family violence order may be a child.

279. Existing paragraph 68P(2)(d) sets out the matters that the court must include in the explanation.

280. In practice it can be difficult for the court to comply with the requirements of subparagraph 68P(2)(c)(iii) and paragraph 68P(2)(d) where the person protected is (or includes) a child. For instance, young children covered by the order or injunction, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in the explanations. For older children it may not be in their best interest, and indeed may be distressing, to be exposed to the parental controversy to the extent necessary to comply with the requirements.

281. To address this, Item 13 would insert new subsections (2A), (2B) and (2C) into section 68P. New subsection 68P(2A) would specify that the court is not required to provide the explanation mandated by subparagraph 68P(2)(c)(iii) to a child if the court is satisfied that:

- the child is too young to understand an explanation of the order or injunction, or
- it is in the child's best interests not to receive an explanation of the order or injunction.

282. Similarly, new subsection 68P(2B) would specify that the court is not required to include a particular matter otherwise required to be explained by paragraph (2)(d) if the court is satisfied that:

- the child is too young to understand the matter, or
- it is in the child's best interest for the matter not to be included in the explanation.

283. New subsection 68P(2C) would provide that in determining whether it is satisfied as to the matters as described above, the court may have regard to all or any of the matters set out in subsections 60CC(2) or (3), which provide detailed considerations to be taken into account in determining the best interests of the child. However, the court is not required to consider

these matters. To require this would be unnecessary given the relatively confined scope of the decision required of the court.

Division 8—Immunity of registrars

Item 14—At the end of Division 4 of Part IVA

284. Division 4 of Part IVA of the Act sets out miscellaneous administrative matters.

285. Item 14 would insert new section 38Z into the Act to confer immunity on registrars of the Family Court, the Federal Circuit Court, or of a State family court conducting conferences with parties to a property settlement proceeding. The section confers on registrars the same protection and immunity that a Judge of the Family Court has in performing the functions of a Judge.

286. For the purposes of the new subsection, Registrar is defined in subsection 4(1) of the Act and includes Deputy Registrars.

287. The amendment is intended to remove any doubt that registrars and deputy registrars of the Family Court, the Federal Circuit Court or of a State Family Court have immunity when conducting conferences about property matters.

288. For avoidance of doubt, new subsection 38Z(2) provides that the amendment is not intended to limit any other immunity or protection enjoyed by a Registrar of those courts. Registrars will generally enjoy the protection of common law judicial immunity where they exercise delegated judicial power.

Division 9—Summary decrees

Item 15—After section 45

289. Item 15 would insert new section 45A into the Act to clarify and modernise the powers of courts under the Act to summarily dismiss unmeritorious applications. It replaces existing section 118, which would be repealed by Item 19.

290. New subsections 45A(1) and (2) would allow the court to make a summary decree in favour of one party, in relation to the whole or part of a proceeding, if satisfied that:

- a party has no reasonable prospect of successfully prosecuting the proceedings or part of the proceedings, or
- a party has no reasonable prospect of successfully defending the proceedings or part of the proceedings.

291. New subsection 45A(3) would provide that, for the purposes of the section, in determining whether a defence or proceeding has no reasonable prospect of success, proceedings need not be hopeless or bound to fail.

292. New subsection 45A(4) would also empower the court to dismiss all or part of the proceedings if it is frivolous, vexatious or an abuse of process.

293. New subsections 45A(5)–(7) would provide that:

- the court may make costs orders as it see fit
- the court may take such action of its own volition, or on the application of a party to the proceedings, and
- the new section does not limit any powers that the court has apart from this section.

294. The reference to ‘court’ in this provision has the meaning given by subsection 4(1) of the Act, which provides that in relation to any proceedings, court means the court exercising

jurisdiction in those proceedings by virtue of the Act. The power of dismissal provided by section 45A is available to any court exercising jurisdiction under the Act.

295. New section 45A is intended to modernise and clarify the power to dismiss unmeritorious proceedings under the Act. New section 45A would make the legislative and jurisdictional foundations of the court's power to summarily dismiss applications without merit clear in the Act.

296. The new section would be substantially similar to the powers of Federal Court and the Federal Circuit Court in relation to summary judgement. However, section 45A would differ from these powers by expressly conferring power to dismiss proceedings that are frivolous, vexatious or an abuse of process. The explicit power to dismiss frivolous or vexatious proceedings reflects the existing dismissal power in section 118.

