

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND
OTHER MEASURES) BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

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FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) BILL

GENERAL OUTLINE

The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill (the Bill) amends the *Family Law Act 1975* (the Act) to provide for opposite-sex and same-sex de facto couples to access the federal family law courts on property and maintenance matters. The Bill also amends the Act to provide for amendments relating to financial agreements between married couples and superannuation splitting, and for an amendment to the Act providing for certificates given in relation to family dispute resolution.

The Bill relies on referrals by States to the Commonwealth in accordance with subsection 51(xxxvii) of the Constitution. For example, New South Wales has enacted the *Commonwealth Powers (De Facto Relationships) Act 2003*, and Victoria, Queensland and Tasmania have legislated in similar terms. These State referral Acts are expected to come into effect on proclamation, which is expected to be timed with proclamation of the commencement of the operative amendments in Schedule 1 to the Bill.

The primary objective of the Bill is to extend the financial settlement regime under the Act to parties to a de facto relationship. This is achieved by conferring jurisdiction on certain courts in ‘de facto financial causes’ involving parties to de facto relationships, and providing a new Part VIIIAB of the Act (and amendments to existing Parts VIIIAA and VIIIB) to allow the court to make orders in those proceedings covered by the definition of ‘de facto financial cause’.

The Bill provides that a person is in a de facto relationship with another person if they are not married or related to each other by family where, having regard to all the circumstances of the relationship, they have a relationship as a couple living together on a genuine domestic basis.

Presently, the financial arrangements between separated de facto couples are subject to State and Territory law, and these laws vary between jurisdictions. The Bill will offer de facto couples covered by the Bill a nationally consistent financial settlement regime, to minimise jurisdictional disputes and uncertainties that sometimes impede settlement of these matters under State and Territory law. The Bill will also offer these de facto couples access to the family law system for determination of their financial matters arising on relationship breakdown. The family law courts have experience in relationship matters, and have procedures and dispute resolution mechanisms more suited to handling family litigation. Also, the Bill will enable one court exercising jurisdiction under the Act, such as the Family Court of Australia or the Federal Magistrates Court, to deal in the one proceeding with both financial and child-related matters arising between separated de facto couples.

The Bill creates a new ‘de facto financial cause’ in subsection 4(1) of the Act. This provides jurisdiction for de facto financial matters in all financial matters presently available under the Act between parties to a marriage, such as proceedings for distribution of property or financial resources, or for provision of maintenance between parties to a de facto relationship, and proceedings involving third parties, binding financial agreements, and related bankruptcy matters.

The Bill links the application of its provisions to ‘participating jurisdictions’ by requiring that a geographical nexus be established in relation to those jurisdictions in a de facto financial matter brought under the provisions of the Bill. The Bill will apply in the Territories by virtue of section 122 of the Constitution.

Where federal jurisdiction applies to de facto financial matters under the provisions of the Bill in participating jurisdictions, State and Territory laws dealing with the same subject matter are excluded. Detailed provisions dealing with the relationship between the federal provisions and State and Territory laws are set out in new section 90RC.

Schedule 1 to the Bill contains the operative amendments to the Act that extend its operation to de facto financial matters. This occurs principally by insertion of new Part VIIIAB, dealing with maintenance, declaration and alteration of property interests (Division 2), orders and injunctions binding third parties (Division 3), financial agreements (Division 4), proceeds of crime and forfeiture (Division 5), and instruments not liable to duty (Division 6).

Under these amendments, the Act will apply to allow the court to make orders in de facto financial matters if:

- the de facto relationship broke down after the commencement of the Act
- the conditions relating to length of relationship or other matters are met
- the application is brought within required time limits
- the geographical nexus with a ‘participating jurisdiction’ is satisfied when the application is made, if all States have not referred power, and
- the proceedings are not otherwise determined to be a matter for State and Territory law by the effect of transitional provisions in Part 2 of Schedule 1 to the Bill.

Schedule 2 to the Bill contains consequential amendments to other related legislation. Generally, these consequential amendments flow from the extension of the Act to de facto financial matters, and therefore ensure that references to matrimonial property settlements under the Act (such as ‘spouse’ or ‘property proceedings’ or ‘Part VIII’) extend also, where appropriate, to financial proceedings under the Act between parties to a de facto relationship.

Schedule 3 to the Bill contains amendments relating to financial agreements between married couples, separation declarations and superannuation splitting. It also amends the definition of ‘matrimonial cause’ to cover proceedings by third parties in relation to binding financial agreements.

Schedule 4 to the Bill contains an amendment to subsection 60I(8), to allow family dispute resolution practitioners to give an additional certificate to parties who attend family dispute resolution. It also makes a minor drafting correction to paragraph 330(4)(ba) of the *Proceeds of Crime Act 2002*.

FINANCIAL IMPACT STATEMENT

The Bill will confer additional jurisdiction on federal courts and the Government will monitor, in consultation with the courts, the impact of the new jurisdiction created by the Bill. Additional resources were provided to the courts in the 2007-08 Budget to deal with the increased workload.

REGULATION IMPACT STATEMENT

The Office of Regulation Review has considered the proposed amendments and determined that a Regulation Impact Statement is not required.

