



**Family Law Amendment (De Facto  
Financial Matters and Other Measures)  
Act 2008**

**No. 115, 2008**

**An Act to amend the *Family Law Act 1975*, and for  
related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008**

**No. 115, 2008**

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**An Act to amend the *Family Law Act 1975*, and for  
related purposes**

[Assented to 21 November 2008]

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Family Law Amendment (De Facto  
Financial Matters and Other Measures) Act 2008*.

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*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* No.  
115, 2008 1

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	21 November 2008
2. Schedule 1, items 1 to 4	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 March 2009 (see F2009L00264)
2A. Schedule 1, item 5	The day on which this Act receives the Royal Assent.	21 November 2008
2B. Schedule 1, items 6 to 20	At the same time as the provision(s) covered by table item 2.	1 March 2009
2C. Schedule 1, item 21	The day on which this Act receives the Royal Assent.	21 November 2008
2D. Schedule 1, items 22 to 93	At the same time as the provision(s) covered by table item 2.	1 March 2009
3. Schedule 2, items 1 to 32	At the same time as the provision(s) covered by table item 2.	1 March 2009
4. Schedule 2, item 33	The later of: (a) the commencement of the provision(s) covered by table item 2; and (b) the commencement of the <i>First Home Saver Accounts Act 2008</i> .  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	1 March 2009 (paragraph (a) applies)

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
5. Schedule 2, items 34 to 52	At the same time as the provision(s) covered by table item 2.	1 March 2009
6. Schedule 3	The day on which this Act receives the Royal Assent.	21 November 2008
6A. Schedule 3A	The day on which this Act receives the Royal Assent.	21 November 2008
7. Schedule 4, item 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 March 2009 (see F2009L00264)
8. Schedule 4, item 2	Immediately after the commencement of section 330 of the <i>Proceeds of Crime Act 2002</i> .	1 January 2003

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Amendments relating to de facto financial matters

### Part 1—Amendments

#### *Family Law Act 1975*

##### 1 Title

Omit “**Children, and**”, substitute “**Children, and to financial matters arising out of the breakdown of de facto relationships and to**”.

##### 2 Subsection 4(1)

Insert:

***breakdown:***

- (a) in relation to a marriage, does not include a breakdown of the marriage by reason of death; and
- (b) in relation to a de facto relationship, does not include a breakdown of the relationship by reason of death.

##### 3 Subsection 4(1)

Insert:

***de facto financial cause*** means:

- (a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship; or
- (b) proceedings between:
  - (i) a party to a de facto relationship; and
  - (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;with respect to the maintenance of the first-mentioned party after the breakdown of the de facto relationship; or
- (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them; or
- (d) proceedings between:



- (i) a party to a de facto relationship; and
  - (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;
- with respect to the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property in relation to the bankrupt party; or
- (e) without limiting any of the preceding paragraphs, proceedings with respect to a Part VIIIAB financial agreement that are between any combination of:
    - (i) the parties to that agreement; and
    - (ii) the legal personal representatives of any of those parties who have died;(including a combination consisting solely of parties or consisting solely of representatives); or
  - (f) third party proceedings (as defined in section 4B) to set aside a Part VIIIAB financial agreement; or
  - (g) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of the preceding paragraphs.

#### **4 Subsection 4(1)**

Insert:

*de facto property settlement or maintenance proceedings* means proceedings with respect to:

- (a) the distribution of the property of the parties to a de facto relationship or of either of them; or
- (b) the distribution of the vested bankruptcy property in relation to a bankrupt party to a de facto relationship; or
- (c) the maintenance of a party to a de facto relationship.

#### **5 Subsection 4(1) (definition of *de facto relationship*)**

Repeal the definition, substitute:

*de facto relationship* has the meaning given by section 4AA.

#### **6 Subsection 4(1)**

Insert:

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***distribute:***

- (a) in relation to:
  - (i) property, and financial resources, of the parties to a de facto relationship or either of them; or
  - (ii) vested bankruptcy property in relation to a bankrupt party to a de facto relationship;includes conferring rights or obligations in relation to the property or financial resources; and
- (b) in relation to a Part VIIIAB financial agreement, has a meaning affected by subsection 90UI(3).

**7 Subsection 4(1) (definition of *financial matters*)**

Repeal the definition, substitute:

***financial matters*** means:

- (a) in relation to the parties to a marriage—matters with respect to:
  - (i) the maintenance of one of the parties; or
  - (ii) the property of those parties or of either of them; or
  - (iii) the maintenance of children of the marriage; or
- (b) in relation to the parties to a de facto relationship—any or all of the following matters:
  - (i) the maintenance of one of the parties;
  - (ii) the distribution of the property of the parties or of either of them;
  - (iii) the distribution of any other financial resources of the parties or of either of them.

**8 Subsection 4(1)**

Insert:

***non-referring State de facto financial law*** means a law that:

- (a) is a law of a State that is not a participating jurisdiction; and
- (b) relates to financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships.

**9 Subsection 4(1)**

Insert:

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*participating jurisdiction* has the meaning given by subsection 90RA(1).

#### **10 Subsection 4(1)**

Insert:

*Part VIIIAB financial agreement* means an agreement:

- (a) made under section 90UB, 90UC or 90UD; or
- (b) covered by section 90UE.

#### **11 Subsection 4(1)**

Insert:

*Part VIIIAB proceedings* means:

- (a) proceedings under Part VIIIAB for orders with respect to:
    - (i) the maintenance of a party to a de facto relationship; or
    - (ii) the property of the parties to a de facto relationship or of either of them; or
  - (b) proceedings in relation to a Part VIIIAB financial agreement;
- but does not include any proceedings specified in the regulations for the purposes of this definition.

#### **12 Subsection 4(1)**

Insert:

*Part VIIIAB termination agreement* means an agreement made under paragraph 90UL(1)(b).

#### **13 Subsection 4(1)**

Insert:

*party to a de facto relationship* means a person who lives or has lived in a de facto relationship.

#### **14 Subsection 4(1) (definition of *property*)**

Repeal the definition, substitute:

*property* means:

- (a) in relation to the parties to a marriage or either of them—  
means property to which those parties are, or that party is, as

the case may be, entitled, whether in possession or reversion;  
or

- (b) in relation to the parties to a de facto relationship or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

**15 Subsection 4(1) (definition of *property settlement proceedings*)**

Repeal the definition, substitute:

*property settlement proceedings* means:

- (a) in relation to the parties to a marriage—proceedings with respect to:
- (i) the property of the parties or either of them; or
  - (ii) the vested bankruptcy property in relation to a bankrupt party to the marriage; or
- (b) in relation to the parties to a de facto relationship—proceedings with respect to:
- (i) the property of the parties or either of them; or
  - (ii) the vested bankruptcy property in relation to a bankrupt party to the de facto relationship.

**16 Subsection 4(1)**

Insert:

*referring State* has the meaning given by subsections 90RA(2), (3), (4) and (5).

**17 Subsection 4(1)**

Insert:

*section 90RD declaration* means a declaration under subsection 90RD(1).

**18 Subsection 4(1) (definition of *spouse party*)**

Repeal the definition, substitute:

*spouse party* means:

- (a) in relation to a financial agreement—a party to the agreement who is a party to the contemplated marriage, marriage or former marriage to which the agreement relates; or
- (b) in relation to a Part VIIIAB financial agreement—a party to the agreement who is a party to the contemplated de facto relationship, de facto relationship or former de facto relationship to which the agreement relates.

## **19 Subsection 4(1) (definition of *third party*)**

Repeal the definition, substitute:

*third party*, in relation to a financial agreement or Part VIIIAB financial agreement, means a party to the agreement who is not a spouse party.

## **20 After subsection 4(2)**

Insert:

- (2A) A reference in this Act, the standard Rules of Court or the related Federal Magistrates Rules to a party to a de facto relationship includes a reference to a person who was a party to a de facto relationship that has broken down.

## **21 After section 4**

Insert:

### **4AA De facto relationships**

#### *Meaning of de facto relationship*

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

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

#### *Working out if persons have a relationship as a couple*

- (2) Those circumstances may include any or all of the following:

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

*When 2 persons are related by family*

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

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

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## **22 After subsection 4A(1)**

Insert:

- (1A) For the purposes of paragraph (eab) of the definition of *matrimonial cause* in subsection 4(1), *third party proceedings* also means proceedings between:
- (a) any combination of:
    - (i) the parties to a financial agreement; and
    - (ii) the legal personal representatives of any of those parties who have died;(including a combination consisting solely of parties or consisting solely of representatives); and
  - (b) either:
    - (i) another person who is a party to a de facto relationship with one of the spouse parties to the financial agreement; or
    - (ii) the legal personal representative of that other person if that person has died;being proceedings for the setting aside of the financial agreement on the ground specified in paragraph 90K(1)(ab).

## **23 After section 4A**

Insert:

### **4B Third party proceedings to set aside Part VIIIAB financial agreement**

- (1) For the purposes of paragraph (f) of the definition of *de facto financial cause* in subsection 4(1), *third party proceedings* means proceedings between:
- (a) any combination of:
    - (i) the parties to a Part VIIIAB financial agreement; and
    - (ii) the legal personal representatives of any of those parties who have died;(including a combination consisting solely of parties or consisting solely of representatives); and
  - (b) any of the following:
    - (i) a creditor;

- (ii) if a creditor is an individual who has died—the legal personal representative of the creditor;
  - (iii) a government body acting in the interests of a creditor;being proceedings for the setting aside of the Part VIIIAB financial agreement on the ground specified in paragraph 90UM(1)(b).
- (2) For the purposes of paragraph (f) of the definition of *de facto financial cause* in subsection 4(1), *third party proceedings* also means proceedings between:
  - (a) any combination of:
    - (i) the parties to a Part VIIIAB financial agreement; and
    - (ii) the legal personal representatives of any of those parties who have died;(including a combination consisting solely of parties or consisting solely of representatives); and
  - (b) either:
    - (i) another person who is a party to a de facto relationship with one of the spouse parties to the Part VIIIAB financial agreement; or
    - (ii) the legal personal representative of that other person if that person has died;being proceedings for the setting aside of the Part VIIIAB financial agreement on the ground specified in paragraph 90UM(1)(c).
- (3) For the purposes of paragraph (f) of the definition of *de facto financial cause* in subsection 4(1), *third party proceedings* also means proceedings between:
  - (a) any combination of:
    - (i) the parties to a Part VIIIAB financial agreement; and
    - (ii) the legal personal representatives of any of those parties who have died;(including a combination consisting solely of parties or consisting solely of representatives); and
  - (b) either:
    - (i) another person who is a party to a marriage with one of the spouse parties to the Part VIIIAB financial agreement; or
    - (ii) the legal personal representative of that other person if that person has died;



being proceedings for the setting aside of the Part VIIIAB financial agreement on the ground specified in paragraph 90UM(1)(d).

(4) In this section:

**creditor** means:

- (a) a creditor of a party to the Part VIIIAB financial agreement;  
or
- (b) a person who, at the commencement of the proceedings, could reasonably have been foreseen by the court as being reasonably likely to become a creditor of a party to the Part VIIIAB financial agreement.

**government body** means:

- (a) the Commonwealth, a State or a Territory; or
- (b) an official or authority of the Commonwealth, a State or a Territory.

#### **24 Paragraph 10L(2)(a)**

After “Part VIII proceedings”, insert “, or Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement)”.

#### **25 Subparagraph 10L(2)(b)(i)**

After “Part VIIIA proceedings”, insert “Part VIIIAB proceedings”.

#### **26 Subsection 13E(1)**

Omit all the words after “exercising”, substitute:

jurisdiction in:

- (a) Part VIII proceedings; or
- (b) Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement);

may make an order referring the proceedings, or any part of them, or any matter arising in them, to an arbitrator for arbitration.

Note: The heading to section 13E is altered by inserting “**or Part VIIIAB proceedings**” after “**Part VIII proceedings**”.

#### **27 At the end of paragraph 31(1)(a)**

Add “and”.

**28 After paragraph 31(1)(a)**

Insert:

- (aa) matters arising under this Act in respect of which de facto financial causes are instituted under this Act; and

**29 At the end of paragraph 31(1)(b)**

Add “and”.

**30 Subparagraph 37A(1)(f)(i)**

Omit “or 77”, substitute “, 77 or 90SG”.

**31 Part V (heading)**

Repeal the heading, substitute:

**Part V—Jurisdiction of courts**

**32 Before section 39**

Insert:

**Division 1—Jurisdiction in matrimonial causes**

**33 After section 39**

Insert:

**Division 2—Jurisdiction in de facto financial causes**

**39A Instituting proceedings**

*Instituting proceedings under this Act*

- (1) A de facto financial cause may be instituted under this Act in:
  - (a) the Family Court; or
  - (b) the Federal Magistrates Court; or
  - (c) the Supreme Court of the Northern Territory of Australia; or
  - (d) a court of summary jurisdiction of a participating jurisdiction.
- (2) However:

- (a) in the case of proceedings between the parties to the de facto relationship—either of those parties; or
  - (b) in any other case—at least one of the parties to the proceedings;
- must be an Australian citizen, ordinarily resident in Australia or present in Australia on the following day:
- (c) if the application instituting the proceedings is filed in a court—the day on which the application is so filed;
  - (d) in any other case—the day on which the application instituting the proceedings is made.
- (3) Subsection (2) does not apply in relation to proceedings referred to in paragraph (g) of the definition of *de facto financial cause* in subsection 4(1).
- (4) Subsection (1) has effect subject to this Part.

*Proceedings only to be instituted under this Act*

- (5) A de facto financial cause that may be instituted under this Act must not, after the commencement of this section, be instituted otherwise than under this Act.
- (6) Subsection (5) has effect subject to subsection 90RC(5).

**39B Jurisdiction in de facto financial causes**

- (1) Jurisdiction is conferred on:
- (a) the Family Court; and
  - (b) the Federal Magistrates Court; and
  - (c) the Supreme Court of the Northern Territory of Australia; and
  - (d) each court of summary jurisdiction of each Territory;
- with respect to matters arising under this Act in respect of which de facto financial causes are instituted under this Act.

Note 1: The exercise of this jurisdiction by the Family Court is subject to section 40.

Note 2: The exercise of this jurisdiction by the Federal Magistrates Court is subject to section 40A.

Note 3: The exercise of this jurisdiction by a Territory court is subject to sections 39C, 39D, 39E and 39F.

- (2) Each court of summary jurisdiction of each referring State is invested with federal jurisdiction with respect to matters arising under this Act in respect of which de facto financial causes are instituted under this Act.

Note: The exercise of this jurisdiction by a State court is subject to sections 39D and 39E.

- (3) This section has effect subject to this Part.

### **39C Ceasing jurisdiction of Supreme Court of the Northern Territory of Australia**

- (1) The Governor-General may, by Proclamation, fix a day as the day on and after which a de facto financial cause:
- (a) may not be instituted in, or transferred to, the Supreme Court of the Northern Territory of Australia; or
  - (b) may be so instituted or transferred only where specified conditions are complied with.
- (2) Without limiting the generality of subsection (1), a Proclamation under that subsection may be expressed to apply only in relation to one or more of the following:
- (a) proceedings of specified classes;
  - (b) the institution of proceedings in, or the transfer of proceedings to, the Supreme Court of the Northern Territory of Australia.
- (3) The Supreme Court of the Northern Territory of Australia must not hear and determine de facto financial causes otherwise than in accordance with any Proclamation in force under subsection (1).

### **39D Ceasing jurisdiction of State or Territory courts of summary jurisdiction**

- (1) The Governor-General may, by Proclamation, fix a day as the day on and after which a de facto financial cause may not be instituted in, or transferred to, a court of summary jurisdiction in a specified participating jurisdiction.
- (2) Without limiting the generality of subsection (1), a Proclamation under that subsection may be expressed to apply only in relation to one or more of the following:
-

- (a) proceedings of specified classes;
  - (b) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction in a specified part of a participating jurisdiction;
  - (c) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction constituted in a specified way.
- (3) A court of summary jurisdiction must not hear and determine de facto financial causes otherwise than in accordance with any Proclamation in force under subsection (1).