297. For consistency with other provisions of the Act, the new section would refer to making a decree, rather than giving judgment as in section 17A of the *Federal Circuit Court of Australia Act 1999* and section 31A of the *Federal Court of Australia Act 1976.* This is not intended to reflect any difference in policy between these provisions.

298. This amendment would improve outcomes for victims of family violence by strengthening the court's powers to dismiss proceedings where people are using the legal system as a tool of victimisation. It would also improve court efficiency by providing greater clarity on when applications can be dismissed by the court.

Item 16—Section 102QA (note)

299. Item 16 would repeal the existing note and substitute a new note to reflect the replacement of existing section 118 by new section 45A.

Item 17—Subsection 117(1)

300. Item 17 would omit "subsection 70NFB(1)" and substitute "subsections 45A(5) and 70NFB(1)". This is a consequential amendment to reflect the insertion of section 45A by Item 15.

Item 18—Subsection 117(1)

301. Item 18 would remove a reference to section 118 in subsection 117(1) of the Act, to reflect the repeal of that provision by Item 19.

Item 19—Section 118

302. Existing section 118 enables the court to dismiss frivolous or vexatious proceedings and make costs orders as it sees fit.

303. Item 19 would repeal this provision.

304. Existing section 118 is no longer necessary as the powers contained in the provision would be re-enacted in new section 45A by Item 15 above.

Item 20—Application

305. Item 20 would provide that the amendment in Division 9 applies to all proceedings in the family law courts whether instituted before, on, or after the commencement date.

306. However, any action taken under section 118 would not be affected by its repeal.

Division 10—Orders of costs against guardians ad litem

Item 21—Subsection 117(2)

307. Item 21 would omit "and (5)" and substitute ", (5) and (6)" in subsection 117(2) as a consequence of the insertion of new subsection 117(6) by Item 25.

Items 22—Before subsection 117(3); 23—Before subsection 117(4A); 24—Before subsection 117(5)

308. Items 22, 23 and 24 would insert the subheadings into section 117 to aid the readability of the provision. This insertion is not intended to affect the operation or meaning of the subsection and is simply intended as an editorial change to assist the reader in understanding the section.

Item 25—At the end of section 117

309. Existing section 117 of the Act sets out matters relating to costs, including the general principle that each party to a proceedings under the Act should bear his or her own costs. Subsection 117(2) provides an exception to this general principle by allowing the court to order costs if there are circumstances that justify doing so.

310. Item 25 would insert a new subsection 117(6) to prohibit the court from making an order under subsection 117(2) against a guardian *ad litem*, unless the court is satisfied that an act or omission of the guardian is unreasonable or has unreasonably delayed the proceedings.

311. The term 'guardian *ad litem'* is intended to include case guardians as described in Part 6.3 of the Family Law Rules and litigation guardians as described in Division 11.2 of the *Federal Circuit Court Rules 2001*.

312. If a person does not have the capacity to conduct litigation, a guardian *ad litem* may be appointed to act in the place of the person and make decisions relating to the proceedings that are in the best interests of that party. This is an important role that enables access to justice for vulnerable people involved in family law proceedings. If no suitable guardian *ad litem* can be appointed, the court may stay proceedings indefinitely, which frustrates access to justice for all parties involved in the proceedings.

313. Currently, persons who are appointed as a guardian *ad litem* may be personally liable for costs in proceedings. This discourages suitable people, who would otherwise be willing to undertake the role, from agreeing to appointment. To ensure that people are not discouraged from acting as a guardian *ad litem*, the amendment would provide protection from costs within appropriate limits.

314. Guardians *ad litem* would not be protected from a costs order if the guardian has acted unreasonably or has unreasonably delayed the proceedings. In these circumstances it would be open to the court to consider making a costs order under subsection 117(2). This provides the appropriate balance between protection for guardian *ad litem*, the parties they are appointed to represent, and the interests of other parties.

Item 26—Application

315. Item 26 provides that the amendments in Division 10 would apply to persons who become guardian *ad litem* in proceedings on or after the commencement of the Division, whether or not the proceedings were instituted before, on or after the commencement.

316. The amendments would not apply to persons who became guardian *ad litem* before the commencement of the Division.

Division 11—Powers of arrest

Item 27—Subsection 4(1)

317. Item 27 would insert definitions of 'conveyance' and 'dwelling house' into subsection 4(1) of the Act to support new section 122A, which is inserted by Item 32 below. These definitions are modelled on equivalent provisions in the *Crimes Act 1914*.