CONSULTATION STATEMENT

The scope of referred powers on de facto financial matters has been a matter of consultation with the States and Territory Governments for several years. This culminated in a decision at the November 2002 meeting of the Standing Committee of Attorneys-General to proceed with Commonwealth implementation of references of State powers in this area, with support from a majority of State and Territory Governments.

Over the period November 2006 to March 2007, the Attorney-General's Department undertook consultations on the amendments extending the operation of the Act to de facto financial matters, with the States and Territories, the Family Court of Australia, the Federal Magistrates Court of Australia, the Family Law Section of the Law Council of Australia and the Family Law Council. Consultation on the Bill has also been undertaken with affected Government agencies.

The Family Court of Australia and the Federal Magistrates Court of Australia were consulted about the financial impact of additional workload generated by the proposed amendments.

NOTES ON ITEMS

Terms used in this Explanatory Memorandum

1. The following terms are used in this Explanatory Memorandum:
 - ‘Act’ refers to the *Family Law Act 1975*
 - ‘Amendment Act’ refers to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*
 - ‘Bill’ refers to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, and
 - ‘State reference Acts’ refers to the Acts passed by State Parliaments that refer State powers to the Commonwealth in respect of financial matters arising on the breakdown of de facto relationships, for example, the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW)

Clause 1 – Short title

2. Clause 1 provides for the Act to be cited as the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

Clause 2 – Commencement

3. Clause 2 provides for the commencement of the Amendment Act, and contains a table which sets out when each of its provisions commences.
4. Item 1 of the table provides that the operative provisions of the Bill – clauses 1 to 3, which provide for the short title, the application of the schedules, and this commencement provision – commence on the day on which the Bill receives Royal Assent.
5. Items 2, 3 and 5 of the table provide that the amendments in Schedule 1 and the amendments in Schedule 2 (other than the amendment at item 33 of Schedule 2) commence on a day to be fixed by Proclamation. Item 7 of the table also provides that the amendment at item 1 of Schedule 4 commences on a day to be fixed by Proclamation. However, if any of those amendments do not commence within 6 months from the day on which the Bill receives Royal Assent, they will commence on the first day after this period. This allows up to 6 months for Proclamation, ensuring time for the public, practitioners and the courts to prepare for the changes. Schedule 1 contains the amendments to the Act and transitional provisions implementing the State references of power in relation to de facto financial matters. Schedule 2 contains amendments to other federal legislation consequential on implementation of the references. The amendment at item 1 of Schedule 4 deals with an additional circumstance in which a family dispute resolution practitioner may give a certificate to a person.
6. Item 4 of the table provides for the commencement of the amendment at item 33 of Schedule 2 to the Bill (containing an amendment to the *First Home Saver Accounts Act 2008*) to commence on the later of the commencement of the *First Home Saver*

Accounts Act 2008 or the commencement of the provisions covered by item 2 of the table in clause 2.

7. Item 6 of the table provides that Schedule 3 of the Bill – providing for amendments relating to financial agreements about marriage – commences on the day on which the Bill receives Royal Assent.

8. Item 8 of the table provides for the commencement of the amendment at item 2 of Schedule 4 to the Bill, being a minor drafting correction to paragraph 330(4)(ba) of the *Proceeds of Crime Act 2002* (the Proceeds Act), from the commencement of section 330 of the Proceeds Act on 1 January 2003, in accordance with drafting practice for rectifying technical errors of a statute law revision nature.

Clause 3 – Schedules

9. This clause provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule.

SCHEDULE 1 – AMENDMENTS RELATING TO DE FACTO FINANCIAL MATTERS

Part 1 – Amendments

Item 1: Title

10. Item 1 amends the long title to the Act to reflect the extension of jurisdiction under the Act to include financial matters arising out of the breakdown of de facto relationships, as provided by the amendments in the Bill.

New and amended definitions and terminology

11. The Bill contains several new definitions, and amendments to existing definitions, relating to de facto financial matters. These definitions support the new provisions extending federal jurisdiction under the Act to financial matters arising on the breakdown of de facto relationships. The Bill aims to replicate for parties to de facto relationships the financial settlement regime under Parts VIII, Part VIII A A, Part VIII A and Part VIII B of the Act, consistently with the references of powers provided by the State reference Acts. Therefore, the new and extended definitions are intended to be aligned as far as possible with the existing definitions used in the Act, and to depart only where necessary for consistency with the terminology used in the State reference Acts.

Item 2: Subsection 4(1)

12. Item 2 inserts in subsection 4(1) a definition of ‘breakdown’ in relation to a de facto relationship, to clarify that this does not include death. This replicates the definition of ‘breakdown’ used in the State reference Acts.

Item 3: Subsection 4(1)

13. This item inserts in subsection 4(1) a definition of ‘de facto financial cause’. The scope of proceedings covered by this term is intended to mirror the scope of proceedings referred to in paragraphs (c), (caa), (ca), (cb), (eaa), (eab) and (f) of the definition of ‘matrimonial cause’, in order to cover all equivalent financial matters presently justiciable in relation to parties to a marriage. This includes jurisdiction in property and maintenance matters, in proceedings involving third parties, financial agreements, and concurrent bankruptcy jurisdiction.