### **39E Revoking Proclamations ceasing jurisdiction of State or Territory courts**

- (1) The Governor-General may, by Proclamation, declare that a Proclamation under section 39C or 39D is revoked on and from a specified day.
- (2) If, under subsection (1), the Governor-General declares that a Proclamation under section 39C or 39D is revoked:
  - (a) this Part (including sections 39C and 39D) has effect as if the revoked Proclamation had not been made; but
  - (b) the effect of the revoked Proclamation on the jurisdiction of courts before the specified day is not affected.

### **39F Territory court does not have jurisdiction unless a party is ordinarily resident in the Territory**

A court of a Territory must not hear or determine a de facto financial cause unless at least one of the parties to the proceedings is ordinarily resident in the Territory when the proceedings are instituted or are transferred to the court.

### **39G Jurisdiction in relation to transferred matters under other Commonwealth laws**

If proceedings in relation to a matter arising under a law of the Commonwealth are transferred under this Act to a court that has jurisdiction conferred on or invested in it by this Division, the jurisdiction so conferred on or invested in the court includes jurisdiction in relation to that matter.

### Division 3—Other provisions

#### 34 Section 43

Before “The”, insert “(1)”.

#### 35 At the end of section 43

Add:

- (2) Paragraph (1)(a) does not apply in relation to the exercise of jurisdiction conferred or invested by Division 2.

#### 36 At the end of section 44

Add:

- (5) Subject to subsection (6), a party to a de facto relationship may apply for:
- (a) an order under section 90SE, 90SG or 90SM; or
  - (b) a declaration under section 90SL;
- only if the application is made within the period of 2 years after the end of the de facto relationship (the *standard application period*).
- (6) The court may grant the party leave to apply after the end of the standard application period if the court is satisfied that:
- (a) hardship would be caused to the party or a child if leave were not granted; or
  - (b) in the case of an application for an order for the maintenance of the party—the party’s circumstances were, at the end of the standard application period, such that he or she would have been unable to support himself or herself without an income tested pension, allowance or benefit.

#### 37 Subsection 45(1A)

After “proceedings” (second occurring), insert “under this Act”.

#### 38 After subsection 45(1A)

Insert:

- (1B) For the purposes of subsection (1):
- (a) a de facto financial cause instituted in relation to a de facto relationship; and

(b) proceedings relating to an application, by the bankruptcy trustee of one of the parties to the de facto relationship, under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act;

are taken to be proceedings under this Act in relation to the same matter.

(1C) For the purposes of subsection (1), the first proceedings set out in each item of following table, and the second proceedings set out in that item, are taken to relate to the same matter if one of the parties to each marriage, void marriage or de facto relationship referred to in that item is the same.

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<b>Proceedings relating to the same matter</b>		
<b>Item</b>	<b>First proceedings</b>	<b>Second proceedings</b>
1	a matrimonial cause instituted in relation to a marriage (or void marriage)	a de facto financial cause instituted in relation to a de facto relationship
2	a de facto financial cause instituted in relation to a de facto relationship	a de facto financial cause instituted in relation to a de facto relationship

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### **39 Subsection 69ZM(3)**

Repeal the subsection, substitute:

(3) This Division also applies to other proceedings between the parties that involve the court exercising jurisdiction under this Act if:

(a) the proceedings:

(i) arise from the breakdown of the parties' marital relationship; or

(ii) are a de facto financial cause; and

(b) the parties to the proceedings consent.

### **40 At the end of paragraphs 75(2)(a), (b), (c), (d), (e), (f), (g), (h), (j), (k), (l), (m) and (n)**

Add "and".

### **41 After paragraph 75(2)(n)**

Insert:

---

- (naa) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:
- (i) a party to the marriage; or
  - (ii) a person who is a party to a de facto relationship with a party to the marriage; or
  - (iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

**42 Paragraph 75(2)(p)**

After “parties”, insert “to the marriage”.

**43 At the end of subsection 75(2)**

Add:

- ; and (q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

**44 Subsection 79(10)**

After “this section”, insert “by a party to a marriage (the *subject marriage*)”.

**45 After paragraph 79(10)(a)**

Insert:

- (aa) a person:
  - (i) who is a party to a de facto relationship with a party to the subject marriage; and
  - (ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;
- (ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

**46 After subsection 79(10A)**

Insert:

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(10B) If a person becomes a party to proceedings under this section because of paragraph (10)(aa), the person may, in the proceedings, apply for:

- (a) an order under section 90SM; or
- (b) a declaration under section 90SL;

in relation to the de facto relationship described in that paragraph.

#### **47 At the end of section 79F**

Add:

Note: The applicable Rules of Court may, for example, require notice to be given to persons referred to in subsection 79(10) whose interests could be affected by proceedings for an order under section 79.

#### **48 Subparagraph 83(2)(a)(i)**

After “changed”, insert “(including the person entering into a stable and continuing de facto relationship)”.

#### **49 After paragraph 90K(1)(aa)**

Insert:

- (ab) a party (the *agreement party*) to the agreement entered into the agreement:
  - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or
  - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or
  - (iii) with reckless disregard of those interests of that other person; or

#### **50 After Part VIIIA**

Insert:

## Part VIIIAB—Financial matters relating to de facto relationships

### Division 1—Preliminary

#### Subdivision A—Meaning of key terms

##### 90RA Participating jurisdictions

*Participating jurisdictions*

- (1) For the purposes of this Act, the following are the *participating jurisdictions*:
- (a) each referring State;
  - (b) each Territory.

*Referring States*

- (2) A State is a *referring State* if:
- (a) the Parliament of the State has referred, or refers, to the Parliament of the Commonwealth financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships; and
  - (b) the referral of the financial matters is made:
    - (i) for the purposes of paragraph 51(xxxvii) of the Constitution; and
    - (ii) to the extent that the financial matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution).

This subsection has effect subject to subsection (5).

- (3) To avoid doubt, a State is not a *referring State* if its Parliament has referred, or refers, to the Parliament of the Commonwealth only a limited class of the matters referred to in paragraph (2)(a).
- (4) A State is a *referring State* even if a law of the State provides that a reference to the Commonwealth Parliament described in subsection (2) is to terminate in particular circumstances.

- (5) A State ceases to be a *referring State* if the State's reference to the Commonwealth Parliament described in subsection (2) terminates.

### **90RB Meaning of *child of a de facto relationship***

For the purposes of this Part, a child is a *child of a de facto relationship* if the child is the child of both of the parties to the de facto relationship.

Note: To determine who is a child of a person see Subdivision D of Division 1 of Part VII.

## **Subdivision B—Relationship with State and Territory laws**

### **90RC Relationship with State and Territory laws**

#### *De facto financial provisions*

- (1) In this section:

*de facto financial provisions* means the following provisions:

- (a) this Part;
- (b) Part VIII AA (as applied by section 90TA);
- (c) Part VIII B, to the extent to which it relates to a superannuation interest to be allocated between the parties to a de facto relationship;
- (d) subsection 114(2A).

#### *State and Territory laws do not apply to financial matters*

- (2) Parliament intends that the de facto financial provisions are to apply to the exclusion of any law of a State or Territory to the extent that the law:
- (a) deals with financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships; and
  - (b) deals with those matters by referring expressly to de facto relationships (regardless of how the State or Territory law describes those relationships).

Note 1: If, for example, both this Part and a law of a non-referring State deal with the distribution of property between the parties to a de facto relationship that has broken down after the commencement of this section, then the parties can only seek to distribute the property under

**Schedule 1** Amendments relating to de facto financial matters  
**Part 1** Amendments

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this Part. Subsection (2) has the effect of preventing the parties from seeking to distribute the property under the State law.

Note 2: For *de facto relationship*, see section 4AA.

*Exception—insufficient link to a participating jurisdiction or Division 2 not applicable because of section 90SB*

- (3) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory in relation to a financial matter relating to the parties to a de facto relationship arising out of the breakdown of the relationship if:
- (a) a court cannot make an order under this Part in relation to that financial matter because of section 90SB, 90SD or 90SK; and
  - (b) there is no Part VIIIAB financial agreement that is binding on the parties dealing with that financial matter.

Example 1: Abbey and Bob are parties to a de facto relationship that has broken down, and have never been ordinarily resident in a participating jurisdiction. Subsection (3) has the effect that State law will govern financial matters arising out of the breakdown of their relationship.

Example 2: Cleo and Dan are parties to a de facto relationship that has broken down after the commencement of this section. Early in their relationship, they made a financial agreement under the law of a non-referring State, but later spent most of their relationship in a participating jurisdiction. Cleo and Dan now have a sufficient geographical link with a participating jurisdiction for either of them to apply for an order under this Part in relation to financial matters arising out of the breakdown of their relationship. This means that subsection (3) will not apply and that their financial agreement will not be enforceable under State law because of subsection (2). However, their financial agreement will be enforceable under this Part as a Part VIIIAB financial agreement (see section 90UE).

*Exception—laws facilitating this Act*

- (4) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory to the extent that the law facilitates the operation of this Act.

Note: This Part is not intended to apply to the exclusion of, for example, a State law that deals with superannuation entitlements by acknowledging superannuation splitting under Part VIIIIB of this Act.

*Exception—prescribed State or Territory laws*

- (5) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory if the law is prescribed in regulations made for the purposes of this subsection.

**Subdivision C—Declarations about existence of de facto relationships**

**90RD Declarations about existence of de facto relationships**

- (1) If:
- (a) an application is made for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL; and
  - (b) a claim is made, in support of the application, that a de facto relationship existed between the applicant and another person;
- the court may, for the purposes of those proceedings (the *primary proceedings*), declare that a de facto relationship existed, or never existed, between those 2 persons.
- (2) A declaration under subsection (1) of the existence of a de facto relationship may also declare any or all of the following:
- (a) the period, or periods, of the de facto relationship for the purposes of paragraph 90SB(a);
  - (b) whether there is a child of the de facto relationship;
  - (c) whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);
  - (d) when the de facto relationship ended;
  - (e) where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

Note: For *child of a de facto relationship*, see section 90RB.

**90RE Effect of declarations**

- (1) A section 90RD declaration has effect as a judgment of the court.
- (2) For the purposes of this Act (other than Part VII), a section 90RD declaration has effect according to its terms.

### **90RF Applying for declarations**

Any party to the primary proceedings may apply for a section 90RD declaration.

### **90RG Geographical requirement**

A court may make a section 90RD declaration only if the court is satisfied that a person referred to in paragraph 90RD(1)(b), or both of those persons, were ordinarily resident in a participating jurisdiction when the primary proceedings commenced.

### **90RH Setting aside declarations**

- (1) If, in the primary proceedings, a person (the *affected person*) affected by a section 90RD declaration made in those proceedings applies under this subsection, and the court is satisfied that:
  - (a) a fact or circumstance has arisen that has not previously been disclosed to the court; and
  - (b) if the affected person was a party to the primary proceedings at the time the application for the declaration was made—the fact or circumstance was not within the affected person’s knowledge at that time;the court may do any of the following:
  - (c) vary the declaration;
  - (d) set the declaration aside;
  - (e) set the declaration aside and make another section 90RD declaration in substitution for the declaration so set aside.
- (2) The setting aside of a declaration does not affect anything done in reliance on the declaration while it remained in force.
- (3) If the court sets aside a section 90RD declaration, the court may, on application by the affected person or any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of placing as far as practicable any person affected by the setting aside of the declaration in the same position as that person would have been in if the declaration had not been made.

## **Division 2—Maintenance, declarations of property interests and alterations of property interests**

### **Subdivision A—Application of Division**

#### **90SA This Division does not apply to certain matters covered by binding financial agreements**

- (1) This Division does not apply to any of the following matters to which a Part VIIIAB financial agreement that is binding on the parties to the agreement applies:
  - (a) the maintenance of one of the spouse parties;
  - (b) the property of the spouse parties or of either of them;
  - (c) the financial resources of the spouse parties or of either of them.
- (2) Subsection (1) does not apply in relation to:
  - (a) proceedings between:
    - (i) a party to a de facto relationship; and
    - (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;with respect to the maintenance of the first-mentioned party after the breakdown of the de facto relationship; or
  - (b) proceedings between:
    - (i) a party to a de facto relationship; and
    - (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;with respect to the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property in relation to the bankrupt party.
- (3) Despite subsection (1), a party to a de facto relationship is not prevented from bringing property settlement proceedings under this Part if a Part VIIIAB financial agreement is not binding on that party.

Example: Before Amy and Ben's de facto relationship breaks down, Ben and Cathy make a Part VIIIAB financial agreement. Ben and Cathy's Part VIIIAB financial agreement does not prevent Amy from bringing property settlement proceedings against Ben.

**90SB When this Division applies—length of relationship etc.**

A court may make an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL, in relation to a de facto relationship only if the court is satisfied:

- (a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or
- (b) that there is a child of the de facto relationship; or
- (c) that:
  - (i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and
  - (ii) a failure to make the order or declaration would result in serious injustice to the applicant; or
- (d) that the relationship is or was registered under a prescribed law of a State or Territory.

Note: For *child of a de facto relationship*, see section 90RB.

**90SC This Division ceases to apply in relation to a de facto relationship if the parties marry each other**

- (1) This Division (other than subsections 90SJ(2) to (5)) ceases to apply in relation to a de facto relationship if the parties to the de facto relationship later marry each other.
- (2) Despite subsection (1), a declaration, order or injunction:
  - (a) made in property settlement proceedings under this Division in relation to the de facto relationship; and
  - (b) in force when the parties marry each other;may, after the marriage, be enforced, varied or set aside in accordance with this Act.
- (3) If a declaration, order or injunction is set aside as described in subsection (2), another declaration, order or injunction may be made under this Division in substitution for that declaration, order or injunction.



## **Subdivision B—Maintenance**

### **90SD Geographical requirement**

- (1) A court may make an order under section 90SE or 90SG in relation to a de facto relationship only if the court is satisfied:
- (a) that either or both of the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the order was made (the *application time*); and
  - (b) that either:
    - (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
    - (ii) the applicant for the order made substantial contributions, in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); in one or more States or Territories that are participating jurisdictions at the application time;
- or that the alternative condition in subsection (1A) is met.

- (1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.
- (2) For the purposes of paragraph (1)(b), a State need not have been a participating jurisdiction during the de facto relationship.
- (3) If each State is a referring State, the Governor-General may, by Proclamation, fix a day as the day on which paragraph (1)(b), and the alternative condition in subsection (1A), cease to apply in relation to new applications.

Note: Paragraph (1)(b) and subsection (1A) will continue to apply in relation to applications made before the proclaimed day.

- (4) If:
- (a) a Proclamation under subsection (3) is in force; and
  - (b) a State ceases to be a referring State on a particular day;
- the Proclamation is revoked by force of this subsection on and from that day.

- (5) If, under subsection (4), a Proclamation under subsection (3) is revoked:
- (a) this section has effect as if the revoked Proclamation had not been made; but
  - (b) the effect of the revoked Proclamation on applications made before the specified day is not affected.

**90SE Power of court in maintenance proceedings**

- (1) After the breakdown of a de facto relationship, a court may make such order as it considers proper for the maintenance of one of the parties to the de facto relationship in accordance with this Division.

Note 1: The geographical requirement in section 90SD must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

- (2) If:
- (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the maintenance of a party to the de facto relationship; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the application was made, the party was a bankrupt;
    - (ii) after the application was made but before the proceedings are finally determined, the party became a bankrupt; and
  - (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
  - (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;
- the court must join the bankruptcy trustee as a party to the proceedings.
- (3) If, under subsection (2), a bankruptcy trustee is a party to proceedings with respect to the maintenance of a party to a de facto relationship, then, except with the leave of the court, the bankrupt party to the de facto relationship is not entitled to make a

submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

- (4) The court must not grant leave under subsection (3) unless the court is satisfied that there are exceptional circumstances.
- (5) If:
- (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the maintenance of a party to the de facto relationship; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship (the *debtor party*):
    - (i) when the application was made, the debtor party was a debtor subject to a personal insolvency agreement;
    - (ii) after the application was made but before it is finally determined, the debtor party becomes a debtor subject to a personal insolvency agreement; and
  - (c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and
  - (d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;
- the court must join the trustee of the agreement as a party to the proceedings.
- (6) If, under subsection (5), the trustee of a personal insolvency agreement is a party to proceedings with respect to the maintenance of a party to a de facto relationship, then, except with the leave of the court, the debtor party is not entitled to make a submission to the court in connection with any property subject to the agreement.
- (7) The court must not grant leave under subsection (6) unless the court is satisfied that there are exceptional circumstances.
- (8) For the purposes of subsections (2) and (5), an application for an order under this section is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
  - (b) an order (other than an interim order) is made as a result of the application.