Item 28—Subsection 4(1) (definition of warrant issued under a provision of this Act)

318. Item 28 would repeal the definition of warrant issued under a provision of the Act. The definition is no longer necessary as a result of the repeal of existing sections 122AA and 122A by Item 32 below.

Item 29—Section 67Q (note 1)

319. Item 29 would omit "Section 122AA authorises the use of reasonable force" and substitute "Section 122A deals with use of reasonable force by certain persons". This is necessary to reflect the replacement of existing section 122AA by new section 122A by Item 32 and the different operation of new section 122A which, instead of authorising the use of reasonable force, describes when force must not be used by an arrester, and provides for a specific list of persons who may exercise force.

Items 30—Subsection 68C(1) (note); 31—Subsection 114AA(1) (note)

320. Items 30 and 31 would omit "Section 122AA authorises" and substitute "Section 122A deals" in notes to subsection 68C(1) and subsection 114A(1) of the Act respectively.

321. This is necessary to reflect the replacement of existing section 122AA by new section 122A by Item 32, and the different operation of new section 122A which, instead of authorising the use of reasonable force, describes when force must not be used by an arrester.

Item 32—Sections 122AA and 122A

322. Existing section 122AA enables a person who is authorised by a provision of the Act, or by a warrant issued under the Act, to use such reasonable force as is necessary to arrest another person or to prevent their escape.

323. Existing section 122A(1) empowers authorised persons to enter and search a place without a warrant for the purposes of arresting another person. Existing subsection 122A(2) specifies that where a person may enter and search a vehicle, vessel or aircraft under subsection (1), the person may stop and detain the vehicle, vessel or aircraft.

324. Item 32 would repeal existing sections 122AA and 122A and substitute them with new sections 122A and 122AA.

325. The amendments would provide a more modern framework for arrests, with substantially improved safeguards. The powers reflect the arrest provisions in the Crimes Act and the Federal Circuit Court Act, as well as the requirements of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* in relation to powers to enter and search premises for the purposes of arresting a person.

New section 122A—Making arrests under this Act or warrants

326. New section 122A would provide rules for making arrests under the Act, or under warrants authorised under the Act, and would provide substantially greater detail in relation to:

- whom the section applies
- when it is appropriate to use force to arrest a person, and

- how and when to inform the arrestee of the ground of arrest

327. Application: existing paragraph 122A(1)(a) empowers 'a person' (without specific limitation) authorised by the Act or by a warrant issued under the Act to exercise arrest powers. New subsection 122A(1) would explicitly set out the categories of persons, who are authorised by the Act or by a warrant issued under the Act to arrest another person, to whom the section applies. This would limit the persons who may exercise arrest powers to only appropriate people. This reflects the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which provides that 'arrest powers should only be granted to sworn police officers unless there are exceptional circumstances which clearly justify extending these powers to non-police'.

328. The list of arresters in new subsection 122A(1) would reflect the list of authorised persons in rule 21.17 of the Family Law Rules and Rule 25B.74 of the Federal Circuit Court Rules, except that it would not provide for 'any other person' to be authorised. To ensure that all the relevant officers would be authorised to exercise arrest powers under the Act, the list would also include the Australian Border Force Commissioner and an APS employee in the Department administered by the Minister administering the *Australian Border Force Act 2015*. This is intended to cover Australian Border Force officers who may be required to exercise powers of arrest in relation to, for example, a parent attempting to abduct their child overseas. The urgency of ensuring children are not abducted internationally warrants the extension of these powers to officers of the Australian Border Force.

329. Use of force: new subsection 122A(2) would replace existing section 122AA and provide greater restrictions around the use of force in arresting a person. The subsection reflects the equivalent provision applying in relation to the Federal Circuit Court (subsection 113A(4) of the Federal Circuit Court Act).

330. Specific limitations in new subsection 122A(2) would place restrictions on the use of force by providing that in the course of arresting the arrestee, the arrester must not use more force, or subject the arrestee to greater indignity, than is necessary and reasonable to make the arrest or prevent the arrestee's escape after the arrest. It would also provide that the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect the life or prevent serious injury to another person (including the arrester). It would also provide that if the arrestee is attempting to escape arrest by fleeing, the arrester must not do anything that is likely to cause the death of, or grievous bodily harm to, the arrestee unless the arrester reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person (including the arrester), and the arrestee has, if practicable, been called on to surrender and the arrester reasonably believes that the arrestee cannot be arrested in any other way. This subsection reflects the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which provides that legislation should only allow an authorised officer to use such force against persons as is necessary and reasonable to execute a warrant.