14. However, the definitions of ‘matrimonial cause’ and ‘de facto financial cause’ differ in some respects, due to the different sources of Commonwealth power to legislate for these matters. The Commonwealth power to legislate for marriage and ‘matrimonial causes’ is supported by paragraphs 51(xxi) and (xxii) of the Constitution, whereas the power to legislate for de facto financial matters largely relies on referrals by States to the Commonwealth in accordance with paragraph 51(xxxvii) of the Constitution. Paragraphs (a) to (d) of the definition of ‘de facto financial cause’, therefore, limit the proceedings within each of those paragraphs to proceedings taken once the relevant de facto relationship has broken down.

15. It should be noted that proceedings referred to in paragraph (e) of the definition of ‘de facto financial cause’, relating to a Part VIIIAB financial agreement made between the parties to a de facto financial relationship agreement, may arise in relation to a Part VIIIAB agreement in the period when the agreement is binding but before the agreement comes into effect upon the breakdown of the parties’ relationship. Similarly, proceedings referred to in paragraph (f) of the definition of ‘de facto financial cause’ relating to third party proceedings to set aside a Part VIIIAB financial agreement may be taken once the agreement is binding and before it comes into effect upon the breakdown of the de facto relationship between the parties.

Item 4: Subsection 4(1)

16. This item inserts in subsection 4(1) a definition for ‘de facto property settlement or maintenance proceedings’, which is intended to replicate for de facto financial matters the definition of ‘property settlement or spousal maintenance proceedings’ applicable to matrimonial financial matters.

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

17. This item repeals the definition of ‘de facto relationship’ in subsection 4(1). The definition of this term now refers to new section 4AA, inserted by item 21 of Schedule 1 to the Bill. The previous definition of ‘de facto relationship’ is modified by new section 4AA only to clarify interpretation of that term for the purpose of new de facto financial matters. In particular, new subsection 4AA(2) makes it clear that a de facto relationship can exist even if one partner is legally married to someone else.

Item 6: Subsection 4(1)

18. This item inserts in subsection 4(1) a definition of ‘distribute’, as the term is used in relation to property and a Part VIIIAB agreement made between parties to a de facto relationship. The term ‘distribute’ is included in the new terms ‘de facto financial cause’, and ‘financial matters’ in relation to property of the parties to a de facto relationship, applying the same terminology as contained in the definition of ‘financial matters’ in the State reference Acts.

19. When used in relation to a Part VIIIAB financial agreement, paragraph (b) of the definition of ‘distribute’ provides that subsection 90UI(3) applies. Subsection 90UI(3) clarifies that a provision in a Part VIIIAB financial agreement that provides for continued ownership of property or financial resources by a party to the agreement is a provision about distribution of the property or financial resources.

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

20. This item amends the definition of ‘financial matters’ in subsection 4(1), by expanding the term to apply to financial matters in relation to parties to a de facto relationship. The definition provided for de facto financial matters in paragraph (b) is necessarily aligned with the definition of this term in the State reference Acts, reflecting the limits of Commonwealth power in relation to de facto financial matters. Otherwise, it is intended to replicate the scope of financial matters defined in paragraph (a) relating to parties to a marriage.

Item 8: Subsection 4(1)

21. This item inserts in subsection 4(1) a definition of ‘non-referring State de facto financial law’, being a law of a State that is not a participating jurisdiction, and a law that relates to financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships. The term is used in section 90UE, which provides for the continued operation, under the Act, of financial agreements made under such a law.

Item 9: Subsection 4(1)

22. This item inserts in subsection 4(1) a definition of ‘participating jurisdiction’, by reference to new subsection 90RA(1). Each referring State, and each Territory, is a participating jurisdiction. Because the Commonwealth power to legislate for de facto financial matters relies on powers referred by State Parliaments, the Bill will only apply to the territorial limits of those ‘referring States’, and does not apply in States that have not referred powers over these matters. The Bill also inserts in subsection 4(1) a definition of the term ‘referring State’, by reference to subsections 90RA(2), (3), (4) and (5).

23. The Bill establishes the territorial limits of application of its provisions by requiring that parties to proceedings in relation to de facto financial matters under the Act establish a geographical connection to a ‘participating jurisdiction’. These geographical requirements are found in:

- section 90RG (relating to proceedings under section 90RD for a declaration of the existence of a de facto relationship)
- section 90SD (relating to proceedings under sections 90SE or 90SG for maintenance of a party to a de facto relationship)
- section 90SK (relating to proceedings under section 90SL for a declaration of property interests, or under section 90SM for alteration of property interests), and
- section 90UA (relating to Part VIIIAB financial agreements made in participating jurisdictions).

Item 10: Subsection 4(1)

24. This item inserts in subsection 4(1) a definition of ‘Part VIIIAB financial agreement’, to mean an agreement made under new sections 90UB, 90UC or 90UD, or covered by section 90UE. Division 4 of Part VIIIAB sets out provisions about financial agreements between parties to a de facto relationship on certain matters in the event of the breakdown of the de facto relationship, and distinguishes agreements made at various stages of the relationship – before the de facto relationship (section 90UB), during the de facto relationship (section 90UC) or after the breakdown of the de facto relationship (section 90UD). Section 90UE provides for the continued operation, under the Act, of financial agreements made under a non-referring State de facto financial law.