**90SF Matters to be taken into consideration in relation to maintenance**

- (1) In exercising jurisdiction under section 90SE (after being satisfied of the matters in subsections 44(5) and (6) and sections 90SB and 90SD), the court must apply the principle that a party to a de facto relationship must maintain the other party to the de facto relationship:
    - (a) only to the extent that the first-mentioned party is reasonably able to do so; and
    - (b) only if the second-mentioned party is unable to support himself or herself adequately whether:
      - (i) by reason of having the care and control of a child of the de facto relationship who has not attained the age of 18 years; or
      - (ii) by reason of age or physical or mental incapacity for appropriate gainful employment; or
      - (iii) for any other adequate reason.
- Note: For *child of a de facto relationship*, see section 90RB.
- (2) In applying this principle, the court must take into account only the matters referred to in subsection (3).
  - (3) The matters to be so taken into account are:
    - (a) the age and state of health of each of the parties to the de facto relationship (the *subject de facto relationship*); and
    - (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and
    - (c) whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years; and
    - (d) commitments of each of the parties that are necessary to enable the party to support:
      - (i) himself or herself; and
      - (ii) a child or another person that the party has a duty to maintain; and
    - (e) the responsibilities of either party to support any other person; and

- (f) subject to subsection (4), the eligibility of either party for a pension, allowance or benefit under:
  - (i) any law of the Commonwealth, of a State or Territory or of another country; or
  - (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;  
and the rate of any such pension, allowance or benefit being paid to either party; and
- (g) a standard of living that in all the circumstances is reasonable; and
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and
- (i) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and
- (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and
- (k) the duration of the de facto relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and
- (l) the need to protect a party who wishes to continue that party's role as a parent; and
- (m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation; and
- (n) the terms of any order made or proposed to be made under section 90SM in relation to:
  - (i) the property of the parties; or
  - (ii) vested bankruptcy property in relation to a bankrupt party; and
- (o) the terms of any order or declaration made, or proposed to be made, under this Part in relation to:

- (i) a party to the subject de facto relationship (in relation to another de facto relationship); or
  - (ii) a person who is a party to another de facto relationship with a party to the subject de facto relationship; or
  - (iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and
- (p) the terms of any order or declaration made, or proposed to be made, under Part VIII in relation to:
- (i) a party to the subject de facto relationship; or
  - (ii) a person who is a party to a marriage with a party to the subject de facto relationship; or
  - (iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and
- (q) any child support under the *Child Support (Assessment) Act 1989* that a party to the subject de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the subject de facto relationship; and
- (r) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and
- (s) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship; and
- (t) the terms of any financial agreement that is binding on a party to the subject de facto relationship.
- (4) In exercising its jurisdiction under section 90SE, a court must disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

### **90SG Urgent maintenance cases**

If, in proceedings with respect to the maintenance of a party to a de facto relationship in accordance with this Division, it appears to the court that:

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- (a) the party is in immediate need of financial assistance; and
  - (b) it is not practicable in the circumstances to determine immediately what order, if any, should be made;
- the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable.

Note 1: The geographical requirement in section 90SD must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

### **90SH Specification in orders of payments etc. for maintenance purposes**

(1) If:

- (a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a de facto relationship in accordance with this Division, is made by consent or varies an earlier order), and the order has the effect of requiring:
  - (i) payment of a lump sum, whether in one amount or by instalments; or
  - (ii) the transfer or settlement of property; and
- (b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a de facto relationship in relation to the breakdown of the de facto relationship;

the court must:

- (c) express the order to be an order to which this section applies; and
- (d) specify the portion of the payment, or the value of the portion of the property, attributable to the maintenance of the party.

(2) If:

- (a) a court makes an order of a kind referred to in paragraph (1)(a); and
- (b) the order:
  - (i) is not expressed to be an order to which this section applies; or
  - (ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, must be taken not to make provision for the maintenance of a party to the relevant de facto relationship.

**90SI Modification of maintenance orders**

- (1) If there is in force an order with respect to the maintenance of a party to a de facto relationship in accordance with this Division:
  - (a) made by the court; or
  - (b) made by another court and registered in the first-mentioned court in accordance with the applicable Rules of Court;the court may:
  - (c) discharge the order if there is any just cause for so doing; or
  - (d) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event; or
  - (e) revive wholly or in part an order suspended under paragraph (d); or
  - (f) subject to subsection (3), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.
- (2) The court's jurisdiction under subsection (1) may be exercised:
  - (a) in any case—in proceedings with respect to the maintenance of a party to the de facto relationship in accordance with this Division; or
  - (b) if there is a bankrupt party to the de facto relationship—on the application of the bankruptcy trustee; or
  - (c) if a party to the de facto relationship is a debtor subject to a personal insolvency agreement—on the application of the trustee of the agreement.
- (3) The court must not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied:
  - (a) that, since the order was made or last varied:
    - (i) the circumstances of a person for whose benefit the order was made have so changed (including the person entering into a stable and continuing de facto relationship); or



- (ii) the circumstances of the person liable to make payments under the order have so changed; or
  - (iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative—the circumstances of the estate are such;  
as to justify its so doing; or
  - (b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;  
or
  - (c) in a case where the order was made by consent—that the amount ordered to be paid is not proper or adequate; or
  - (d) that:
    - (i) material facts were withheld from the court that made the order, or from a court that varied the order; or
    - (ii) material evidence previously given before such a court was false.
- (4) In satisfying itself for the purposes of paragraph (3)(b), the court must have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician.
- (5) The court must not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living.
- (6) In satisfying itself for the purposes of paragraph (3)(c), the court must have regard to any payments, and any transfer or settlement of property, previously made by a party to the de facto relationship, or by the bankruptcy trustee of a party to the de facto relationship, to:
- (a) the other party; or
  - (b) any other person for the benefit of the other party.
- (7) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate.
- (8) If, as provided by subsection (7), an order decreasing the amount of a periodic sum payable under an order is expressed to be retrospective to a specified date, any money paid under the second-mentioned order since the specified date, being money that
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would not have been required to be paid under the second-mentioned order as varied by the first-mentioned order, may be recovered in a court having jurisdiction under this Act.

- (9) If, as provided by subsection (7), an order discharging an order is expressed to be retrospective to a specified date, any money paid under the second-mentioned order since the specified date may be recovered in a court having jurisdiction under this Act.
- (10) For the purposes of this section, the court must have regard to the provisions of section 90SF.
- (11) The discharge of an order does not affect the recovery of arrears due under the order at the time as at which the discharge takes effect.

### **90SJ Cessation of maintenance orders**

- (1) An order with respect to the maintenance of a party to a de facto relationship in accordance with this Division ceases to have effect upon:
  - (a) the death of the party; or
  - (b) the death of the person liable to make payments under the order.
- (2) An order with respect to the maintenance of a party to a de facto relationship in accordance with this Division ceases to have effect upon the marriage of the party unless in special circumstances a court having jurisdiction under this Act otherwise orders.
- (3) If a marriage referred to in subsection (2) takes place, it is the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date of the marriage.
- (4) Any money paid in respect of a period after the event referred to in subsection (2) may be recovered in a court having jurisdiction under this Act.
- (5) Nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect.

## **Subdivision C—Declarations and alterations of property interests**

### **90SK Geographical requirement**

- (1) A court may make a declaration under section 90SL, or an order under section 90SM, in relation to a de facto relationship only if the court is satisfied:
- (a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the *application time*); and
  - (b) that either:
    - (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
    - (ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);in one or more States or Territories that are participating jurisdictions at the application time;
- or that the alternative condition in subsection (1A) is met.
- (1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.
- (2) For the purposes of paragraph (1)(b), a State need not have been a participating jurisdiction during the de facto relationship.
- (3) If each State is a referring State, the Governor-General may, by Proclamation, fix a day as the day on which paragraph (1)(b), and the alternative condition in subsection (1A), cease to apply in relation to new applications.

Note: Paragraph (1)(b) and subsection (1A) will continue to apply in relation to applications made before the proclaimed day.

- (4) If:
- (a) a Proclamation under subsection (3) is in force; and
  - (b) a State ceases to be a referring State on a particular day;

the Proclamation is revoked by force of this subsection on and from that day.

- (5) If, under subsection (4), a Proclamation under subsection (3) is revoked:
- (a) this section has effect as if the revoked Proclamation had not been made; but
  - (b) the effect of the revoked Proclamation on applications made before the specified day is not affected.

### **90SL Declaration of interests in property**

- (1) In proceedings between the parties to a de facto relationship:
- (a) after the breakdown of the de facto relationship; and
  - (b) with respect to existing title or rights in respect of property;
- the court may declare the title or rights, if any, that a party has in respect of the property.

Note 1: The geographical requirement in section 90SK must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

- (2) If a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.

### **90SM Alteration of property interests**

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

- (c) an order for a settlement of property in substitution for any interest in the property; and
- (d) an order requiring:
  - (i) either or both of the parties to the de facto relationship; or
  - (ii) the relevant bankruptcy trustee (if any);to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

Note 1: The geographical requirement in section 90SK must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

Note 3: For *child of a de facto relationship*, see section 90RB.

- (2) If a party to the de facto relationship dies after the breakdown of the de facto relationship, an order made under subsection (1) in property settlement proceedings may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (3) The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court must take into account:
  - (a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
    - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
    - (ii) otherwise in relation to any of that last-mentioned property;whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and
  - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:

- (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
  - (ii) otherwise in relation to any of that last-mentioned property;  
whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and
  - (c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and
  - (d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and
  - (e) the matters referred to in subsection 90SF(3) so far as they are relevant; and
  - (f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and
  - (g) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.
- (5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, if, in property settlement proceedings in relation to the parties to a de facto relationship, a court is of the opinion:
- (a) that there is likely to be a significant change in the financial circumstances of the parties to the de facto relationship or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
  - (b) that an order that the court could make with respect to:
    - (i) the property of the parties to the de facto relationship or either of them; or
    - (ii) the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship;

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the de facto relationship than an order that the court could make immediately with respect to:

- (iii) the property of the parties to the de facto relationship or either of them; or
- (iv) the vested bankruptcy property in relation to a bankrupt party to the de facto relationship;

the court may, if so requested by either party to the de facto relationship or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the de facto relationship or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

- (6) If a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:
  - (a) any of the property of the parties to the de facto relationship or of either of them; or
  - (b) any of the vested bankruptcy property in relation to a bankrupt party to the de facto relationship.
- (7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the de facto relationship, have regard to any change in the financial circumstances of a party to the de facto relationship that may occur by reason that the party to the de facto relationship:
  - (a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or
  - (b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant

change in the financial circumstances of a party to the de facto relationship.

- (8) If a party to the de facto relationship dies after the breakdown of the de facto relationship, but before property settlement proceedings are completed:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
  - (b) if the court is of the opinion:
    - (i) that it would have made an order with respect to property if the deceased party had not died; and
    - (ii) that it is still appropriate to make an order with respect to property;the court may make such order as it considers appropriate with respect to:
    - (iii) any of the property of the parties to the de facto relationship or either of them; or
    - (iv) any of the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship; and
  - (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (9) The Family Court must not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:
- (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court; or
  - (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or
  - (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).
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- (10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a de facto relationship (the *subject de facto relationship*):
- (a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;
  - (b) a person:
    - (i) who is a party to a de facto relationship (the *other de facto relationship*) with a party to the subject de facto relationship; and
    - (ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship;
  - (c) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject de facto relationship;
  - (d) a person:
    - (i) who is a party to a marriage with a party to the subject de facto relationship; and
    - (ii) who could apply, or has an application pending, for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage);
  - (e) a person who is a party to a financial agreement (that is binding on the person) with a party to the subject de facto relationship;
  - (f) any other person whose interests would be affected by the making of the order.
- (11) Subsection (10) does not apply to a creditor of a party to the proceedings:
- (a) if the party is a bankrupt—to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or
  - (b) if the party is a debtor subject to a personal insolvency agreement—to the extent to which the debt is covered by the personal insolvency agreement.
- (12) If a person becomes a party to proceedings under this section because of paragraph (10)(b), the person may, in the proceedings, apply for:
-

- (a) an order under section 90SM; or
    - (b) a declaration under section 90SL;in relation to the other de facto relationship described in that paragraph.
  - (13) If a person becomes a party to proceedings under this section because of paragraph (10)(d), the person may, in the proceedings, apply for:
    - (a) an order under section 79; or
    - (b) a declaration under section 78;in relation to the marriage (or void marriage) described in that paragraph.
  - (14) If:
    - (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and
    - (b) either of the following subparagraphs apply to a party to the de facto relationship:
      - (i) when the application was made, the party was a bankrupt;
      - (ii) after the application was made but before it is finally determined, the party became a bankrupt; and
    - (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
    - (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;the court must join the bankruptcy trustee as a party to the proceedings.
  - (15) If a bankruptcy trustee is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the bankrupt party to the de facto relationship is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.
  - (16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.
-

- (17) If:
- (a) an application is made for an order under this section in proceedings between the parties to a de facto relationship with respect to the property of the parties to the de facto relationship or either of them; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship (the *debtor party*):
    - (i) when the application was made, the party was a debtor subject to a personal insolvency agreement;
    - (ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and
  - (c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and
  - (d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;
- the court must join the trustee of the agreement as a party to the proceedings.
- (18) If the trustee of a personal insolvency agreement is a party to property settlement proceedings in relation to the parties to a de facto relationship, then, except with the leave of the court, the party to the de facto relationship who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.
- (19) The court must not grant leave under subsection (18) unless the court is satisfied that there are exceptional circumstances.
- (20) For the purposes of subsections (14) and (17), an application for an order under this section is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
  - (b) an order (other than an interim order) is made as a result of the application.

### **90SN Varying and setting aside orders altering property interests**

- (1) If, on application by a person affected by an order made by a court under section 90SM in property settlement proceedings, the court is satisfied that:

- (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
- (b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
- (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
- (d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the de facto relationship, the child or, where the applicant has caring responsibility for the child (as defined in subsection (3)), the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order; or
- (e) a proceeds of crime order has been made covering property of the parties to the de facto relationship or either of them, or a proceeds of crime order has been made against a party to the de facto relationship;

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 90SM in substitution for the order so set aside.

Note: For *child of a de facto relationship*, see section 90RB.

- (2) A court may, on application by a person affected by an order made by a court under section 90SM in property settlement proceedings, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it considers appropriate, make another order under section 90SM in substitution for the order so set aside.
- (3) For the purposes of paragraph (1)(d), a person has ***caring responsibility*** for a child if:
  - (a) the person is a parent of the child with whom the child lives; or
  - (b) a parenting order provides that:

- (i) the child is to live with the person; or
  - (ii) the person has parental responsibility for the child.
- (4) An order varied or made under subsection (1) or (2) may, after the death of a party to the de facto relationship in relation to which the order was so varied or made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (5) If, before proceedings under this section in relation to an order made under section 90SM are completed, a party to the de facto relationship dies:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
  - (b) if the court is of the opinion:
    - (i) that it would have exercised its powers under subsection (1) or (2) in relation to the order if the deceased party had not died; and
    - (ii) that it is still appropriate to exercise its powers under subsection (1) or (2) in relation to the order;the court may vary the order, set the order aside, or set the order aside and make another order under section 90SM in substitution for the order so set aside; and
  - (c) an order varied or made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (6) In the exercise of its powers under subsection (1), (2) or (5), a court must have regard to the interests of, and must make any order proper for the protection of, a bona fide purchaser or other person interested.
- (7) For the purposes of this section, a creditor of a party to the proceedings in which the order under section 90SM was made is taken to be a person whose interests are affected by the order if the creditor may not be able to recover his or her debt because the order has been made.