331. Existing section 122AA does not provide specific rules governing the use of potentially lethal force.

332. Informing the arrestee of the grounds for arrest: new subsections 122A(3), (4) and (5) set out the requirements for the arrester to inform the arrestee of the grounds for arrest. This subsection reflects the equivalent provisions applying in relation to the Federal Circuit Court (subsections 113A(5),(6) and (7) of the Federal Circuit Court Act). Informing the arrestee of the grounds for arrest is not a requirement of existing section 122AA.

New section 122AA—Powers to enter and search premises, and stop conveyances, for making arrests under this Act or warrants

333. New section 122AA would provide for an arrester's power to enter and search premises, and stop and detain conveyances, for the purposes of making arrests under the Act or under warrants. The scope of the power conferred is similar to that in existing section 122A, but substantially greater safeguards are provided for the use of the power.

334. Power to enter premises: new subsection 122AA(1) reflects existing section 122A, which empowers a person specified in subsection 122A(1) to enter and search premises for the purpose of arresting a person. New subsection 122AA(1) would provide that if an arrester reasonably believes that the arrestee is on the premises, the arrester may enter the premises, using such force as is necessary and reasonable, at any time of the day or night, for the purpose of searching the premises for the arrestee or arresting the arrestee. New subsection 122AA(1) would not authorise the use of force that was unreasonable or excessive in the circumstances.

335. New subsection 122AA(2) would provide a new prohibition on an arrester entering a dwelling house between 9pm one day and 6am the next day, unless it would not be practicable to arrest the arrestee there or elsewhere at another time. This prevents the unnecessary or unreasonable interference with privacy, noting that the purpose of the provision is to bring people before the court while balancing the need for arresters to take reasonable steps to arrest an arrestee. This prohibition would not apply to the power to stop and detain a vehicle, vessel or aircraft in new subsection (3). The privacy considerations relevant to dwelling houses at night-time are not relevant to vehicles in motion. The term 'dwelling house' would be defined in section 4(1) of the Act to include a conveyance, or a room in accommodation (see Item 27). This restriction on the power of arrest would reflect equivalent provisions applying in relation to the Federal Circuit Court (see subsection 113A(3) of the Federal Circuit Court Act).

336. Power to stop and detain conveyances: new subsection 122AA(3) empowers an arrester to stop and detain a conveyance, if they would be empowered by new subsection (1) to enter and search it. This reflects existing subsection 122A(2). However, new subsection (4) would provide new rules limiting the power to stop, detain, enter and search conveyances.

337. Rules about stopping, detaining, entering and searching conveyances: new subsection 122AA(4) would provide for prescriptive rules around stopping, detaining, entering and searching conveyances, including that the arrester must search the conveyance in a public place. This provision would reflect the rules in section 3U of the Crimes Act, and provides substantially greater safeguards on the use of this power than existing section 122A.

338. Definition of premises: new subsection 122AA(5) would define premises for the purposes of new section 122A to include both a place and a conveyance. This definition is consistent with the approach in section 113A of the *Federal Circuit Court Act.*

Item 33—Application

339. Item 33 would provide that the amendments apply in relation to arrests authorised by the Act, and arrests authorised by warrants, on or after the commencement of the Division.

Division 12—Family counselling and family dispute resolution

Item 34—At the end of section 10B

340. Existing section 10B defines 'family counselling' as a process in which a family counsellor helps people deal with personal and interpersonal issues in relation to a marriage,

or people affected by separation or divorce to deal with personal and interpersonal issue or issues relating to the care of children.

341. Item 34 would expand the definition of family counselling to also include a process by which a family counsellor helps one or more persons who may apply for a parenting order under section 65C to deal with issue relation to the care of children.

342. The existing definition of family counselling does not appropriately apply to all family arrangements—for example, parents who have never lived together or been married, and therefore cannot be said to be affected by separation or divorce. New paragraph (c) would ensure that the definition aligns with existing section 65C (which specifies a broad range of parenting order applicants) and is sufficiently broad to capture the relevant parties involved in family disputes.