Item 11: Subsection 4(1)

25. This item inserts in subsection 4(1) a definition of ‘Part VIIIAB proceedings’ (applicable to parties to a de facto relationship) in equivalent terms to the definition of ‘Part VIII proceedings’ (applicable to parties to a marriage).

26. The term is defined to mean proceedings under Part VIIIAB for orders with respect to the maintenance of a party, or property of the parties to a de facto relationship, or of either of them, or proceedings in relation to a Part VIIIAB financial agreement, but does not include proceedings specified in the regulations for this provision.

Item 12: Subsection 4(1)

27. This item inserts in subsection 4(1) a definition of ‘Part VIIIAB termination agreement’, by reference to new paragraph 90UL(1)(b). Paragraph 90UL(1)(b) allows a Part VIIIAB financial agreement made between parties to a de facto relationship to be terminated by the parties making a written agreement to that effect, and confirms that such an agreement is a ‘Part VIIIAB termination agreement’.

Item 13: Subsection 4(1)

28. This item inserts in subsection 4(1) a definition of ‘party to a de facto relationship’, to clarify that this includes a party who is living or has lived in a de facto relationship. ‘De facto relationship’ is also defined in subsection 4(1), by reference to new section 4AA.

Item 14: Subsection 4(1) (definition of *property*)

29. This item amends the definition of ‘property’ in subsection 4(1), extending this term to apply also to property of the parties to a de facto relationship or either of them. The extended definition provided for parties to a de facto relationship is identical to that already provided for parties to a marriage.

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

30. This item repeals the existing definition of ‘property settlement proceedings’, and substitutes a new definition applicable to parties to a marriage as well as parties to a de facto relationship. The new definition replicates the previous definition applicable to parties to a marriage, and extends that definition for de facto relationships.

Item 16: Subsection 4(1)

31. This item inserts in subsection 4(1) a definition of ‘referring State’, by reference to new subsections 90RA(2), (3), (4) and (5). The term ‘referring State’ is contained in the description of ‘participating jurisdiction’, and its meaning is further explained, in section 90RA.

Item 17: Subsection 4(1)

32. This item inserts in subsection 4(1) a definition of ‘section 90RD declaration’ by reference to section 90RD, which provides for declarations about the existence of de facto relationships and other related matters for the purpose of de facto maintenance and property proceedings under sections 90SE, 90SG, 90SL or 90SM of Part VIIIAB.

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

33. This item inserts in subsection 4(1) a definition of ‘spouse party’. Several of the amendments in Part 1 of Schedule 3 to the Bill clarify that a financial agreement under Part VIIIA of the Act, between parties to a marriage, can include another person or persons as a party to the agreement. In relation to such an agreement, a ‘spouse party’ is defined to mean a party to the agreement who is a party to the contemplated marriage (section 90B), marriage (section 90C) or former marriage (section 90D) to which the agreement relates. Division 4 of Part VIIIAB of the Act makes provision in similar terms for financial agreements under Part VIIIAB between parties to a de facto relationship. In relation to a Part VIIIAB financial agreement, a ‘spouse party’ is defined to mean a party to the agreement who is a party to the contemplated de facto relationship (section 90UB) or de facto relationship (section 90UC) to which the agreement relates.

34. The definition will replace the definition of ‘spouse party’ inserted by item 1 of Schedule 3 of the Bill, which commences on the day the Amendment Act receives the Royal Assent.

Item 19: Subsection 4(1) (definition of *third party*)

35. This item inserts in subsection 4(1) a definition of ‘third party’ to mean, in relation to a financial agreement or Part VIIIAB financial agreement, a party to the agreement who is not a spouse party.

36. The definition will replace the definition of ‘third party’ inserted by item 2 of Schedule 3 of the Bill, which commences on the day the Amendment Act receives the Royal Assent.

Item 20: After subsection 4(2)

37. This item inserts new subsection 4(2A), clarifying that a reference in the Act, the standard Rules of Court or the related Federal Magistrates Rules to a de facto relationship is not confined to an ongoing relationship, and includes a relationship that has broken down.

Item 21: After section 4

38. This item inserts new section 4AA, which provides a new definition of ‘de facto relationship’ for the purposes of the Act. The new definition applies the pre-existing definition in subsection 4(1) of the Act of a couple living together on a genuine domestic basis although not legally married to each other. In addition, the new definition:

- encompasses both opposite-sex and same-sex de facto relationships, unlike the previous definition which was confined to opposite-sex de facto relationships, and
- is derived from the definition of the term in the State reference Acts.

39. As with the previous definition, paragraph 4AA(1)(a) provides as one of the requirements for a de facto relationship that the persons in the relationship are not legally married to each other.

40. Paragraph 4AA(1)(b) contains a requirement that the persons must not be related by family, by reference to subsection 4AA(6). The new definition is derived from the definition of the term in the State reference Acts, which does not include caring relationships.

41. Paragraph 4AA(1)(c) requires that, having regard to all the circumstances of their relationship, the persons have a relationship as a couple living together on a genuine domestic basis.

42. Subsection 4AA(2) provides a list of circumstances for a court to consider in determining whether a de facto relationship exists between two persons:

- the duration of the relationship
- the nature and extent of their common residence
- whether a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them
- the ownership, use and acquisition of their property
- the degree of mutual commitment to a shared life
- whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship
- the care and support of children, and
- the reputation and public aspects of the relationship.