- (8) For the purposes of this section, if:
- (a) an order is made by a court under section 90SM in proceedings with respect to the property of the parties to a de facto relationship or either of them; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the order was made, the party was a bankrupt;
    - (ii) after the order was made, the party became a bankrupt;the bankruptcy trustee is taken to be a person whose interests are affected by the order.
- (9) For the purposes of this section, if:
- (a) a party to a de facto relationship is a bankrupt; and
  - (b) an order is made by a court under section 90SM in proceedings with respect to the vested bankruptcy property in relation to the bankrupt party;
- the bankruptcy trustee is taken to be a person whose interests are affected by the order.
- (10) For the purposes of this section, if:
- (a) an order is made by a court under section 90SM in proceedings with respect to the property of the parties to a de facto relationship or either of them; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the order was made, the party was a debtor subject to a personal insolvency agreement;
    - (ii) after the order was made, the party became a debtor subject to a personal insolvency agreement;the trustee of the agreement is taken to be a person whose interests are affected by the order.

### **Subdivision D—Notification of application**

#### **90SO Notifying third parties about application**

The applicable Rules of Court may specify the circumstances in which a person who:

- (a) applies for an order under this Division; or
  - (b) is a party to a proceeding for an order under this Division;
-

is to give notice of the application to a person who is not a party to the proceedings.

Note: The applicable Rules of Court may, for example, make provision for the notification of a person married to, or in a de facto relationship with, the applicant or respondent to the proceedings.

**90SP Notifying bankruptcy trustee etc. about application under section 90SE, 90SL, 90SM or 90SN**

- (1) The applicable Rules of Court may make provision for a bankrupt who becomes a party to a proceeding for an application under section 90SE, 90SL, 90SM or 90SN to give notice of the application to the bankruptcy trustee.
- (2) The applicable Rules of Court may make provision for a debtor subject to a personal insolvency agreement who becomes a party to a proceeding for an application under section 90SE, 90SL, 90SM or 90SN to give notice of the application to the trustee of the agreement.

**90SQ Notifying court about bankruptcy etc.**

*Bankruptcy*

- (1) The applicable Rules of Court may make provision for a person who:
  - (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90SE, 90SL, 90SM or 90SN; and
  - (c) before that application is finally determined, becomes a bankrupt;to notify a court exercising jurisdiction under this Act that the person has become a bankrupt.

*Debtor subject to a personal insolvency agreement*

- (2) The applicable Rules of Court may make provision for a person who:
  - (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90SE, 90SL, 90SM or 90SN; and

(c) before that application is finally determined, becomes a debtor subject to a personal insolvency agreement;  
to notify a court exercising jurisdiction under this Act that the person has become a debtor subject to a personal insolvency agreement.

*Institution of proceeding under the Bankruptcy Act 1966*

- (3) The applicable Rules of Court may make provision for a person who:
- (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90SE, 90SL, 90SM or 90SN; and
  - (c) before that application is finally determined, becomes a party to a proceeding before the Federal Court or the Federal Magistrates Court under the *Bankruptcy Act 1966* that relates to:
    - (i) the bankruptcy of the person; or
    - (ii) the person's capacity as a debtor subject to a personal insolvency agreement;
- to notify a court exercising jurisdiction under this Act of the institution of the proceeding under the *Bankruptcy Act 1966*.

- (4) The applicable Rules of Court may make provision for a person who:
- (a) is the bankruptcy trustee of a bankrupt party to a de facto relationship; and
  - (b) the de facto relationship has broken down; and
  - (c) applies under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act;
- to notify a court exercising jurisdiction under this Act of the making of the application.

*When application finally determined*

- (5) For the purposes of this section, an application for an order under section 90SE, 90SM or 90SN is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
  - (b) an order (other than an interim order) is made as a result of the application.



- (6) For the purposes of this section, an application for a declaration under section 90SL is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
  - (b) a declaration is made as a result of the application.

**90SR Notifying non-bankrupt de facto party about application under section 139A of the *Bankruptcy Act 1966***

The applicable Rules of Court may make provision for a person who:

- (a) is the bankruptcy trustee of a bankrupt party to a de facto relationship; and
- (b) applies under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act in relation to an entity (other than the other party to the de facto relationship);

to notify the other party to the de facto relationship of the making of the application if that bankruptcy trustee is aware that the de facto relationship has broken down.

**Subdivision E—Court powers**

**90SS General powers of court**

*General powers*

- (1) The court, in exercising its powers under this Division, may do any or all of the following:
- (a) order payment of a lump sum, whether in one amount or by instalments;
  - (b) order payment of a weekly, monthly, yearly or other periodic sum;
  - (c) order that a specified transfer or settlement of property be made by way of maintenance for a party to a de facto relationship;
  - (d) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;
  - (e) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out

effectively or to provide security for the due performance of an order;

- (f) appoint or remove trustees;
- (g) order that payments be made direct to a party to the de facto relationship, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the de facto relationship;
- (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;
- (i) impose terms and conditions;
- (j) make an order by consent;
- (k) make any other order, or grant any other injunction, (whether or not of the same nature as those mentioned in the preceding paragraphs of this section) which it thinks it is necessary to make to do justice;
- (l) subject to this Act and the applicable Rules of Court, make an order under this Division at any time before or after the making of a decree under another provision of this Act.

Note: The court also has specific powers in relation to third parties (see Division 3 of Part VIII AA (as that Division has effect because of section 90TA)).

*Limitation for orders or injunctions covered by section 90AF*

- (2) Subsection (1) has effect subject to subsection 90AF(3) (as that subsection has effect because of section 90TA).

Note: An order or injunction made or granted under subsection (1) that is of a kind covered by subsection 90AF(1) or (2) can only be made or granted in accordance with subsection 90AF(3).

*Maintenance orders*

- (3) The making of an order of a kind referred to in paragraph (1)(c), or of any other order under this Division, in relation to the maintenance of a party to a de facto relationship does not prevent a court from making a subsequent order in relation to the maintenance of the party.
- (4) The applicable Rules of Court may make provision with respect to the making of orders under this Division in relation to the maintenance of parties to de facto relationships (whether as to their

form or otherwise) for the purpose of facilitating their enforcement and the collection of maintenance payable under them.

*Injunctions*

- (5) Without limiting paragraph (1)(k), the court may:
- (a) grant:
    - (i) an interlocutory injunction; or
    - (ii) an injunction in aid of the enforcement of a decree; in any case in which it appears to the court to be just or convenient to do so; and
  - (b) grant an injunction either unconditionally or upon such terms and conditions as the court considers appropriate.

*Bankruptcy and insolvency*

- (6) If a bankruptcy trustee is a party to a proceeding before the court, the court may make an order under paragraph (1)(e) directed to the bankrupt.
- (7) If the trustee of a personal insolvency agreement is a party to a proceeding before the court, the court may make an order under paragraph (1)(e) directed to the debtor subject to the agreement.
- (8) Subsections (6) and (7) do not limit paragraph (1)(e).
- (9) If a party to a de facto relationship is a bankrupt, a court may, on the application of the other party to the de facto relationship, by interlocutory order, grant an injunction under subsection (1) restraining the bankruptcy trustee from declaring and distributing dividends amongst the bankrupt's creditors.
- (10) If a party to a de facto relationship is a debtor subject to a personal insolvency agreement, a court may, on the application of the other party to the de facto relationship, by interlocutory order, grant an injunction under subsection (1) restraining the trustee of the agreement from disposing of (whether by sale, gift or otherwise) property subject to the agreement.
- (11) Subsections (9) and (10) do not limit subsections (1) and (5).

### 90ST Duty of court to end financial relations

In proceedings under this Division, other than proceedings under section 90SL, the court must, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the de facto relationship and avoid further proceedings between them.

## Division 3—Orders and injunctions binding third parties

### 90TA Orders and injunctions binding third parties

- (1) In addition to the effect Part VIII AA has apart from this section, that Part also has effect in relation to:
  - (a) orders and injunctions under Division 2; and
  - (b) proceedings for orders or injunctions under Division 2; with the modifications provided for in subsections (2) and (3).
- (2) Part VIII AA has effect in accordance with subsection (1) as if the following substitutions were made:

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#### Substitutions to be made

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Item	For a reference in Part VIII AA to ...	substitute a reference to ...
1	marriage	de facto relationship
2	section 79	section 90SM
3	section 114	section 90SS
4	paragraph (ca) of the definition of <i>matrimonial cause</i>	paragraph (c) of the definition of <i>de facto financial cause</i>
5	orders or injunctions under section 114	orders or injunctions under Division 2 of Part VIII AB
6	proceedings under section 114	proceedings under Division 2 of Part VIII AB
7	an injunction under subsection 114(3)	an injunction covered by subsection 90SS(5)

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- (3) Part VIII AA has effect in accordance with subsection (1) as if:
  - (a) subsection 90AD(2) were replaced with the following:

“(2) For the purposes of section 90SS (to the extent that it provides for the granting of an injunction in relation to the property of a party to

a de facto relationship), *property* includes a debt owed by a party to the de facto relationship.”; and

(b) paragraph 90AF(3)(d) were omitted; and

(c) the following paragraph were inserted after paragraph 90AF(3)(e):

“(ea) for any other injunction—the court is satisfied that, in all the circumstances, it is necessary to grant the injunction to do justice; and”; and

(d) the following subsection were added at the end of section 90AF:

“(5) Subsections (1) and (2) do not limit subsection 90SS(1).”.

## **Division 4—Financial agreements**

### **90UA Geographical requirement for agreements made in participating jurisdictions**

Two or more people can make a Part VIIIAB financial agreement under section 90UB, 90UC or 90UD only if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement.

### **90UB Financial agreements before de facto relationship**

(1) If:

(a) people who are contemplating entering into a de facto relationship with each other make a written agreement with respect to any of the matters mentioned in subsection (2) in the event of the breakdown of the de facto relationship; and

(b) at the time of the making of the agreement, the people are not the spouse parties to any other Part VIIIAB financial agreement that is binding on them with respect to any of those matters; and

(c) the agreement is expressed to be made under this section; the agreement is a *Part VIIIAB financial agreement*. The people may make the Part VIIIAB financial agreement with one or more other people.

(2) The matters referred to in paragraph (1)(a) are the following:

(a) how all or any of the:

- (i) property; or
  - (ii) financial resources;
- of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;
- (b) the maintenance of either of the spouse parties.
- (3) A Part VIIIAB financial agreement made as mentioned in subsection (1) may also contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A Part VIIIAB financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous Part VIIIAB financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

### **90UC Financial agreements during de facto relationship**

- (1) If:
- (a) while in a de facto relationship, the parties to the de facto relationship make a written agreement about any of the matters mentioned in subsection (2) in the event of the breakdown of the de facto relationship; and
  - (b) at the time of the making of the agreement, the parties to the de facto relationship are not the spouse parties to any other Part VIIIAB financial agreement that is binding on them with respect to any of those matters; and
  - (c) the agreement is expressed to be made under this section; the agreement is a *Part VIIIAB financial agreement*. The parties to the de facto relationship may make the Part VIIIAB financial agreement with one or more other people.
- (2) The matters referred to in paragraph (1)(a) are the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;
  - (b) the maintenance of either of the spouse parties.

- (3) A Part VIIIAB financial agreement made as mentioned in subsection (1) may also contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A Part VIIIAB financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous Part VIIIAB financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

**90UD Financial agreements after breakdown of a de facto relationship**

- (1) If:
    - (a) after the breakdown of a de facto relationship, the parties to the former de facto relationship make a written agreement with respect to any of the matters mentioned in subsection (2); and
    - (b) at the time of the making of the agreement, the parties to the former de facto relationship are not the spouse parties to any other Part VIIIAB financial agreement that is binding on them with respect to any of those matters; and
    - (c) the agreement is expressed to be made under this section; the agreement is a *Part VIIIAB financial agreement*. The parties to the former de facto relationship may make the Part VIIIAB financial agreement with one or more other people.
  - (2) The matters referred to in paragraph (1)(a) are the following:
    - (a) how all or any of the:
      - (i) property; or
      - (ii) financial resources;that either or both of the spouse parties had or acquired during the former de facto relationship is to be distributed;
    - (b) the maintenance of either of the spouse parties.
  - (3) A Part VIIIAB financial agreement made as mentioned in subsection (1) may also contain matters incidental or ancillary to those mentioned in subsection (2).
  - (4) A Part VIIIAB financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous Part VIIIAB financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.
-

**90UE Agreements made in non-referring States that become  
Part VIIIAB financial agreements**

*How State agreements can become Part VIIIAB financial agreements*

- (1) This section applies if:
- (a) 2 people (the *couple*) have made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subsection (3); and
  - (b) the agreement was made under a non-referring State de facto financial law; and
  - (c) either:
    - (i) a court could not, because of that law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; or
    - (ii) a court could not, because of that law, make an order under that law that is with respect to any of the eligible agreed matters to which the agreement applies; and
  - (d) at the time the agreement was made, the members of the couple were not the spouse parties to any Part VIIIAB financial agreement that is binding on them with respect to any of the eligible agreed matters; and
  - (e) at a later time (the *transition time*), the couple's circumstances change so that:
    - (i) if the de facto relationship has not broken down— sections 90SB, 90SD and 90SK would not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters if the de facto relationship were to break down; or
    - (ii) if the de facto relationship has broken down— sections 90SB, 90SD and 90SK do not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters; and
  - (f) immediately before the transition time:
    - (i) the agreement was in force under the non-referring State de facto financial law; and
    - (ii) the couple were not married to each other.



Paragraph (a) extends to agreements made before the commencement of this section, and to agreements made with one or more other people.

Note 1: This section extends to agreements made in contemplation of a de facto relationship, during a de facto relationship or after a de facto relationship has broken down.

Note 2: Part 2 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* deems certain agreements, made under a law of a State that is or becomes a participating jurisdiction, or made under a law of a Territory, to be Part VIIIAB financial agreements.

- (2) For the purposes of this Act, the agreement is taken, on and after the transition time, to be a ***Part VIIIAB financial agreement*** to the extent that the agreement deals with:
- (a) the eligible agreed matters; and
  - (b) matters incidental or ancillary to the eligible agreed matters.

Note: This means that, after the transition time, the agreement can only be enforced, varied, terminated or otherwise set aside under this Act.

*Eligible agreed matters*

- (3) The matters referred to in paragraph (1)(a) are the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either member, or both members, of the couple at the time when the agreement is made, or at a later time and during a de facto relationship between them, is to be distributed;
  - (b) the maintenance of either member of the couple; in the event of the breakdown of a de facto relationship between them, or in relation to a de facto relationship between them that has broken down, as the case requires.
- (4) For the purposes of paragraph (1)(c), disregard whether the non-referring State de facto financial law permits the court to make such an order if the court varies or sets aside the agreement.

**90UF Need for separation declaration for certain provisions of financial agreement to take effect**

- (1) A Part VIIIAB financial agreement that is binding on the parties to the agreement, to the extent to which it deals with how, in the event of the breakdown of the de facto relationship, all or any of the property or financial resources of either or both of the spouse parties:
- (a) at the time when the agreement is made; or
  - (b) at a later time and during the de facto relationship;
- are to be dealt with, is of no force or effect until a separation declaration is made.

Note: Before the separation declaration is made, the financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by section 90UG).

- (2) Subsection (1) ceases to apply if either or both of the spouse parties die.

Note: This means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the death(s).

*Requirements for a valid separation declaration*

- (3) A separation declaration is a written declaration that complies with subsections (4) and (5), and may be included in the Part VIIIAB financial agreement to which it relates.
- (4) The declaration must be signed by at least one of the spouse parties to the Part VIIIAB financial agreement.
- (5) The declaration must state that:
- (a) the spouse parties lived in a de facto relationship; and
  - (b) the spouse parties have separated and are living separately and apart at the declaration time; and
  - (c) in the opinion of the spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

*Meaning of declaration time*

- (6) In this section:
-

**declaration time** means the time when the declaration was signed by a spouse party to the Part VIIIAB financial agreement.

**90UG Whether or when certain other provisions of financial agreements take effect**

A Part VIIIAB financial agreement that is binding on the parties to the agreement, to the extent to which it provides for matters covered by subsection 90UB(3) or 90UC(3) or paragraph 90UE(2)(b), is of no force or effect unless and until the de facto relationship breaks down.