343. It is important the families involved in disputes can access quality family counselling services so they can attempt to resolve their disputes outside of the court and avoid the adversarial court system where possible.

Item 35—Paragraph 10F(a)

344. Existing section 10F defines 'family dispute resolution' as a process in which an independent family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve disputes.

345. Item 35 would repeal existing paragraph 10F(a) and substitute a broader definition that includes, in addition to people affected by separation or divorce, helping people who may apply for a parenting order under section 65C to resolve some or all of their dispute relating to the care of children.

346. The existing definition of family dispute resolution did not appropriately capture all family arrangements—for example, parents who have never lived together or been married. New paragraph 10F(a) would ensure that the definition aligns with section 65C (which specifies a broad range of parenting order applicants) and all family arrangements and parties who may be involved in family disputes are captured.

Division 13—Alternative constitutional basis for Part VII of the Family Law Act 1975

Item 36—At the end of subsection 69ZH(2)

347. Existing section 69ZH is a technical provision, providing for additional application of Part VII of the Act. The section was inserted into the Act to ensure that, if certain provisions cannot apply to all children due to limitations in State referrals of power over ex-nuptial children, these provisions apply to the extent that they are supported by an alternative constitutional basis.

348. Item 36 would insert a note at the end of subsection 69ZH(2) to clarify the intended operation of the subsection. The provisions covered by subsection 69ZH(2) are expressed in terms of children generally, without a distinction between children of marriages and ex-nuptial children. The note would confirm that the subsection does not limit the operation of those provisions, but provides an alternative constitutional basis to enable the provisions to at least operate in relation to children of marriages even if they cannot also operate in relation to ex-nuptial children.

349. The note would clarify the intended operation of the subsection while preserving existing policy.

Division 14—Family consultants and compliance with parenting orders

Item 37—Subsection 65L(1)

350. Item 37 would omit 'subsection (2)' and substitute 'subsection (2) and (3)' in section 65L as a consequence of the insertion of new subsection 65L(3) by Item 38.

Item 38—At the end of section 65L

351. Existing subsection 65L(1) empowers the court to make orders requiring a family consultant to supervise, or assist with, compliance of a parenting order.

352. Item 38 would insert a new subsection 65L(3) to provide that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are 'exceptional circumstances' which warrant the order.

353. It is necessary to limit the court's power in subsection 65L(1) to ensure that the courts are not unduly burdened with an ongoing and onerous obligation to supervise compliance with court orders. Compliance with parenting orders is managed through the separate compliance regime in Part VII, Division 13A of the Act.

Part 2—Amendments commencing up to 6 months after Royal Assent

Division 1—Information to be provided by principal executive officers of courts

Item 39—At the end of subsection 12F(1)

354. Existing section 12F places an obligation on the principal executive officer of a court to provide prescribed information and respond to requests for information. Existing subsection 12F(1) requires the principal executive officer to ensure that any person considering initiating proceedings be given documents containing information prescribed under section 12B (non-court based family services and court's processes and services) and section 12C (reconciliation). The subsection does not require the principal executive officer to provide information prescribed under section 12D (information about Part VII proceedings).

355. Item 39 would add a new paragraph into subsection 12F(1) to require the principal executive officer to provide information prescribed under section 12D.

356. Regulation 8D of the *Family Law Regulations 1984* prescribes information for the purposes of section 12D of the Act as "information about family counselling services available to assist the parties and the child or children concerned in the proceedings to adjust to the consequences of orders made under Part VII of the Act".

357. Information about Part VII proceedings (that is, proceedings for parenting orders) is highly relevant to individuals who are considering initiating, or who are otherwise involved, in litigation on children's matters.

Division 2—Offence of retaining child overseas

Overview

358. While aspects of international parental child abduction are generally a private civil issue between parents, the Australian Government has responsibilities arising under the *Hague Convention on the Civil Aspects of International Child Abduction* (the Convention). The Australian Government also has a broader interest in ensuring that children are not wrongfully removed from Australia regardless of whether that removal is to a Convention or non-Convention country.

359. The Convention clearly envisages that international child abduction includes both wrongful removal of a child and wrongful retention of a child who was not wrongfully removed. The existing offences found in sections 65Y and 65Z of the Act only cover situations where a child has been abducted from Australia, they do not cover situations where a child is lawfully removed from Australia for a period, but at the end of that period the parent does not return the child to Australia as required.