43. Some State and Territory laws provide for registration of certain relationships that are not marriages on Relationships Registers maintained by the relevant State or Territory Registrar of Births, Deaths and Marriages. Subsection 4AA(2)(g) provides that a court, in determining whether a de facto relationship exists between two persons, may consider whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship. The relationship must be of a kind that has been prescribed, as some State Relationships Registers provide for the registration of relationships that do not fall within the definition of ‘de facto relationship’ in the State reference Acts, for example caring relationships.

44. Subsection 4AA(3) provides that no particular finding in relation to any circumstance listed in subsection 4AA(2) is to be regarded as necessary in deciding whether the persons have a de facto relationship.

45. The new definition encompasses both opposite-sex and same-sex de facto relationships, as provided in subsection 4AA(5)(a).

46. New paragraph 4AA(5)(b) clarifies that a de facto relationship can exist even if the man or the woman in the relationship is legally married to another person or in another de facto relationship.

47. Subsection 4AA(6) provides that two persons are considered to be related by family if:

- one is the child (including an adopted child) of the other
- one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- they have a parent in common (who may be an adoptive parent of either or both of them).

48. For the purposes of determining if two persons are related by family, a court is to disregard whether an adoption is declared void or has ceased to have effect.

Item 22: After subsection 4A(1)

49. This item inserts new subsection 4A(1A) for the definition of paragraph (eab) of the definition of ‘matrimonial cause’ in subsection 4(1), relating to third party proceedings to set aside a financial agreement made between parties to a marriage under Part VIIIA. New subsection 4A(1A) provides that, for third party proceedings to set aside such an agreement on the ground set out in paragraph 90K(1)(ab) of the Act – inserted by item 50 of Schedule 1 to the Bill – proceedings between either or both of the parties to the financial agreement (or the legal personal representative of any such party who has died) and another person who is a party to a de facto relationship with one of the parties to the financial agreement (or the legal personal representative of that other person if he or she has died) are a ‘matrimonial cause’.

50. New subsection 4A(1A) is one of a number of amendments in the Bill that recognise and respond to the potential for ‘overlapping’ financial matters, involving a common party to two different relationships which may both invoke jurisdiction under the Act.

Item 23: After section 4A

51. This item inserts new section 4B for the definition of paragraph (f) of the definition of ‘de facto financial cause’ in subsection 4(1), relating to third party proceedings to set aside a Part VIIIAB financial agreement. Section 4B is an equivalent provision, for the definition of ‘de facto financial cause’, to section 4A, of the Act as amended by item 43 of Schedule 3 to the Bill, applicable to paragraph (eab)

of the definition of ‘matrimonial cause’, dealing with third party proceedings to set aside a financial agreement made between parties to a marriage under Part VIIIA of the Act.

52. Section 4B also has similar effect to new subsection 4A(1A) in relation to setting aside of Part VIIIAB agreements, recognising the potential for proceedings involving another person who is a party to a marriage or a de facto relationship with one of the parties to the Part VIIIAB financial agreement.

53. Subsections 4B(1), (2) and (3) apply to third party proceedings to set aside a Part VIIIAB financial agreement on grounds set out in new paragraphs 90UM(1)(b), 90UM(1)(c) and 90UM(1)(d) respectively. The effect of section 4B is that proceedings between either or both of the parties to a Part VIIIAB agreement and certain specified persons are a ‘de facto financial cause’ for the purpose of paragraph (f) of the definition of that term in subsection 4(1).

Item 24: Paragraph 10L(2)(a)

54. This item expands the definition of ‘section 13E arbitration’ in paragraph 10L(2)(a) to apply also to Part VIIIAB proceedings, other than proceedings relating to a Part VIIIAB financial agreement.

Item 25: Subparagraph 10L(2)(b)(i)

55. This item expands the definition of ‘relevant property or financial arbitration’ in paragraph 10L(2)(b) to apply also to Part VIIIAB proceedings.

Item 26: Subsection 13E(1)

56. This item expands the range of proceedings that can be referred by a court for arbitration under section 13E to include Part VIIIAB proceedings (other than proceedings relating to a Part VIIIAB financial agreement). The heading to section 13E is also changed to refer also to Part VIIIAB proceedings.

Items 27 and 28: At the end of paragraph 31(1)(a), and after paragraph 31(1)(a)

57. These items have the combined effect of inserting new paragraph 31(1)(aa) after existing paragraph 31(1)(a). Section 31 lists the matters in respect of which original jurisdiction is conferred on the Family Court of Australia under the Act. New paragraph 31(1)(aa) adds to that list ‘matters arising under this Act in respect of which de facto financial causes are instituted under [the] Act’.

Item 29: At the end of paragraph 31(1)(b)

58. This item is a drafting update – the amendment adds ‘and’ to the end of paragraph 31(1)(b), for consistency with modern drafting style.

Item 30: Subparagraph 37A(1)(f)(i)

59. This item amends the list of powers that may be delegated to Registrars under subsection 37A(1) by inserting, in addition to powers in paragraph 37(1)(f)(i) in

proceedings in relation to urgent child maintenance (section 66Q), urgent child bearing expenses (67E), and urgent spousal maintenance (section 77), powers in proceedings relating to urgent maintenance of a party to a de facto relationship (section 90SG).