**90UH Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children**

- (1) A provision of a Part VIIIAB financial agreement that relates to the maintenance of a spouse party to the agreement or a child or children is void unless the provision specifies:
  - (a) the party, or the child or children, for whose maintenance provision is made; and
  - (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

Note: While Part VIIIAB financial agreements are not made with respect to child maintenance, provisions about child maintenance could be included in the same document for child support (or other non-Part VIIIAB) purposes.

- (2) Subsection (1) does not apply in relation to a Part VIIIAB financial agreement covered by section 90UE.

**90UI Certain provisions in financial agreements**

- (1) No provision of a Part VIIIAB financial agreement excludes or limits the power of a court to make an order under Division 2 in relation to the maintenance of a party to the agreement if subsection (2) applies.
- (2) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the

agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.

- (3) To avoid doubt, a provision in a Part VIIIAB financial agreement:
- (a) made as mentioned in subsection 90UB(1), 90UC(1) or 90UD(1); or
  - (b) covered by section 90UE;
- that provides for property or financial resources owned by a spouse party to the agreement to continue in the ownership of that party is taken, for the purposes of that subsection or section, to be a provision with respect to how the property or financial resources are to be distributed.

### **90UJ When financial agreements are binding**

- (1) A Part VIIIAB financial agreement (other than an agreement covered by section 90UE) is binding on the parties to the agreement if, and only if:
- (a) the agreement is signed by all parties; and
  - (b) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
    - (i) the effect of the agreement on the rights of that party;
    - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
  - (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
  - (d) the agreement has not been terminated and has not been set aside by a court; and
  - (e) after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

- (2) A Part VIIIAB financial agreement covered by section 90UE is binding on the parties to the agreement if, and only if, the agreement has not been terminated and has not been set aside by a court.
- (3) A Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other.
- (4) A court may make such orders for the enforcement of a Part VIIIAB financial agreement that is binding on the parties to the agreement as it thinks necessary.

### **90UK Effect of death of party to financial agreement**

A Part VIIIAB financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

Note: If the parties are still in the de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the financial agreement (see the definition of *breakdown* in subsection 4(1)).

### **90UL Termination of financial agreement**

- (1) The parties to a Part VIIIAB financial agreement may terminate the agreement for the purposes of this Act only by:
  - (a) including a provision to that effect in another Part VIIIAB financial agreement as mentioned in subsection 90UB(4), 90UC(4) or 90UD(4); or
  - (b) making a written agreement (a *Part VIIIAB termination agreement*) to that effect.
- (2) A Part VIIIAB termination agreement is binding on the parties if, and only if:
  - (a) the termination agreement is signed by all parties to the Part VIIIAB financial agreement; and
  - (b) the termination agreement contains, in relation to each spouse party, a statement to the effect that the party to whom the statement relates has been provided, before the termination agreement was signed by him or her, as certified in an annexure to the termination agreement, with

independent legal advice from a legal practitioner as to the following matters:

- (i) the effect of the termination agreement on the rights of that party;
  - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the termination agreement; and
- (c) the annexure to the termination agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
- (d) the termination agreement has not been set aside by a court; and
- (e) after the termination agreement is signed, the original termination agreement is given to one of the spouse parties and a copy is given to each of the other parties.
- (3) A court may, on an application by:
- (a) a person who was a party to the Part VIIIAB financial agreement; or
  - (b) any other interested person;
- make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of:
- (c) persons who were parties to the Part VIIIAB financial agreement; and
  - (d) any other interested persons.

Note: For the manner in which the contents of a Part VIIIAB financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

### **90UM Circumstances in which court may set aside a financial agreement or termination agreement**

- (1) A court may make an order setting aside, for the purposes of this Act, a Part VIIIAB financial agreement or a Part VIIIAB termination agreement if, and only if, the court is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
  - (b) a party to the agreement entered into the agreement:

- (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
- (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
- (c) a party (the **agreement party**) to the agreement entered into the agreement:
  - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the **other de facto relationship**) with a spouse party; or
  - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship; or
  - (iii) with reckless disregard of those interests of that other person; or
- (d) a party (the **agreement party**) to the agreement entered into the agreement:
  - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or
  - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or
  - (iii) with reckless disregard of those interests of that other person; or
- (e) the agreement is void, voidable or unenforceable; or
- (f) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
- (g) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the

applicant has caring responsibility for the child (as defined in subsection (4)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

- (h) in respect of the making of a Part VIIIAB financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
- (i) a payment flag is operating under Part VIIIAB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
- (j) the agreement covers at least one superannuation interest that is an unspittable interest for the purposes of Part VIIIAB; or
- (k) if the agreement is a Part VIIIAB financial agreement covered by section 90UE—subsection (5) applies.

Note: For *child of a de facto relationship*, see section 90RB.

- (2) For the purposes of paragraph (1)(b), **creditor**, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.
- (3) For the purposes of the application of subparagraph (1)(c)(ii) to a Part VIIIAB financial agreement covered by section 90UE:
  - (a) the reference in that subparagraph to an order under section 90SM is taken to include a reference to an order (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned; and
  - (b) the reference in that subparagraph to a declaration under section 90SL is taken to include a reference to a declaration (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned.
- (4) For the purposes of paragraph (1)(g), a person has **caring responsibility** for a child if:
  - (a) the person is a parent of the child with whom the child lives; or
  - (b) a parenting order provides that:
    - (i) the child is to live with the person; or
    - (ii) the person has parental responsibility for the child.



- (5) This subsection applies if:
- (a) at least one of the spouse parties to the agreement was not provided, before signing the agreement, with independent legal advice from a legal practitioner about the following:
    - (i) the effect of the agreement on the rights of that party;
    - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; or
  - (b) if the advice was provided to one of the spouse parties—a signed statement by the legal practitioner stating that the advice was provided was neither:
    - (i) included in, or attached to, the agreement; or
    - (ii) given to the party;
- and it would be unjust and inequitable, having regard to the eligible agreed matters (within the meaning of section 90UE) for the agreement, if the court does not set the agreement aside.
- (6) A court may, on an application by a person who was a party to the Part VIIIAB financial agreement that has been set aside, or by any other interested person, make such order or orders (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.
- (7) An order under subsection (1) or (6) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (8) If a party to proceedings under this section dies before the proceedings are completed:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
  - (b) if the court is of the opinion:
    - (i) that it would have exercised its powers under this section if the deceased party had not died; and
    - (ii) that it is still appropriate to exercise those powers;

- the court may make any order that it could have made under subsection (1) or (6); and
- (c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (9) The court must not make an order under this section if the order would:
- (a) result in the acquisition of property from a person otherwise than on just terms; and
- (b) be invalid because of paragraph 51(xxxi) of the Constitution.
- For this purpose, *acquisition of property* and *just terms* have the same meanings as in paragraph 51(xxxi) of the Constitution.

**90UN Validity, enforceability and effect of financial agreements and termination agreements**

The question whether a Part VIIIAB financial agreement or a Part VIIIAB termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
- (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and
- (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

## **Division 5—Proceeds of crime and forfeiture**

### **90VA Notification of proceeds of crime orders etc.**

- (1) If:
- (a) a person makes an application for an order, under this Part, with respect to:
    - (i) the property of the parties to a de facto relationship or either of them; or
    - (ii) the maintenance of a party to a de facto relationship; and
  - (b) the person knows that the property of the parties to the de facto relationship or either of them is covered by:
    - (i) a proceeds of crime order; or
    - (ii) a forfeiture application;
- the person must:
- (c) disclose in the application the proceeds of crime order or forfeiture application; and
  - (d) give to the court a sealed copy of that order or application.
- (2) A person who does not comply with subsection (1) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.
- (3) If:
- (a) a person is a party to de facto property settlement or maintenance proceedings under this Part; and
  - (b) the person is notified by the DPP that the property of the parties to the de facto relationship or either of them is covered by:
    - (i) a proceeds of crime order; or
    - (ii) a forfeiture application;
- the person must notify the Registry Manager in writing of the proceeds of crime order or forfeiture application.
- (4) A person who does not comply with subsection (3) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

**90VB Court to stay property or maintenance proceedings affected by proceeds of crime orders etc.**

- (1) A court in which property settlement, or maintenance proceedings, are pending must stay those proceedings if notified under section 90VA in relation to the proceedings.
- (2) The court may, before staying proceedings under subsection (1), invite or require the DPP to make submissions relating to staying the proceedings.
- (3) A court must, on the application of the DPP, stay de facto property settlement or maintenance proceedings under this Part if the property of the parties to the de facto relationship or either of them is covered by:
  - (a) a proceeds of crime order; or
  - (b) a forfeiture application.
- (4) A court must notify the DPP if the court stays de facto property settlement or maintenance proceedings under subsection (1) or (3).
- (5) The DPP must notify the Registry Manager if:
  - (a) a proceeds of crime order ceases to be in force; or
  - (b) a forfeiture application is finally determined.
- (6) For the purposes of subsection (5), a forfeiture application is taken to be *finally determined* when:
  - (a) the application is withdrawn; or
  - (b) if the application is successful—the resulting forfeiture order comes into force; or
  - (c) if the application is unsuccessful—the time within which an appeal can be made has expired and any appeals have been finally determined or otherwise disposed of.

**90VC Lifting a stay**

- (1) A court that stayed the de facto property settlement or maintenance proceedings under section 90VB must wholly or partially lift the stay if:
  - (a) either party to the proceedings makes an application for the stay to be lifted and the DPP consents to such an application;or

- (b) the DPP makes an application for the stay to be lifted.
- (2) A court that stayed the de facto property settlement or maintenance proceedings under section 90VB may, on its own motion, wholly or partially lift the stay if the DPP consents to such a motion.
- (3) Giving the Registry Manager written notice of the DPP's consent under this section is taken to be the giving of that consent, unless the court requires the DPP to appear in the proceedings. The notice may be given by the DPP or by a party to the proceedings.

#### **90VD Intervention by DPP**

- (1) The DPP may intervene in any de facto property settlement or maintenance proceedings in relation to which a court is notified under section 90VA, or in any proceedings under section 90VB or 90VC in which the DPP is not already a party.
- (2) If the DPP intervenes, the DPP is taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

### **Division 6—Instruments not liable to duty**

#### **90WA Certain instruments not liable to duty**

- (1) None of the following is subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:
- (a) a deed or other instrument executed by a person for the purposes of, or in accordance with, an order made under Division 2;
  - (b) a Part VIIIAB financial agreement;
  - (c) a Part VIIIAB termination agreement;
  - (d) a deed or other instrument executed by a person for the purposes of, or in accordance with, an order or Part VIIIAB financial agreement made under Division 4.
- (2) Subsection (1) does not apply to a liability to pay duty or charge (if any) in relation to a Part VIIIAB financial agreement covered by section 90UE if the liability arises before the transition time (within the meaning of that section) for the agreement.

- (3) Despite any State law, a failure to discharge a liability covered by subsection (2) in relation to an agreement has no effect for the purposes of this Act. In particular, the failure does not affect whether the agreement may be presented in evidence in a court for the purposes of this Act.

**51 Section 90MA**

Omit all the words after “allocated”, substitute:

between:

- (a) the parties to a marriage; or
  - (b) the parties to a de facto relationship;
- either by agreement or by court order.

**52 Section 90MC**

Before “A superannuation”, insert “(1)”.

Note: The heading to section 90MC is altered by omitting “*meaning of matrimonial cause*” and substituting “*meanings of matrimonial cause and de facto financial cause*”.

**53 At the end of section 90MC**

Add:

- (2) A superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of *de facto financial cause* in section 4.

**54 Section 90MD (definition of *declaration time*)**

Before “means”, insert “, in relation to a separation declaration,”.

**55 Section 90MD (definition of *spouse*)**

Repeal the definition, substitute:

*spouse* means:

- (a) a party to a marriage; or
- (b) a party to a de facto relationship.

**56 Section 90MD (definition of *superannuation agreement*)**

Omit “section 90MH”, substitute “sections 90MH and 90MHA”.

**57 After subsection 90MG(1)**

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Insert:

- (1A) A Part VIIIAB financial agreement is *in force* at any time when it is binding on the parties in accordance with section 90UJ.

### **58 Subsection 90MG(2)**

After “financial agreement”, insert “, or relevant Part VIIIAB financial agreement,”.

### **59 After section 90MH**

Insert:

#### **90MHA Superannuation agreement to be included in Part VIIIAB financial agreement if about a de facto relationship**

- (1) A Part VIIIAB financial agreement may include an agreement that deals with superannuation interests of either or both of the spouse parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.
- (2) The part of the Part VIIIAB financial agreement that deals with superannuation interests is a *superannuation agreement* for the purposes of this Part.
- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under Part VIIIAB.
- (4) A superannuation agreement that is included in a Part VIIIAB financial agreement under section 90UB (in contemplation of a de facto relationship) has no effect unless and until the spouse parties enter into that de facto relationship.
- (5) In applying sections 90UB, 90UC, 90UD and 90UE for the purposes of this Division, a superannuation interest of a spouse party to a Part VIIIAB financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

Note: The heading to section 90MH is altered by adding at the end “**if about a marriage**”.

### **60 Before paragraph 90MJ(1)(e)**

Insert:

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- (db) if the agreement relates to a de facto relationship—the de facto relationship is broken down at the operative time; and

**61 Subsection 90MK(2) (paragraph (a) of the definition of service time)**

Repeal the paragraph, substitute:

- (a) if the parties are divorced—a copy of the divorce order that has terminated the marriage; and
- (aa) if the parties are not divorced—a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and

**62 Section 90MM**

Before “If a”, insert “(1)”.

**63 At the end of section 90MM**

Add:

- (2) If a court makes an order under section 90UM setting aside a Part VIIIAB financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90MHA, a superannuation agreement relating to a de facto relationship must be part of a Part VIIIAB financial agreement. Therefore, setting aside the financial agreement also has the effect of setting aside the superannuation agreement.

**64 Subsection 90MN(4)**

Omit all the words after “satisfied”, substitute:

as to:

- (a) if the spouses are parties to a marriage—any of the grounds set out in subsection 90K(1) (other than paragraph 90K(1)(f)); or
- (b) if the spouses are parties to a de facto relationship—any of the grounds set out in subsection 90UM(1) (other than paragraph 90UM(1)(i)).

**65 At the end of subsection 90MN(5)**

Add “or Part VIIIAB financial agreement”.

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**66 At the end of section 90MN**

Add:

- (7) An order under section 90UM setting aside a Part VIIIAB financial agreement also operates to set aside the related flag lifting agreement.

**67 Subsection 90MO(1)**

After “79”, insert “or 90SM”.

Note: The heading to section 90MO is altered by inserting “or 90SM” after “79”.

**68 After subsection 90MP(2)**

Insert:

*Spouses who are parties to a marriage*

- (2A) Subsections (3) to (5) apply if the spouses are parties to a marriage.

**69 Subsection 90MP(5)**

Omit “this section”, substitute “subsections (3) to (4A)”.

**70 Subsection 90MP(6)**

Omit “this section”, substitute “subsections (3) to (5)”.

**71 At the end of section 90MP**

Add:

*Spouses who are parties to a de facto relationship*

- (7) Subsections (8) to (12) apply if the spouses are parties to a de facto relationship.
- (8) If section 90MQ applies to the declaration, then the declaration must state that:
- (a) the spouses lived in a de facto relationship; and
  - (b) the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time; and
  - (c) in the opinion of the spouse (or spouses) making the declaration, there is no reasonable likelihood of cohabitation being resumed.

- (9) If section 90MQ does not apply to the declaration, then the declaration must state that the spouses lived in a de facto relationship, but are separated, at the declaration time.
- (10) If either or both of the spouses have died, then the declaration must state:
- (a) if section 90MQ applies to the declaration—that:
    - (i) the spouses lived in a de facto relationship; but
    - (ii) at the most recent time when both spouses were alive, the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time; or
  - (b) if section 90MQ does not apply to the declaration—that the spouses:
    - (i) lived in a de facto relationship; but
    - (ii) were separated at the most recent time when both spouses were alive.

Subsections (8) and (9) have effect subject to this subsection.