360. In a letter of advice dated 14 March 2011, the Family Law Council recommended to the then Attorney-General that the criminal offences in sections 65Y and 65Z of the Act be extended to include wrongful retentions. This was endorsed by the Senate Legal and Constitutional Affairs References Committee in its report of October 2011 on international parental child abduction to and from Australia.

361. In line with those recommendations, the amendments in this Division would introduce new offences to cover the situation where a parent retains a child in another country beyond the period stipulated in a court order, or the period agreed by other parties to the parenting order, and would also make consequential amendments to fully integrate those offences into the Act.

Items 40 and 41—Subsection 65X(2)

362. Existing subsection 65X(2) provides that for the purposes of Subdivision E of Division 6 of Part VII of the Act, if an appeal against a decision of a court in proceedings has been instituted and is pending, the proceedings are taken to be pending and sections 65Z and 65ZB, which provide offences where proceedings are pending (rather than sections 65Y and 65ZA, which provide offences where parenting orders have been made) apply.

363. Subsection 65X(2) provides certainty as to which offence will apply when a decision has been made, but there is an appeal pending.

364. Items 40 and 41 would amend subsection 65X(2) to include references to the offences that would be inserted by Items 43 and 45 (sections 65YA and 65ZAA respectively). The amendment will provide the same certainty for the new offences of retaining a child overseas (sections 65YA and 65ZAA) as currently exists for the offences of taking or sending a child outside Australia.

Item 42—Section 65Y (heading)

365. Item 42 would omit and substitute the heading to section 65Y. This amendment is consequential to the insertion of section 65YA by Item 43. The current title of section 65Y is "Obligations if certain parenting orders have been made". After the insertion of section 65YA, the current title would be misleading as section 65YA will also contain obligations that apply if certain parenting orders have been made.

366. This new title substituted by this item would be "Obligations if certain parenting orders have been made: taking or sending a child outside Australia". The new title better clarifies the purpose and effect of section 65Y.

Item 43—After section 65Y

367. Item 43 would insert a new section 65YA after section 65Y. New section 65YA would provide that a person commits an offence where:

- a parenting order to which Subdivision E of Division 6 of Part VII of the Act applies is in force in relation to a child, and
- that child has been taken or sent from Australia to a place outside Australia, by or on behalf of a party to the proceedings in which the parenting order was made:

- with the consent in writing (authenticated as prescribed) of each person in whose favour the parenting order was made, or
- in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time, or after, the parenting order was made, and

- the person retains the child outside Australia otherwise than in accordance with the consent or order, and
- the person was a party to the proceedings in which the parenting order was made, or is retaining the child on behalf of, or at the request of, such a party.

368. Section 65YA would also specify that the penalty for an offence against new section 65YA is 3 years imprisonment; this penalty is identical to the penalties specified for the similar offences against sections 65Y, and 65Z and the proposed penalty for an offence against new section 65ZAA.

369. This new offence would remedy an identified gap in the existing legislation, as while under section 65Y it is currently an offence to remove a child in relation to whom a parenting order is in force if there is no relevant court order or consent in writing from other parties, a person does not currently commit an offence if they retain a child beyond the expiry of that order or consent.

370. This new section would be similar to existing section 65Y. Where section 65Y makes it an offence to unlawfully remove a child under a parenting order from Australia, new section 65YA would make it an offence to retain a child in another country, where the child is under a parenting order and has been removed from Australia. The offences are otherwise identical. Both offences are intended to act together to ensure that parental abduction of a child to another country is a punishable offence, regardless of whether or not the person initially removed the child from Australia lawfully.

371. The new section 65YA would complement the new section 65ZAA in the same way that existing section 65Y complements existing section 65Z. That is, where section 65Y and 65YA would apply when a parenting order is in place, sections 65Z and 65ZAA would apply when there are proceedings for a parenting order pending, or an appeal is being made on a parenting order.

372. Item 43 would also insert a note to new section 65YA stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempt), apply in relation to the offence in new section 65YA. Ancillary offence is a defined term in the dictionary of the *Criminal Code*, and the specific mention of the offence of attempt is not intended to exclude the application of any other ancillary offence.

Item 44—Section 65Z (heading)

373. Item 44 would omit and substitute the heading to section 65Z. This amendment is consequential to the insertion of section 65ZAA by Item 45. The current title of section 65Z is "Obligations if proceedings for the making of certain parenting orders are pending". After the insertion of section 65ZAA, the current title would be misleading as section 65ZAA will also contain obligations that apply if certain parenting orders are pending.