Item 31: Part V (heading)

60. This item replaces the current heading of Part V ('Jurisdiction in matrimonial causes') with 'Jurisdiction of courts', to reflect the expanded operation of Part V under these amendments. Part V will now deal with jurisdiction conferred on courts in both matrimonial and de facto financial causes, and will be split into three Divisions:

- Division 1 headed 'Jurisdiction in matrimonial causes', containing existing section 39 (unamended in this Bill)
- Division 2 headed 'Jurisdiction in de facto financial causes', containing new sections 39A to 39G (as contained in item 33 of the Bill), and
- Division 3 headed 'Other provisions', containing existing sections 40 to 47 (as amended by items 34 to 38 of the Bill).

Item 32: Before section 39

61. This item creates a new Division in Part V, headed 'Division 1 – Jurisdiction in matrimonial causes'. Division 1 now contains pre-existing section 39, which is unamended by the provisions of the Bill.

Item 33: After section 39

62. This item inserts in Part V of the Act a new Division 2, headed 'Jurisdiction in de facto financial causes', containing new sections 39A to 39G.

63. Sections 39A to 39G provide, for de facto financial causes, equivalent provisions to sections 39 and 40 that confer jurisdiction on certain courts in respect of matrimonial causes.

64. Section 39A provides that a de facto financial cause may be instituted under the Act in certain courts. Subsection 39A(5) prevents a de facto financial cause that is able to be instituted under the Act from being instituted otherwise than under the Act, once new Part VIIIAB of the Act commences.

65. Section 39B provides that jurisdiction is conferred on the courts referred to in section 39A in de facto financial causes instituted under the Act.

66. The courts conferred with jurisdiction in de facto financial causes are the Family Court of Australia, the Federal Magistrates Court of Australia, the Supreme Court of the Northern Territory, and courts of summary jurisdiction in a participating jurisdiction. ('De facto financial cause' and 'participating jurisdiction' are defined in other provisions of the Bill).

67. As the notes to section 39B indicate, the exercise of jurisdiction conferred on these courts under section 39B is subject to other provisions of Part V, including section 40 (dealing with the Family Court's exercise of jurisdiction under the Act) and section 40A (dealing with the exercise of the Federal Magistrates Court's jurisdiction in certain States and Territories). The operation of jurisdiction in Territory courts is noted to be subject to new sections 39C, 39D, 39E and 39F in respect of Territory courts, and subject to sections 39D and 39E in respect of State courts of summary jurisdiction.

68. Section 39F establishes a specific residential requirement for de facto financial causes instituted in or transferred to a Territory court (such as the ACT Magistrates Court): as in subsection 39(8) of the Act in relation to matrimonial causes, at least one of the parties to the proceedings must be ordinarily resident in the Territory when the proceedings are instituted in or transferred to the court.

69. This requirement would operate in addition to the geographical requirement set out in sections 90RG, 90SD, 90SK and 90UA to establish that the parties to the proceedings or those entering a Part VIIIAB financial agreement are connected to a participating jurisdiction. In effect, if the geographical nexus in those provisions applies and is established in relation to a participating jurisdiction other than a Territory, and the proceedings are transferred to or are later instituted in a Territory court in respect of that matter, section 39F would require that one of the parties to the proceedings reside in the Territory for the Territory court to exercise jurisdiction under the Act.

70. State courts in States that are not 'participating jurisdictions' (as described in new section 90RA inserted by the Bill) cannot exercise jurisdiction under the Bill. The Family Court of Western Australia is not included as a court on which jurisdiction is conferred under subsection 39B(1) in de facto financial causes, and while Western Australia and South Australia are not referring States, their courts of summary jurisdiction are not invested under subsection 39B(2) with federal jurisdiction in de facto financial causes under the Act.

71. As provided for in sections 39A and 39B, it is possible for the Family Court of Australia and the Federal Magistrates Court of Australia located and operating in a non-participating jurisdiction to exercise jurisdiction in de facto financial causes under the Act, but this would arise only in limited situations, where the case is linked to a participating jurisdiction. This could happen, for example, where the geographical requirements under section 90SD or 90SK are established in connection with a participating jurisdiction, so that federal jurisdiction can apply, but the court determines that the better venue for determination of the matter is in a federal court having jurisdiction but being located in a non-referring State, perhaps because the parties' child-related matters are pending in that court.

Items 34 and 35: Section 43, and at the end of section 43

72. Section 43 of the Act sets out principles that a court must have regard to when exercising jurisdiction under the Act. These principles are broadly stated, including the principle in paragraph 43(a) regarding the 'need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'. The effect of items 34 and 35 is to add a new

subsection 43(2), providing that paragraph 43(1)(a) does not apply in relation to the exercise of jurisdiction in relation to de facto financial causes by courts conferred with that jurisdiction under Division 2 of Part V.