- (11) For the purposes of subsection (8) and paragraph (10)(a), the spouses can have separated and be living separately and apart even if:
- (a) their cohabitation was brought to an end by the action or conduct of one only of them; or
  - (b) they have continued to reside in the same residence; or
  - (c) either of them has rendered some household services to the other.
- (12) For the purposes of subsection (8) and paragraph (10)(a), if, after the spouses separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the relevant time referred to in paragraph (8)(b) or (10)(a):
- (a) the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period; but
  - (b) the period of cohabitation shall not be taken to be part of the period of living separately and apart.

## **72 Subsection 90MS(1)**

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After “79”, insert “or 90SM”.

Note: The heading to section 90MS is altered by inserting “or 90SM” after “79”.

### **73 Subsection 90MS(1) (note 1)**

Repeal the note, substitute:

Note 1: Although the orders are made in accordance with this Division, they will be made under either section 79 or 90SM. Therefore they will be generally subject to all the same provisions as other orders made under that section.

### **74 At the end of subsection 90MS(1)**

Add:

Note 3: Subsections 44(5) and (6) and sections 90SB, 90SK and 90MO limit the scope of section 90SM.

### **75 Subsection 90MS(2)**

After “79”, insert “or 90SM”.

### **76 Subsection 90MV(1)**

After “79”, insert “or 90SM”.

### **77 Subsection 90MX(3) (example)**

Omit “Example”, substitute “Example 1”.

### **78 At the end of subsection 90MX(3)**

Add:

Example 2: W has a superannuation interest that is subject to 3 payment splits in respect of W’s de facto relationship with X, W’s marriage to Y and W’s de facto relationship with Z (in that order). The operative times of the payment splits are in the same order as the relationships. Assume each payment split provides for a 50% share to the non-member spouse. W becomes entitled to a splittable payment of \$100. The final payment entitlements are as follows: X gets \$50. Y gets \$25. Z gets \$12.50. W gets the remaining \$12.50.

### **79 Subsection 105(2A)**

After “90KA(c)”, insert “or 90UN(c)”.

### **80 Paragraph 106B(1A)(a)**

After “marriage”, insert “, or a party to a de facto relationship.”.

**81 Paragraph 106B(1B)(a)**

After “marriage”, insert “, or a party to a de facto relationship,”.

**82 Subsection 106B(4A)**

After “80(1)”, insert “or 90SS(1)”.

**83 At the end of subsection 107(1)**

Add “or de facto financial cause”.

**84 Section 112AA (paragraph (b) of the definition of *order under this Act*)**

After “section”, insert “90SS or”.

**84A After subsection 114(2)**

Insert:

(2A) In a de facto financial cause (other than proceedings referred to in, or relating to, paragraph (e) or (f) of the definition of *de facto financial cause* in subsection 4(1)) the court may:

- (a) make such order or grant such injunction as it considers proper with respect to the use or occupancy of a specified residence of the parties to the de facto relationship or either of them; and
- (b) if it makes an order or grants an injunction under paragraph (a)—make such order or grant such injunction as it considers proper with respect to restraining a party to the de facto relationship from entering or remaining in:
  - (i) that residence; or
  - (ii) a specified area in which that residence is situated; and
- (c) make such order or grant such injunction as it considers proper with respect to the property of the parties to the de facto relationship or either of them.

Sections 90SB and 90SK apply in relation to an order or injunction under this subsection in a corresponding way to the way in which those sections apply in relation to an order under section 90SM.

Note 1: This subsection does not apply to proceedings referred to in paragraph (g) of the definition of *de facto financial cause* that relate to proceedings referred to in paragraph (e) or (f) of that definition.

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Note 2: The same requirements in sections 90SB (length of relationship etc.) and 90SK (geographical requirements) for section 90SM orders must be satisfied for orders and injunctions under this subsection.

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## Part 2—Transitional provisions

### Division 1—Introduction

#### 85 Interpretation

In this Part:

***commencement*** means the commencement of this Schedule.

***designated agreed matters***, in relation to 2 persons, means the following:

- (a) how all or any of the:
  - (i) property; or
  - (ii) financial resources;of either person, or both persons, at the time when the agreement is made, or at a later time and during a de facto relationship between them, is to be distributed;
- (b) the maintenance of either of the persons;

in the event of the breakdown of a de facto relationship between them, or in relation to a de facto relationship between them that has broken down, as the case requires.

***designated State/Territory financial agreement***, in relation to 2 persons, means a written agreement:

- (a) signed by both of them with respect to matters that include any designated agreed matters; and
- (b) made under a preserved law of a State or Territory; and
- (c) in relation to which, either:
  - (i) a court could not, because of that preserved law, make an order under that law that is inconsistent with the agreement with respect to any of the designated agreed matters; or
  - (ii) a court could not, because of that preserved law, make an order under that law that is with respect to any of the designated agreed matters.

***earlier participating jurisdiction*** means a State or Territory that is a participating jurisdiction at commencement.

***later participating jurisdiction*** means a State that becomes a participating jurisdiction after commencement.

*new Act* means the *Family Law Act 1975* as in force after commencement.

*Part VIIIIB* means Part VIIIIB of the new Act to the extent to which that Part relates to a superannuation interest to be allocated between the parties to a de facto relationship.

*preserved law*, of a State or Territory, means a law of the State or Territory relating to financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships.

*transition time*, for a later participating jurisdiction, means the time the State becomes a participating jurisdiction.

## **Division 2—Application of new Act to de facto relationships breaking down before commencement**

### **86 De facto relationships that broke down before commencement**

- (1) Subject to item 86A, Parts VIIIAB and VIIIIB, and subsection 114(2A), of the new Act do not apply in relation to a de facto relationship that broke down before commencement.

Note 1: After commencement, State/Territory law will apply to any proceedings etc. to enforce, discharge, suspend, revive or vary an order or injunction in force at commencement in relation to the maintenance, or the distribution of property, of the parties to the de facto relationship arising out of the breakdown of the de facto relationship.

Note 2: After commencement, State/Territory law will continue to apply to any proceedings pending at commencement for an order or injunction in relation to the maintenance, or the distribution of property, of the parties to the de facto relationship arising out of the breakdown of the de facto relationship.

Note 3: After commencement, State/Territory law will continue to apply if the parties to the de facto relationship have made, or make, an agreement about financial matters arising out of the breakdown of the de facto relationship.

Note 4: Section 90UE of the new Act will not apply in relation to an agreement made, by the parties to the de facto relationship under a non-referring State de facto financial law, about financial matters arising out of the breakdown of the de facto relationship. Such an agreement will not be affected by the new Act.

- (2) To avoid doubt, section 90RC of the new Act does not exclude the operation of any State or Territory law in relation to the de facto relationship.

Note: Subsection 39A(5) of the new Act will not apply in relation to the de facto relationship because the effect of this item is that a de facto financial cause relating to that relationship cannot be instituted under the new Act.

## **86A Opting into the new regime**

### *Choosing the new regime*

- (1) The parties to a de facto relationship that broke down before commencement may choose for Parts VIIIAB and VIIIB, and subsection 114(2A), of the new Act to apply in relation to the de facto relationship.

Note 1: Whether the parties will be able to obtain an order under those provisions of the new Act, or make a Part VIIIAB financial agreement, will depend on whether the tests found in those provisions are satisfied for the de facto relationship.

Note 2: Divisions 3 and 4 of this Part, and section 90UE of the new Act, are not affected by a choice under this item. Those Divisions, and that section, relate to de facto relationships that (if they are to break down) will break down after commencement.

### *When a choice can be made*

- (2) A choice under subitem (1) can be made if:
- (a) the choice is unconditional; and
  - (b) subitems (3), (4) and (5) are satisfied for the choice.
- A choice is irrevocable.
- (3) This subitem is satisfied for the choice if no order (other than an interim order) under a preserved law of a State or Territory has been made by a court in relation to either of the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;that either or both of the parties to the de facto relationship had or acquired during the de facto relationship is to be distributed;
  - (b) the maintenance of either of the parties to the de facto relationship.
- (4) This subitem is satisfied for the choice if:
- (a) the parties have not made a designated State/Territory financial agreement in relation to their de facto relationship;
- or
-



- (b) if the parties have made such an agreement, that agreement has ceased to have effect without:
  - (i) any property being distributed; or
  - (ii) any maintenance being paid;under the agreement.
- (5) This subitem is satisfied for the choice if:
  - (a) the choice is in writing and signed by both of the parties to the de facto relationship; and
  - (b) each of the parties was provided, before the choice was signed by him or her, with:
    - (i) independent legal advice from a legal practitioner about the advantages and disadvantages, at the time that the advice was provided, to the party of making the choice; and
    - (ii) a signed statement by the legal practitioner stating that this advice was given to the party.
- (6) For the purposes of Part VIIIAB of the new Act, a choice can be included in a Part VIIIAB financial agreement for which the parties are the spouse parties.

*Setting aside a choice*

- (7) A court may make an order setting aside a choice if the court is satisfied that, having regard to the circumstances in which the choice was made, it would be unjust and inequitable if the court does not set the choice aside.
- (8) A court setting aside a choice under subitem (7) may make such order or orders (including an order for the transfer of property) as it considers just and equitable to, so far as is practicable, return the rights of:
  - (a) the parties to the de facto relationship; and
  - (b) any other interested persons affected by the choice;to their position immediately before the choice was made.
- (9) Subsections 90UM(8) and (9) of the new Act apply in relation to setting aside a choice as if:
  - (a) a reference in those subsections to subsection 90UM(1) or (6) of the new Act were a reference to subitem (7) or (8); and

- (b) the reference in those subsections to section 90UM of the new Act were a reference to this item.

### **Division 3—De facto relationships linked to earlier participating jurisdictions**

#### **87 Pre-commencement agreements—made in contemplation of de facto relationships**

- (1) This item applies if:
- (a) before commencement, 2 people (the *couple*) who were contemplating entering into a de facto relationship with each other made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subitem (3); and
  - (b) the agreement was made under a preserved law of an earlier participating jurisdiction; and
  - (c) a court could not, because of the preserved law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; and
  - (d) immediately before commencement:
    - (i) the agreement was in force under the preserved law; and
    - (ii) if the couple had entered into the de facto relationship—the de facto relationship had not broken down; and
    - (iii) the couple were not married to each other.

Paragraph (a) extends to an agreement made with one or more other people.

Note: Agreements made in non-referring States are not covered by this item. Those agreements continue to be governed by State law unless they are transformed into Part VIIIAB financial agreements (see section 90UE of the new Act and Division 4 of this Part).

- (2) For the purposes of the new Act, the agreement is taken, on and after commencement, to be a Part VIIIAB financial agreement made as mentioned in subsection 90UB(1) of the new Act to the extent that the agreement deals with the eligible agreed matters.

Note: After commencement, the agreement can only be enforced, varied, terminated or otherwise set aside under the new Act.

- (3) The matters referred to in paragraph (a) of subitem (1) are the following:
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- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either member, or members, of the couple at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed in the event of the breakdown of the de facto relationship;
  - (b) the maintenance of either member of the couple in the event of the breakdown of the de facto relationship;
  - (c) matters incidental or ancillary to those mentioned in paragraph (a) or (b).
- (4) For the purposes of paragraph (c) of subitem (1), disregard whether the preserved law permits the court to make such an order if the court varies or sets aside the agreement.

### **88 Pre-commencement agreements—made during de facto relationships**

- (1) This item applies if:
- (a) before commencement and while in a de facto relationship, the parties to the de facto relationship (the *couple*) made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subitem (3); and
  - (b) the agreement was made under a preserved law of an earlier participating jurisdiction; and
  - (c) a court could not, because of the preserved law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; and
  - (d) immediately before commencement:
    - (i) the agreement was in force under the preserved law; and
    - (ii) the de facto relationship had not broken down; and
    - (iii) the couple were not married to each other.

Paragraph (a) extends to an agreement made with one or more other people.

Note: Agreements made in non-referring States are not covered by this item. Those agreements continue to be governed by State law unless they are transformed into Part VIIIAB financial agreements (see section 90UE of the new Act).

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- (2) For the purposes of the new Act, the agreement is taken, on and after commencement, to be a Part VIIIAB financial agreement made as mentioned in subsection 90UC(1) of the new Act to the extent that the agreement deals with the eligible agreed matters.

Note: After commencement, the agreement can only be enforced, varied, terminated or otherwise set aside under the new Act.

- (3) The matters referred to in paragraph (a) of subitem (1) are the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either member, or members, of the couple at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed in the event of the breakdown of the de facto relationship;
  - (b) the maintenance of either member of the couple in the event of the breakdown of the de facto relationship;
  - (c) matters incidental or ancillary to those mentioned in paragraph (a) or (b).
- (4) For the purposes of paragraph (c) of subitem (1), disregard whether the preserved law permits the court to make such an order if the court varies or sets aside the agreement.

**Division 4—De facto relationships linked to later participating jurisdictions**

**89 When this Division applies**

This Division applies if Parts VIIIAB and VIIIB, and subsection 114(2A), of the new Act:

- (a) apply in relation to a de facto relationship; or
- (b) would, but for item 90, apply in relation to a de facto relationship;

only because a State has become a later participating jurisdiction.

Note 1: This Division will not apply to a de facto relationship that breaks down during the period starting at commencement and ending at the transition time for the State if, during that period, section 90UE of the new Act has applied in relation to the de facto relationship. This is because it is section 90UE, and not the State becoming a participating jurisdiction, that has caused Part VIIIAB of the new Act to apply in relation to the de facto relationship.

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Note 2: The cases covered by paragraph (a) include a case where a de facto relationship has broken down before the transition time for the State and the parties to the relationship make a choice under item 90A.

Example 1: Amy and Ben made an agreement in a non-referring State and then moved to, and spent most of their relationship in, an earlier participating jurisdiction. Their relationship broke down after commencement, but before the non-referring State became a later participating jurisdiction. Their residence in the earlier participating jurisdiction means section 90UE of the new Act will cause Amy and Ben's agreement to become a Part VIIIAB financial agreement.

Example 2: Cathy and Don made an agreement in a non-referring State and did not move from that State. Their relationship broke down after commencement but before the non-referring State became a later participating jurisdiction. That State becoming a later participating jurisdiction is the only way that Part VIIIAB could only apply to Cathy and Don's relationship. This means this Division, and item 90, will apply. The effect of item 90 is that State law will continue to govern Cathy and Don's agreement.

Example 3: During their de facto relationship, Emily and Fred made an agreement in a non-referring State and did not move from that State. Their relationship broke down after the non-referring State became a later participating jurisdiction. That State becoming a later participating jurisdiction is the only way that Part VIIIAB could only apply to Emily and Fred's relationship. This means this Division, and item 92, will apply. The effect of item 92 is that Emily and Fred's agreement will become a Part VIIIAB financial agreement.

## **90 De facto relationships that break down before transition time for a later participating jurisdiction**

(1) Subject to item 90A, Parts VIIIAB and VIIIB, and subsection 114(2A), of the new Act do not apply in relation to the de facto relationship if it broke down before the transition time for the State.

Note 1: After the transition time, the law of the State will apply to any proceedings etc. to enforce, discharge, suspend, revive or vary an order or injunction in force at the transition time in relation to the maintenance, or the distribution of property, of the parties to the de facto relationship arising out of the breakdown of the de facto relationship.

Note 2: After the transition time, the law of the State will continue to apply to any proceedings pending at the transition time for an order or injunction in relation to the maintenance, or the distribution of property, of the parties to the de facto relationship arising out of the breakdown of the de facto relationship.

Note 3: After the transition time, the law of the State will continue to apply if the parties to the de facto relationship have, before the transition time, made an agreement (to which section 90UE of the new Act had not applied) about financial matters arising from that breakdown.

Note 4: After the transition time, the law of the State will continue to apply if the parties to the de facto relationship, after the transition time, make an agreement about financial matters arising from that breakdown.

- (2) To avoid doubt, section 90RC of the new Act does not exclude the operation of any State or Territory law in relation to the de facto relationship.

Note: Subsection 39A(5) of the new Act will not apply in relation to the de facto relationship because the effect of this item is that a de facto financial cause relating to that relationship cannot be instituted under the new Act.

## **90A Opting into the new regime**

### *Choosing the new regime*

- (1) The parties to a de facto relationship that broke down before the transition time for the State may choose for Parts VIIIAB and VIIIIB, and subsection 114(2A), of the new Act to apply in relation to the de facto relationship.