374. This item would substitute the new title "Obligations if proceedings for the making of certain parenting orders are pending: taking or sending a child outside Australia", the new title better clarifies the purpose and effect of section 65Z.

Item 45—After section 65Z

375. Item 45 would insert a new section 65ZAA after section 65Z. New section 65ZAA would provide that a person commits an offence where:

- proceedings for the making, in relation to a child, of a parenting order to which this Subdivision applies are pending, and
- the child has been taken or sent out of Australia with:
  - the consent in writing of each part to the Part VII proceedings, or
  - in accordance with an order of the court made under Part VII of the Act, or under a law of a State or Territory, after the institution of the Part VII proceedings, and
- the person retains the child outside of Australia otherwise than in accordance with the consent or order, and
- the person is a party to the proceedings, or is retaining the child on behalf of, or at the request of, such a party.

376. Section 65ZAA would also specify that the penalty for an offence against new section 65ZAA is 3 years imprisonment; this penalty is identical to the penalties specified for the similar offences against sections 65Y and 65Z and the proposed penalty for an offence against new section 65YA.

377. This new offence would remedy an identified gap in the existing legislation, as while under section 65Z it is currently an offence to remove a child in relation to whom proceedings for a parenting order are pending, if there is no relevant court order or consent in writing from other parties, a person does not currently commit an offence if they retain a child beyond the expiry of that order or consent.

378. New section 65ZAA would be similar to existing section 65Z. Where section 65Z makes it an offence to unlawfully remove a child in relation to whom proceedings for a parenting order are pending, new section 65ZAA would make it an offence to retain a child in another country, where proceedings for a parenting order are pending. The offences are otherwise identical. Both offences are intended to act together to ensure that parental abduction of a child to another country is a punishable offence, regardless of whether or not the person initially removed the child from Australia lawfully.

379. New section 65ZAA would complement the new section 65YA in the same way that existing section 65Z complements existing section 65A. That is, where section 65Y and 65YA apply when a parenting order is in place, sections 65Z and 65ZAA apply when there are proceedings for a parenting order pending, or an appeal is being made on a parenting order.

380. Item 43 would also insert a note to new section 65ZAA stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempt), apply in relation to the offence in section 65ZAA. Ancillary offence is a defined term in the dictionary of the *Criminal Code*, and the specific mention of the offence of attempt is not intended to exclude the application of any other ancillary offence.

Items 46— Paragraph 65ZD(a); 47—Paragraph 65ZD(b)

381. The purpose of existing section 65ZD is to ensure that Subdivision E of Division 6 of Part VII of the Act does not conflict with the operation of State and Territory laws that would prevent a child from leaving, or being taken or sent outside, Australia. That is, the section makes it explicit that the Commonwealth does not intend to supplant or interfere with

State or Territory laws that have a similar purpose. The requirements in Subdivision E are additional to any provided by state and territory laws.

382. The current text of section 65ZD applies to state or territory laws under which:

- action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia, or
- a person may be punished in respect of the taking or sending of a child outside Australia.

383. However, they do not currently relate to laws which relate to a child being retained outside Australia. The offences in new sections 65YA and 65ZAA are not intended to prevent or restrict the operation of any relevant state or territory laws.

384. Items 46 and 47 would amend section 65ZD so that it additionally refers to state and territory laws relating to retaining a child overseas. This will ensure that the new offences in 65YA and 65ZAA will not interfere with any similar state laws.

Item 48—At the end of Subdivision E of Division 6 of Part VII

385. Item 48 would insert new section 65ZE. Section 65ZE would provide that Section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against new section 65YA or 65ZAA (inserted by Items 43 and 45 respectively).

386. The gravity of the effects of wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained.

Item 49—Paragraph 117A(1)(b)

387. Existing section 117A allows a person or the Commonwealth to apply for a court order that another person make reparations for certain losses and expenses relating to recovering a child and returning a child to a person. In particular existing paragraph 117A(1)(b) relevantly provides that where a person has been convicted of an offence under section 65Y or 65Z in respect of a child, the court may, subject to certain requirements, order the person to pay to the Commonwealth or another person, reparation for any loss suffered, or any expense incurred, in recovering the child and returning the child to a person.

388. Item 49 would extend this so that paragraph 117(1)(b) also requires a person convicted of an offence under new sections 65YA or 65ZAA, on the order of the court, to pay reparations for the recovery and return of the child.