Related matters

73. The Bill expands the jurisdiction conferred on courts to deal with financial matters arising on the breakdown of de facto relationships, in addition to its existing jurisdiction in relation to matrimonial matters. In the practical operation of this expanded jurisdiction, there are real possibilities of ‘overlap’ in related matters, such as where two or more financial matters arise under the Act between parties to a marriage or parties to a de facto relationship, with one party in common. (This can occur because proceedings may arise, or financial agreements may be entered into, between parties to a de facto relationship or parties to a marriage before the financial matters arising out of the breakdown of the previous marriage or previous de facto relationship of one of those parties have been resolved).

74. The Bill includes a number of amendments to the Act, explained in this Explanatory Memorandum, that are intended to provide the parties and the courts in these circumstances with additional mechanisms to recognise and deal with related proceedings, and the interests of parties in related matters, as follows:

- the court’s powers to stay, dismiss and transfer ‘related’ pending proceedings between courts having jurisdiction under the Act will now apply to related de facto financial proceedings: new subsections 45(1B) and (1C)
- when making a maintenance order or property settlement order between parties to a marriage (under Part VIII) or parties to a de facto relationship (under Part VIIIAB), the court is required to take into account the terms of any order or declaration made or proposed to be made in related proceedings, and the terms of any financial agreement that is binding on a party to the proceedings: new paragraphs 75(2)(naa) and (q), and new paragraphs 90SF(3)(p) and (s)
- a person who is a party to a de facto relationship with one of the parties to Part VIII proceedings, or a party to a marriage with a party in Part VIIIAB proceedings, and who could apply for their own property settlement orders, can be a third party to the Part VIII or Part VIIIAB proceedings, and join their own application in those proceedings: new paragraphs 79(10)(aa) and 90SM(10)(b) and (d)
- a person who is a party to a financial agreement with a party to a marriage or a party to a de facto relationship can be a third party to Part VIII or Part VIIIAB proceedings: new paragraphs 79(10)(ab) and 90SM(10)(c) and (e)
- the Rules of Court may provide for notice to be given to third parties to Part VIII or Part VIIIAB proceedings, including persons whose interests may be affected by these related matters: new section 90SO, and
- a court can set aside a financial agreement made between parties to a marriage under Part VIIIA or parties to a de facto relationship under Part VIIIAB if it is

made with the purpose of defrauding or defeating the interests of another person in applying for a property order or declaration under Part VIII or VIIIAB, or with reckless disregard for those interests: new paragraphs 90K(1)(ab) and 90UM(1)(c) and (d).

Item 36: At the end of section 44

75. Subsection 44(5) provides that, subject to subsection (6), a party to a de facto relationship may apply for an order under section 90SE (maintenance), 90SG (urgent maintenance) or section 90SM (alteration of property interests), or for a declaration under section 90SL (declaration of interests in property), only if the application is made within 2 years after the end of the de facto relationship.

76. Subsection 44(6) allows the court discretion to grant leave for a party to apply after the end of the period mentioned in subsection (5) if satisfied that hardship would be caused to the party or a child if leave were not granted, or that an applicant for maintenance orders would not be able to support himself or herself without an income tested pension, allowance or benefit if leave were not granted. Paragraph 44(6)(a) refers to a ‘child’, which is broader than a ‘child of the de facto relationship’ for the purposes of the hardship test under that paragraph.

Item 37: Subsection 45(1A)

77. This item amends subsection 45(1A) to clarify a possible ambiguity in the existing provision. The amendment inserts the words ‘under this Act’, to make it clear that proceedings relating to an application by the bankruptcy trustee of a bankrupt party to a marriage under Division 4A of Part VI of the *Bankruptcy Act 1966* are taken to be proceedings ‘under this Act’ (that is, the *Family Law Act 1975*) in relation to a marriage, for the purpose of subsection 45(1).

Item 38: After subsection 45(1A)

78. Under section 45, the court is already provided with procedural powers to stay, dismiss or transfer proceedings in relation to the same marriage that are pending in another court having jurisdiction under the Act. Subsection 45(1) allows a court having jurisdiction under the Act, in pending proceedings instituted under the Act, to stay or dismiss those proceedings if it appears to the court that other proceedings instituted under the Act in relation to the same marriage or the same matter are pending in another such court. Subsection 45(1A) extends the court’s powers under subsection 45(1) to apply to proceedings in which the bankruptcy trustee of a bankrupt party to a marriage applies under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act, as if they were proceedings in relation to the marriage.

79. This item inserts new subsections 45(1B) and (1C) that will apply the court’s powers in subsection 45(1) to stay or dismiss related proceedings in the court to a wider range of related matters. Subsection 45(1B) provides that a de facto financial cause instituted in relation to a de facto relationship and bankruptcy proceedings described in subsection 45(1A) are taken to be proceedings under this Act in relation to the same matter.

80. Subsection 45(1C) has the same effect, allowing the court to regard certain proceedings as relating to the same matter in order to exercise its power to stay or dismiss the related matter under subsection 45(1). Under subsection 45(1C), a matrimonial cause and a de facto financial cause, or a de facto financial cause and another de facto financial cause, are taken to relate to the same matter, for the purpose of subsection 45(1), if one of the parties to the subject marriage or de facto relationship is the same.