Note 1: Whether the parties will be able to obtain an order under those provisions of the new Act, or make a Part VIIIAB financial agreement, will depend on whether the tests found in those provisions are satisfied for the de facto relationship.

Note 2: Items 91 and 92 are not affected by a choice under this item. Those items relate to de facto relationships that (if they are to break down) will break down after the transition time for the State.

### *When a choice can be made*

- (2) A choice under subitem (1) can be made if:
- (a) the choice is unconditional; and
  - (b) subitems (3), (4) and (5) are satisfied for the choice.
- A choice is irrevocable.
- (3) This subitem is satisfied for the choice if no order (other than an interim order) under a preserved law of a State or Territory has been made by a court in relation to either of the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;that either or both of the parties to the de facto relationship had or acquired during the de facto relationship is to be distributed;
  - (b) the maintenance of either of the parties to the de facto relationship.
- (4) This subitem is satisfied for the choice if:
-

- (a) the parties have not made a designated State/Territory financial agreement in relation to their de facto relationship;  
or
  - (b) if the parties have made such an agreement, that agreement has ceased to have effect without:
    - (i) any property being distributed; or
    - (ii) any maintenance being paid;  
under the agreement.
- (5) This subitem is satisfied for the choice if:
  - (a) the choice is in writing and signed by both of the parties to the de facto relationship; and
  - (b) each of the parties was provided, before the choice was signed by him or her, with:
    - (i) independent legal advice from a legal practitioner about the advantages and disadvantages, at the time that the advice was provided, to the party of making the choice; and
    - (ii) a signed statement by the legal practitioner stating that this advice was given to the party.
- (6) For the purposes of Part VIIIAB of the new Act, a choice can be included in a Part VIIIAB financial agreement for which the parties are the spouse parties.

*Setting aside a choice*

- (7) A court may make an order setting aside a choice if the court is satisfied that, having regard to the circumstances in which the choice was made, it would be unjust and inequitable if the court does not set the choice aside.
- (8) A court setting aside a choice under subitem (7) may make such order or orders (including an order for the transfer of property) as it considers just and equitable to, so far as is practicable, return the rights of:
  - (a) the parties to the de facto relationship; and
  - (b) any other interested persons affected by the choice;to their position immediately before the choice was made.
- (9) Subsections 90UM(8) and (9) of the new Act apply in relation to setting aside a choice as if:

- (a) a reference in those subsections to subsection 90UM(1) or (6) of the new Act were a reference to subitem (7) or (8); and
- (b) the reference in those subsections to section 90UM of the new Act were a reference to this item.

**91 Pre-transition time agreements—made in contemplation of de facto relationships**

- (1) This item applies if:
  - (a) before the transition time for the State, 2 people (the *couple*) who were contemplating entering into a de facto relationship with each other made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subitem (3); and
  - (b) the agreement was made under a preserved law of the State; and
  - (c) either:
    - (i) a court could not, because of the preserved law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; or
    - (ii) a court could not, because of the preserved law, make an order under that law that is with respect to any of the eligible agreed matters to which the agreement applies; and
  - (d) at the transition time for the State, the members of the couple were not the spouse parties to any Part VIIIAB financial agreement that is binding on them with respect to any of the eligible agreed matters; and
  - (e) immediately before the transition time for the State:
    - (i) the agreement was in force under the preserved law; and
    - (ii) if the couple had entered into the de facto relationship—the de facto relationship had not broken down; and
    - (iii) the couple were not married to each other.

Paragraph (a) extends to an agreement made with one or more other people.

- (2) For the purposes of the new Act, the agreement is taken, on and after the transition time, to be a Part VIIIAB financial agreement made as



mentioned in subsection 90UB(1) of the new Act to the extent that the agreement deals with the eligible agreed matters.

Note: After the transition time, the agreement can only be enforced, varied, terminated or otherwise set aside under the new Act.

- (3) The matters referred to in paragraph (a) of subitem (1) are the following:
- (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either member, or members, of the couple at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed in the event of the breakdown of the de facto relationship;
  - (b) the maintenance of either member of the couple in the event of the breakdown of the de facto relationship;
  - (c) matters incidental or ancillary to those mentioned in paragraph (a) or (b).
- (4) For the purposes of paragraph (c) of subitem (1), disregard whether the preserved law permits the court to make such an order if the court varies or sets aside the agreement.

## **92 Pre-transition time agreements—made during de facto relationships**

- (1) This item applies if:
- (a) before the transition time for the State and while in a de facto relationship, the parties to the de facto relationship (the *couple*) made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subitem (3); and
  - (b) the agreement was made under a preserved law of the State; and
  - (c) either:
    - (i) a court could not, because of the preserved law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; or
    - (ii) a court could not, because of the preserved law, make an order under that law that is with respect to any of the

eligible agreed matters to which the agreement applies;  
and

- (d) at the transition time for the State, the members of the couple were not the spouse parties to any Part VIIIAB financial agreement that is binding on them with respect to any of the eligible agreed matters; and
- (e) immediately before the transition time for the State:
  - (i) the agreement was in force under the preserved law; and
  - (ii) the de facto relationship had not broken down; and
  - (iii) the parties were not married to each other.

Paragraph (a) extends to an agreement made with one or more other people.

- (2) For the purposes of the new Act, the agreement is taken, on and after the transition time, to be a Part VIIIAB financial agreement made as mentioned in subsection 90UC(1) of the new Act to the extent that the agreement deals with the eligible agreed matters.

Note: After the transition time, the agreement can only be enforced, varied, terminated or otherwise set aside under the new Act.

- (3) The matters referred to in paragraph (a) of subitem (1) are the following:
  - (a) how all or any of the:
    - (i) property; or
    - (ii) financial resources;of either member, or members, of the couple at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed in the event of the breakdown of the de facto relationship;
  - (b) the maintenance of either member of the couple in the event of the breakdown of the de facto relationship;
  - (c) matters incidental or ancillary to those mentioned in paragraph (a) or (b).
- (4) For the purposes of paragraph (c) of subitem (1), disregard whether the preserved law permits the court to make such an order if the court varies or sets aside the agreement.

## **Division 5—Application of new Act to transitioning agreements**

### **93 Application of new Act to agreements covered by this Part**

- (1) For the purposes of the application of the new Act to an agreement covered by item 87, 88, 91 or 92:
- (a) section 90UA of the new Act has effect subject to this Part; and
  - (b) section 90UG of the new Act has effect as if the reference in that section to paragraph 90UE(2)(b) of the new Act included a reference to paragraph (3)(c) of that item; and
  - (c) section 90UH of the new Act is taken not to have been enacted; and
  - (d) section 90UJ of the new Act has effect as if the references in that section to section 90UE of the new Act included references to that item; and
  - (e) subparagraph 90UM(1)(c)(ii) of the new Act has effect as if:
    - (i) the reference in that subparagraph to an order under section 90SM of the new Act included a reference to an order (however described) under a corresponding provision (if any) of the preserved law; and
    - (ii) the reference in that subparagraph to a declaration under section 90SL of the new Act included a reference to a declaration (however described) under a corresponding provision (if any) of the preserved law; and
  - (f) the reference in paragraph 90UM(1)(k) of the new Act to section 90UE of the new Act included a reference to that item; and
  - (g) the reference in subsection 90UM(5) of the new Act to section 90UE of the new Act included a reference to that item; and
  - (h) subsection 90WA(1) of the new Act does not apply to a liability to pay duty or charge (if any) in relation to the agreement if the liability arises before:
    - (i) if the item is item 87 or 88—commencement; or
    - (ii) if the item is item 91 or 92—the transition time.
- (2) Despite any State or Territory law, a failure to discharge a liability covered by paragraph (h) of subitem (1) in relation to the agreement has
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**Schedule 1** Amendments relating to de facto financial matters  
**Part 2** Transitional provisions

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no effect for the purposes of the new Act. In particular, the failure does not affect whether the agreement may be presented in evidence in a court for the purposes of the new Act.

## **Schedule 2—Consequential amendments relating to de facto financial matters**

### ***A New Tax System (Family Assistance) Act 1999***

#### **1 Subparagraph 19(2)(c)(iii)**

After “maintenance agreement”, insert “, a financial agreement (within the meaning of the *Family Law Act 1975*), a Part VIIIAB financial agreement (within the meaning of that Act)”.

#### **2 Subparagraph 20A(10)(b)(iii) of Schedule 1**

After “financial agreement”, insert “, or Part VIIIAB financial agreement,”.

#### **3 Subparagraph 24(3)(a)(iii) of Schedule 1**

After “financial agreement”, insert “, or Part VIIIAB financial agreement,”.

### ***Bankruptcy Act 1966***

#### **4 Subsection 5(1) (definition of *maintenance agreement*)**

After “financial agreement”, insert “, or Part VIIIAB financial agreement,”.

#### **5 After subsection 35(1)**

Insert:

(1A) If, at a particular time:

(a) a party to a de facto relationship is a bankrupt; and

(b) the trustee of the bankrupt’s estate is:

(i) a party to property settlement proceedings in relation to either or both of the parties to the de facto relationship;  
or

(ii) an applicant under section 90SN of the *Family Law Act 1975* for the variation or setting aside of an order made under section 90SM of that Act in property settlement

proceedings in relation to either or both of the parties to the de facto relationship; or

- (iii) a party to maintenance proceedings under Part VIIIAB of the *Family Law Act 1975* in relation to the maintenance of one of the parties to the de facto relationship;

then, at and after that time, the Family Court has jurisdiction in bankruptcy in relation to any matter connected with, or arising out of, the bankruptcy of the bankrupt.

## 6 Subsection 35(2)

Omit “Subsection (1) does”, substitute “Subsections (1) and (1A) do”.

## 7 At the end of section 35

Add:

- (4) An expression used in subsection (1A) that is also used in the *Family Law Act 1975* has the same meaning in that subsection as it has in that Act.

## 8 Subsection 35B(1)

After “35”, insert “(other than subsection (1A))”.

## 9 After subsection 35B(1)

Insert:

- (1A) Despite subsection (1), section 35A does not apply to the Family Court of Western Australia in relation to a de facto financial cause (within the meaning of the *Family Law Act 1975*).

## 10 Paragraph 40(1)(o)

Omit all the words after “accordance”, substitute:

with:

- (i) a financial agreement (within the meaning of the *Family Law Act 1975*); or
- (ii) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*);

to which the debtor is a party.

## 11 Section 59A

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After “VIII”, insert “or VIIIAB”.

Note: The heading to section 59A is altered by inserting “or VIIIAB” after “VIII”.

**12 Paragraph 116(2)(q)**

After “spouse”, insert “, or a former spouse,”.

**13 At the end of subsection 116(2)**

Add:

; (r) any property that, under an order under Part VIIIAB of the *Family Law Act 1975*, the trustee is required to transfer to a former de facto spouse of the bankrupt.

**14 Paragraph 120(5)(e)**

After “spouse”, insert “, or a former spouse,”.

**15 At the end of subsection 120(5)**

Add:

; (f) if the transferee is a former de facto spouse of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

**16 Paragraph 121(6)(e)**

After “spouse”, insert “, or a former spouse,”.

**17 At the end of subsection 121(6)**

Add:

; (f) if the transferee is a former de facto spouse of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

**18 Subsection 140(11)**

Omit “section 114 of the *Family Law Act 1975* (which deals”, substitute “section 90SS or 114 of the *Family Law Act 1975* (which deal”.

***Child Support (Assessment) Act 1989***

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**19 At the end of subsection 84(5)**

Add:

; or (c) a Part VIIIAB financial agreement (within the meaning of that Act).

**20 Paragraph 152(1)(b)**

Omit “or a financial agreement within the meaning of the *Family Law Act 1975*”, substitute “a financial agreement (within the meaning of the *Family Law Act 1975*) or a Part VIIIAB financial agreement (within the meaning of that Act)”.

**21 Subsection 152(1)**

Omit “or financial agreement” (wherever occurring), substitute “, financial agreement or Part VIIIAB financial agreement”.

***Child Support (Registration and Collection) Act 1988***

**22 Subsection 4(1) (at the end of subparagraph (a)(i) of the definition of *collection agency maintenance liability*)**

Add “or”.

**23 Subsection 4(1) (after subparagraph (a)(iii) of the definition of *collection agency maintenance liability*)**

Insert:

or (iv) a party to a de facto relationship to pay a periodic amount for the maintenance of the other party to the de facto relationship;

**24 Subsection 4(1) (definition of *maintenance agreement*)**

Omit “or a party to a marriage”, substitute “, a party to a marriage or a party to a de facto relationship”.

**25 Subsection 4(1) (definition of *maintenance agreement*)**

After “financial agreement”, insert “, or Part VIIIAB financial agreement,”.

**26 Subsection 4(1)**

Insert:

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*party to a de facto relationship* has the same meaning as in the *Family Law Act 1975*.

**27 Subsection 4(1) (after paragraph (d) of the definition of terminating event)**

Insert:

(daa) in a case where the liability relates to the maintenance of a party to a de facto relationship—the marriage of the person unless, under the terms and conditions of the relevant court order or maintenance agreement or otherwise by force of law, the liability is to continue after the marriage of the person; or

**28 Section 18**

Before “Subject”, insert “(1)”.

Note: The heading to section 18 is altered by inserting “, or parties to de facto relationships,” after “marriages”.

**29 At the end of section 18**

Add:

- (2) Subject to section 19, a liability is a registrable maintenance liability if:
- (a) it is a liability of a party to a de facto relationship to pay a periodic amount for the maintenance of the other party to the de facto relationship; and
  - (b) either of the following subparagraphs applies:
    - (i) it arises under a court order or court registered maintenance agreement;
    - (ii) it is a collection agency maintenance liability.

**30 At the end of subparagraph 112(1)(b)(ii)**

Add “or”.

**31 After subparagraph 112(1)(b)(ii)**

Insert:

- (iii) the maintenance by a party to a de facto relationship of the other party to the de facto relationship;

***Federal Magistrates Act 1999***

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*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* No.  
115, 2008 101

**32 Subparagraph 102(2)(l)(i)**

Omit “or 77”, substitute “, 77 or 90SG”.

***First Home Saver Accounts Act 2008***

**33 Section 18 (at the end of the definition of *family law obligation*)**

Add:

- ; or (c) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act.

***Income Tax Assessment Act 1997***

**34 After paragraph 126-5(1)(d)**

Insert:

(da) something done under:

- (i) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or
- (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or

**35 Subsection 126-5(3A)**

After “(d)”, insert “, (da)”.

**36 After paragraph 126-15(1)(d)**

Insert:

(da) something done under:

- (i) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or
- (ii) a corresponding written agreement that is binding because of a corresponding foreign law; or

**37 Subsection 126-15(5)**

After “(d)”, insert “, (da)”.

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**38 Paragraph 126-140(2A)(h)**

After “(2B)(d)”, insert “, (da)”.

**39 Paragraph 126-140(2B)(b)**

Omit “or subsection 90AE(2) or 90AF(2)”, substitute “, subsection 90AE(2) or 90AF(2) or section 90SM”.

**40 Paragraph 126-140(2B)(c)**

Omit “section 79 or subsection 90AE(2) or 90AF(2)”, substitute “subsection 90AE(2) or 90AF(2) or section 90SM”.

**41 After paragraph 126-140(2B)(d)**

Insert:

- (da) a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*) that is binding because of section 90UJ of that Act; or

***Proceeds of Crime Act 2002***

**42 After subparagraph 330(4)(ba)(i)**

Insert:

- (ia) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a de facto relationship (within the meaning of that Act) or either of them; or

**43 Subparagraph 330(4)(ba)(ii)**

After “agreement”, insert “, or Part VIIIAB financial agreement,”.

***Social Security Act 1991***

**44 Subparagraph 9A(2)(h)(iva)**

Omit “spouse” (wherever occurring), substitute “partner”.

**45 Subparagraph 9B(2)(h)(iva)**

Omit “spouse” (wherever occurring), substitute “partner”.

**46 Subparagraph 9BA(2)(f)(vi)**

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Omit “spouse” (wherever occurring), substitute “partner”.

**47 Paragraph 9C(b)**

Omit “spouse” (wherever occurring), substitute “partner”.