389. The proposed offences included in new sections 65YA and 65ZA are offences related to retaining a child outside Australia. They complement the existing offences in sections 65Y and 65Z; where the existing offences deal with circumstances where a person has unlawfully removed a child from Australia, the proposed offences would deal with the circumstance where a person has lawfully removed a child from Australia and has then unlawfully retained that child outside Australia

390. When a child is retained outside Australia, similar costs and losses would be incurred to recover the child as when the child is unlawfully removed from Australia, and it is appropriate that the person who is responsible for the removal or retention of the child is liable to pay reparations to a person or the Commonwealth when costs or losses have been incurred in recovering or returning the child.

Item 50—Application

391. Item 50 relates to when the amendments proposed in Division 2 of Part 2 of Schedule 2 to the Bill would apply.

392. The amendments apply in relation to children taken or sent from Australia to a place outside Australia on or after the commencement of the amendments and to a child taken or sent from Australia before the commencement of the amendments if the period specified in the consent or order in accordance with which the child was taken or sent:

- ended after that commencement, or
- was extended so that it ended after that commencement.

393. Where the offences operate retroactively, they only do so to the extent that the offences apply regardless of when the child was sent or taken from Australia. They do not extend liability to circumstance where the child was retained contrary to the relevant consent or order prior to commencement of these amendments.

394. There is no substantive injustice in this retroactive application as the part of the offence that constitutes conduct (that the child is retained outside Australia otherwise than in accordance with the relevant consent or order) must take effect after commencement. The only element of the offence that operates retroactively is that the child must leave Australia in a certain way. This is a circumstance in which conduct may occur, but does not itself represent conduct on behalf of the offender.

395. Subitem 50(2) provides that subitem 50(1) does not apply to the amendments of sections 65Y, 65Z and 65ZD of the Act made by this Division. These amendments (the amendments made by Items 42, 44, 46 and 47) apply immediately from commencement.

Division 3—Location orders for Child Abduction Convention

Item 51—At the end of section 67K

396. New subsection 67K(4) provides that for the purposes of the Child Abduction Convention, a person may apply to the court for a location order.

397. Location orders allow the court to make orders requiring a person to provide to the Registry Manager of the court information that the person has or obtains about the child's location.

398. This provision also clarifies that 'a person' includes a person appointed as the Central Authority (CA) for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention. This will assist the CAs in fulfilling their obligations under Article 7(a) of the Child Abduction Convention to discover the whereabouts of a child who has been wrongfully removed or retained.

399. Existing subsection 67K(2) allows a person to apply to a court for a location order for the purposes of the Child Protection Convention but there is no similar mechanism available for the Child Abduction Convention. This amendment will overcome that deficiency.

400. While the CAs already have access to location orders for the purposes of the Child Protection Convention, they currently have limited mechanisms available to them to obtain information from entities and individuals within Australia that could be used to assist in locating children wrongfully removed from, or retained outside Australia. By providing the CAs with the ability to apply for location orders for the purposes of the Child Abduction Convention the CAs would be able to access information that may significantly improve their

ability to locate children abducted from Australia, both to convention and non-convention countries.

401. New subsection 67K(5) defines Child Abduction Convention for the purposes of new subsection 67K(4). Child Abduction Convention is defined as the Convention on the Civil Aspects of International Child Abduction done at The Hague on 25 October 1980. This is a technical amendment, and is intended to enhance the flow of new subsection 67K(4).

402. The item also inserts a note to 67K(5) to provide a link to the Convention for the reader.

GLOSSARY

The following terms are used throughout this Explanatory Memorandum:

Act	*Family Law Act 1975*
Amendment Act	*Family Law Amendment Act 2003*
Black v Black	*Black v Black* [2008] FamCAFC 7
the Convention	*Hague Convention on the Civil Aspects of International Child Abduction*
Criminal Code	*Criminal Code Act 1995*
Crimes Act	*Crimes Act 1914*
Efficiency Measures Amendment Act	*Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009*
Evidence Act	*Evidence Act 1995*
Family Law Rules	*Family Law Rules 2004*
Federal Circuit Court Act	*Federal Circuit Court of Australia Act 1999*
Federal Circuit Court Rules	*Federal Circuit Court Rules 2001*
Family Law Superannuation Regulations	*Family Law (Superannuation) Regulations 2001*