***Veterans’ Entitlements Act 1986***

**48 Subparagraph 5JA(2)(h)(iva)**

Omit “spouse” (wherever occurring), substitute “partner”.

**49 Subparagraph 5JB(2)(h)(iva)**

Omit “spouse” (wherever occurring), substitute “partner”.

**50 Subparagraph 5JBA(2)(f)(vi)**

Omit “spouse” (wherever occurring), substitute “partner”.

**51 Paragraph 5JC(b)**

Omit “spouse” (wherever occurring), substitute “partner”.

**52 Subparagraph 51(3)(a)(ia)**

Omit “under”, substitute “, or Part VIIIAB financial agreement, within the meaning of”.

## **Schedule 3—Amendments relating to financial agreements about marriage**

### **Part 1—Clarifying that other persons can be parties**

#### *Family Law Act 1975*

##### **1 Subsection 4(1)**

Insert:

*spouse party*, in relation to a financial agreement, means a party to the agreement who is a party to the contemplated marriage, marriage or former marriage to which the agreement relates.

##### **2 Subsection 4(1)**

Insert:

*third party*, in relation to a financial agreement, means a party to the agreement who is not a spouse party.

##### **3 Paragraph 90B(1)(aa)**

Repeal the paragraph, substitute:

(aa) at the time of the making of the agreement, the people are not the spouse parties to any other binding agreement (whether made under this section or section 90C or 90D) with respect to any of those matters; and

##### **4 At the end of subsection 90B(1)**

Add “The people may make the financial agreement with one or more other people.”.

##### **5 Subsection 90B(2)**

Omit “them” (wherever occurring), substitute “the spouse parties”.

##### **6 Subsections 90B(3) and (4)**

Repeal the subsections, substitute:

(3) A financial agreement made as mentioned in subsection (1) may also contain:

**Schedule 3** Amendments relating to financial agreements about marriage  
**Part 1** Clarifying that other persons can be parties

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- (a) matters incidental or ancillary to those mentioned in subsection (2); and
  - (b) other matters.
- (4) A financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

**7 Paragraph 90C(1)(aa)**

Repeal the paragraph, substitute:

- (aa) at the time of the making of the agreement, the parties to the marriage are not the spouse parties to any other binding agreement (whether made under this section or section 90B or 90D) with respect to any of those matters; and

**8 At the end of subsection 90C(1)**

Add “The parties to the marriage may make the financial agreement with one or more other people.”.

**9 Subsection 90C(2)**

Omit “them” (wherever occurring), substitute “the spouse parties”.

**10 Subsections 90C(3) and (4)**

Repeal the subsections, substitute:

- (3) A financial agreement made as mentioned in subsection (1) may also contain:
- (a) matters incidental or ancillary to those mentioned in subsection (2); and
  - (b) other matters.
- (4) A financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

**11 Paragraph 90D(1)(aa)**

Repeal the paragraph, substitute:

- (aa) at the time of the making of the agreement, the parties to the former marriage are not the spouse parties to any other
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binding agreement (whether made under this section or section 90B or 90C) with respect to any of those matters; and

**12 At the end of subsection 90D(1)**

Add “The parties to the former marriage may make the financial agreement with one or more other people.”.

**13 Subsection 90D(2)**

Omit “them” (wherever occurring), substitute “the spouse parties”.

**14 Subsections 90D(3) and (4)**

Repeal the subsections, substitute:

- (3) A financial agreement made as mentioned in subsection (1) may also contain:
  - (a) matters incidental or ancillary to those mentioned in subsection (2); and
  - (b) other matters.
- (4) A financial agreement (the *new agreement*) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

**15 Subsections 90DA(3) and (4)**

Omit “parties” (wherever occurring), substitute “spouse parties”.

**16 Subsection 90DA(5) (definition of *declaration time*)**

Repeal the definition, substitute:

*declaration time* means the time when the declaration was signed by a spouse party to the financial agreement.

**17 After section 90DA**

Insert:

**90DB Whether or when certain other provisions of financial agreements take effect**

- (1) A financial agreement that is binding on the parties to the agreement, to the extent to which it provides for a third party to

**Schedule 3** Amendments relating to financial agreements about marriage  
**Part 1** Clarifying that other persons can be parties

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contribute to the maintenance of a spouse party during the marriage, is of no force or effect.

- (2) A financial agreement that is binding on the parties to the agreement, to the extent to which it provides for matters covered by paragraph 90B(3)(b) or 90C(3)(b), is of no force or effect unless and until the marriage breaks down.

**18 Section 90E**

Omit “party” (first occurring), substitute “spouse party”.

**19 Subsection 90F(2)**

Omit “party” (first occurring), substitute “spouse party”.

**20 Paragraph 90G(1)(a)**

Omit “both”, substitute “all”.

**21 Paragraph 90G(1)(b)**

Omit “party” (first occurring), substitute “spouse party”.

**22 Paragraph 90G(1)(e)**

Omit “parties and a copy is given to the other”, substitute “spouse parties and a copy is given to each of the other parties”.

**23 Paragraph 90J(2)(a)**

Omit “both”, substitute “all”.

**24 Paragraph 90J(2)(b)**

Omit “party” (first occurring), substitute “spouse party”.

**25 Paragraph 90J(2)(e)**

Omit “parties and a copy is given to the other”, substitute “spouse parties and a copy is given to each of the other parties”.

**26 Paragraph 90K(1)(aa)**

Omit “either”, substitute “a”.

**27 Subsection 90MH(1)**

Omit “parties”, substitute “spouse parties”.

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**28 Subsection 90MH(4)**

Omit “parties”, substitute “spouse parties”.

**29 Subsection 90MH(5)**

Omit “party” (first occurring), substitute “spouse party”.

## Part 2—Separation declarations

### *Family Law Act 1975*

#### **30 Subsection 90DA(1)**

Repeal the subsection, substitute:

- (1) A financial agreement that is binding on the parties to the agreement, to the extent to which it deals with how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties:
- (a) at the time when the agreement is made; or
  - (b) at a later time and before the termination of the marriage by divorce;

are to be dealt with, is of no force or effect until a separation declaration is made.

Note: Before the separation declaration is made, the financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by section 90DB).

(1A) Subsection (1) ceases to apply if:

- (a) the spouse parties divorce; or
- (b) either or both of them die.

Note: This means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the divorce or death(s).

#### **31 Subsection 90DA(2)**

After “(4)”, insert “, and may be included in the financial agreement to which it relates”.

#### **32 Section 90MD (at the end of the definition of *declaration time*)**

Add:

Note: If a spouse has died, the spouse’s legal personal representative may sign a declaration (see subsection 90MP(2)).

#### **33 Section 90MI**

Before “The”, insert “(1)”.

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**34 Paragraph 90MI(a)**

Repeal the paragraph, substitute:

- (a) if the parties are divorced—a copy of the divorce order that has terminated the marriage; and
  - (aa) if, in the case of a payment split under a superannuation agreement:
    - (i) the parties are not divorced; and
    - (ii) a separation declaration is not part of the superannuation agreement;
- a separation declaration; and

**35 At the end of section 90MI**

Add:

- (2) For the purposes of subsection (1), the separation declaration must have a declaration time that is not more than 28 days before the service on the trustee.

**36 After paragraph 90MJ(1)(d)**

Insert:

- (da) if the agreement relates to a marriage—the marriage is broken down at the operative time; and

**37 Subsection 90MP(1)**

After “section”, insert “, and may be included in the superannuation agreement to which it relates”.

**38 At the end of subsection 90MP(2)**

Add “For this purpose, if a spouse has died the spouse’s legal personal representative may sign the declaration.”.

**39 After subsection 90MP(4)**

Insert:

- (4A) If either or both of the spouses have died, then the declaration must state:
  - (a) if section 90MQ applies to the declaration—that at the most recent time when both spouses were alive:
    - (i) the spouses were married; but

- (ii) the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time; or
  - (b) if section 90MQ does not apply to the declaration—that the spouses were married, but separated, at the most recent time when both spouses were alive.
- Subsections (3) and (4) have effect subject to this subsection.

#### **40 Subsection 90MQ(1)**

Repeal the subsection, substitute:

- (1) This section applies to a declaration if:
    - (a) if both spouses are alive at the declaration time—at the declaration time; or
    - (b) otherwise—at the most recent time when both spouses were alive;
- the total withdrawal value for all the superannuation interests of the member spouse is more than the member spouse's low rate cap amount for the income year in which that time occurs.

#### **41 At the end of section 90MZG**

Add:

- (4) Subsection (1) does not apply in relation to a declaration if a spouse to which the declaration relates died before the declaration was made.

## **Part 3—Matrimonial causes**

### *Family Law Act 1975*

#### **42 Subsection 4(1) (paragraph (eaa) of the definition of matrimonial cause)**

Omit all the words after “paragraphs,”, substitute:

proceedings with respect to a financial agreement that are between any combination of:

- (i) the parties to that agreement; and
- (ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); or

#### **43 Paragraphs 4A(1)(a) and (b)**

Repeal the paragraphs, substitute:

(a) any combination of:

- (i) the parties to a financial agreement; and
- (ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); and

(b) any of the following:

- (i) a creditor;
- (ii) if a creditor is an individual who has died—the legal personal representative of the creditor;
- (iii) a government body acting in the interests of a creditor;

#### **44 Subsection 4A(2) (definition of creditor)**

Omit “either of the parties” (wherever occurring), substitute “a party”.

## Part 4—Other amendments

### *Family Law Act 1975*

#### **45 Subsection 90F(2)**

Omit “subsection 90C(1)”, substitute “subsection 90B(1), 90C(1)”.

#### **46 Paragraph 90MU(1)(b)**

Omit “court”, substitute “member spouse and the non-member spouse”.

#### **47 Subsection 90MZB(8) (after paragraph (a) of the definition of eligible person)**

Insert:

(aa) if the member has died—the legal personal representative of the member; or

#### **48 Subsection 90MZB(8) (after paragraph (b) of the definition of eligible person)**

Insert:

(ba) if a spouse of the member has died—the legal personal representative of the spouse; or

## **Schedule 3A—Children**

### ***Family Law Act 1975***

#### **1 Subsection 4(1)**

Insert:

***child***: Subdivision D of Division 1 of Part VII affects the situations in which a child is a child of a person or is a child of a marriage or other relationship.

Note: In determining if a child is the child of a person within the meaning of this Act, it is to be assumed that Part VII extends to all States and Territories.

#### **2 Before section 60F**

Insert:

#### **60EA Definition of *de facto partner***

For the purposes of this Subdivision, a person is the ***de facto partner*** of another person if:

- (a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; or
- (b) the person is in a de facto relationship with the other person.

#### **3 Paragraph 60F(1)(c)**

After “subsection 60H(1)”, insert “or section 60HB”.

#### **4 After subsection 60F(4)**

Insert:

- (4A) To avoid doubt, for the purposes of this Act, a child of a marriage is a child of the husband and of the wife in the marriage.

#### **5 Subsection 60G(2)**

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*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* No.  
115, 2008 115

After “paragraph 60F(4)(a)”, insert “, or paragraph 60HA(3)(a),”.

## **6 Subsection 60H(1)**

Repeal the subsection, substitute:

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the *other intended parent*); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

## **7 Subsection 60H(4)**

Repeal the subsection.

## **8 At the end of Subdivision D of Division 1 of Part VII**

Add:

### **60HA Children of de facto partners**

(1) For the purposes of this Act, a child is the child of a person who has, or had, a de facto partner if:

(a) the child is a child of the person and the person’s de facto partner; or



- 
- (b) the child is adopted by the person and the person's de facto partner or by either of them with the consent of the other; or
  - (c) the child is, under subsection 60H(1) or section 60HB, a child of the person and the person's de facto partner.

This subsection has effect subject to subsection (2).

- (2) A child of current or former de facto partners ceases to be a child of those partners for the purposes of this Act if the child is adopted by a person who, before the adoption, is not a prescribed adopting parent.
- (3) The following provisions apply in relation to a child of current or former de facto partners who is adopted by a prescribed adopting parent:
  - (a) if a court granted leave under section 60G for the adoption proceedings to be commenced—the child ceases to be a child of those partners for the purposes of this Act;
  - (b) in any other case—the child continues to be a child of those partners for the purposes of this Act.
- (4) In this section:

*this Act* includes:

  - (a) the standard Rules of Court; and
  - (b) the related Federal Magistrates Rules.

### **60HB Children born under surrogacy arrangements**

- (1) If a court has made an order under a prescribed law of a State or Territory to the effect that:
  - (a) a child is the child of one or more persons; or
  - (b) each of one or more persons is a parent of a child;then, for the purposes of this Act, the child is the child of each of those persons.
- (2) In this section:

*this Act* includes:

  - (a) the standard Rules of Court; and
  - (b) the related Federal Magistrates Rules.

## **9 Application**

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*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* No.  
115, 2008 117

*Application to children*

- (1) Subject to subitems (2) to (8), the amendments made by this Schedule apply in relation to a child born before, on or after the commencement of this item.

*Application to the Aged Care Act 1997*

- (2) To the extent that the amendments of the *Family Law Act 1975* made by this Schedule affect subparagraph 44-11(2)(a)(i) of the *Aged Care Act 1997*, they apply in relation to that subparagraph on and after 1 July 2009.

*Application to the A New Tax System (Family Assistance) Act 1999*

- (3) To the extent that the amendments of the *Family Law Act 1975* made by this Schedule affect paragraph 22(2)(b) of the *A New Tax System (Family Assistance) Act 1999*, they apply in relation to that paragraph on and after 1 July 2009.

*Application to the Child Support (Assessment) Act 1989*

- (4) To the extent that the amendment of subsection 60H(1), and the repeal of subsection 60H(4), of the *Family Law Act 1975* made by this Schedule affect paragraph (b) of the definition of **parent** in subsection 5(1) of the *Child Support (Assessment) Act 1989*, they apply in relation to that paragraph on and after 1 July 2009.

*Application to the Child Support (Registration and Collection) Act 1988*

- (5) To the extent that the amendment of paragraph 60F(1)(c) of the *Family Law Act 1975* made by this Schedule affects the definition of **child of a marriage** in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988*, it applies in relation to that definition on and after 1 July 2009.

*Application to the Health Insurance Act 1973*

- (6) To the extent that the amendments of the *Family Law Act 1975* made by this Schedule affect paragraph (a) of the definition of **dependent child** in subsection 10AA(7) of the *Health Insurance Act 1973*, they apply in relation to that paragraph on and after 1 January 2009.
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*Application to the National Health Act 1953*

- (7) To the extent that the amendments of the *Family Law Act 1975* made by this Schedule affect paragraph 84(4)(b), and paragraph (a) of the definition of ***dependent child*** in subsection 84B(4) of the *National Health Act 1953*, they apply in relation to those paragraphs on and after 1 January 2009.

*Application to the Social Security Act 1991*

- (8) To the extent that the amendments of the *Family Law Act 1975* made by this Schedule affect paragraph 5(2)(a), subparagraph (b)(i) of point 1067G-B3AA, subparagraph (b)(i) of subpoint 1067G-G9(2) and subparagraph (a)(i) of point 1068-B1B of the *Social Security Act 1991*, they apply in relation to those provisions on and after 1 July 2009.

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## Schedule 4—Other measures

### *Family Law Act 1975*

#### **1A Paragraph 60I(5)(a)**

Omit “the date fixed by Proclamation for the purposes of this paragraph”, substitute “1 July 2008”.

Note: The heading to subsection 60I(5) is altered by omitting “*first proclaimed date*” and substituting “*30 June 2008*”.

#### **1B Subsection 60I(6)**

Omit “the date fixed by Proclamation for the purposes of this subsection”, substitute “1 July 2008”.

Note: The heading to subsection 60I(6) is altered by omitting “*second proclaimed date*” and substituting “*1 July 2008*”.

#### **1 At the end of subsection 60I(8)**

Add:

- ; (d) a certificate to the effect that the person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

### *Proceeds of Crime Act 2002*

#### **2 Paragraph 330(4)(ba)**

Before “the property has”, insert “if”.

Note: This item fixes a grammatical error.

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*[Minister's second reading speech made in—  
House of Representatives on 25 June 2008  
Senate on 1 September 2008]*

(149/08)

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