Item 39: Subsection 69ZM(3)

81. Section 69ZM defines what is meant by ‘child-related proceedings’ and sets out the proceedings to which Division 12A of Part VII applies. Division 12A applies less adversarial ‘child-related’ processes for certain types of proceedings. Division 12A applies to:

- proceedings wholly related to children under Part VII, or partly related to children to the extent that they are proceedings under Part VII: subsection 69ZM(1), and
- proceedings partly related to children under Part VII to the extent that they are not proceedings under Part VII by consent: subsection 69ZM(2) .

82. Subsection 69ZM(3) provides that Division 12A also applies to other proceedings between the parties that involve the court exercising jurisdiction under this Act, and that arise from the breakdown of the parties’ marital relationship, with the consent of the parties.

83. This item extends subsection 69ZM(3) so that Division 12A applies, with the consent of the parties, to a de facto financial cause.

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

84. This item is a drafting update – the amendment adds ‘and’ to the end of paragraphs 75(2)(a) to (h), and (j) to (n), for consistency with modern drafting style.

Item 41: After paragraph 75(2)(n)

85. Subsection 75(2) contains a list of matters that the court must take into account when exercising jurisdiction under section 74 (dealing with powers of the court in spousal maintenance proceedings). By virtue of paragraph 79(4)(e), the court must also take these matters into account, so far as they are relevant, when considering what order the court should make under section 79 in property settlement proceedings between parties to a marriage.

86. This item inserts in subsection 75(2) new paragraph (naa), which sets out a new matter for the court to consider in determining section 74 spousal maintenance proceedings and section 79 property settlement proceedings – namely, the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to a party to the marriage, or a person who is a party to a de facto relationship with a

party to the marriage, or the property of one of those persons or either of them, or vested bankruptcy property in relation to any of those persons.

87. This provision is in similar terms to pre-existing paragraph 75(2)(n), which recognises that an order or declaration that is made or proposed to be made in relation to the parties' property, or vested bankruptcy property in relation to a bankrupt party, may affect the court's consideration of spousal maintenance orders, and should be taken into account in the exercise of the court's powers under section 74.

88. New paragraph 75(2)(naa) recognises that the additional jurisdiction now conferred on the court in de facto financial matters opens up the prospect of orders or declarations being made or proposed in related Part VIIIAB proceedings, involving parties or property in common between the Part VIIIAB proceedings and proceedings involving parties to a marriage under section 74 or 79, so that the outcome in these related matters may affect the court's consideration of the spousal maintenance or property settlement proceedings before it. (The Bill makes reciprocal provisions in section 90SF that replicate the effect of paragraph 75(2)(naa) for consideration in de facto maintenance and property settlement proceedings under Part VIIIAB.)

89. The reference in paragraph 75(2)(naa) to an order or declaration 'proposed to be made' would only extend to orders or declarations that are capable of being made under the Act – that is, if the requirements for orders or declarations to be made under Part VIIIAB can be satisfied, including time limits under subsections 44(5) and (6), and geographical requirements under sections 90SD or 90SK.

Item 42: Paragraph 75(2)(p)

90. This item inserts the words 'to the marriage' in paragraph 75(2)(p). This paragraph requires the court to take into account in spousal maintenance proceedings, and by reference under paragraph 79(4)(e), in property settlement proceedings, the terms of any financial agreement that is binding on the parties. The effect of the amendment is to ensure that this paragraph deals only with consideration of a financial agreement that is binding on the parties to the marriage, and not any other kind of agreement such as a Part VIIIAB financial agreement, which is dealt with in new paragraph 75(2)(q).

Item 43: At the end of subsection 75(2)

91. This item inserts new paragraph 75(2)(q), providing a new matter for consideration under section 75(2), and by reference under paragraph 79(4)(e), in section 79 property settlement proceedings between parties to a marriage. Paragraph 75(2)(q) requires consideration of the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage. This supplements the effect of new paragraph 75(2)(naa) in relation to orders or declarations that are made or proposed to be made under Part VIIIAB that must be taken into account in section 74 and 79 proceedings.

Item 44: Subsection 79(10)

92. Subsection 79(10) specifies certain third parties who are entitled to become a party to section 79 property settlement proceedings between parties to a marriage, as being a creditor of a party to the proceedings, or any other person whose interests would be affected by the making of the order. The amendment clarifies that subsection 79(10) applies to proceedings in which an application is made for an order under section 79 by a party to a marriage. That marriage is called the ‘subject marriage’ for reference in new paragraphs 79(10)(aa) and (ab), inserted by the following item.

Item 45: After paragraph 79(10)(a)

93. This item inserts new paragraphs 79(10)(aa) and (ab), to include, as third parties to section 79 proceedings between parties to a marriage, a party to a de facto relationship with one of the parties to the marriage who could apply or who has applied under Part VIIIAB for an order under section 90SM (alteration of property interests) or a declaration of property interests under 90SL, and a person who is a party to a binding Part VIIIAB financial agreement with a party to the marriage.

Item 46: After subsection 79(10A)

94. This item inserts new subsection 79(10B), providing that a person who becomes a party to section 79 property settlement proceedings under paragraph 79(10)(aa) may bring their own Part VIIIAB application in those proceedings under section 90SM for an order altering property interests, or under section 90SL for a declaration of property interests, in relation to the de facto relationship.

Item 47: At the end of section 79F

95. Section 79F provides that the Rules of Court may specify the circumstances in which an applicant or a party to Part VIII proceedings is to notify a person who is not a party to the proceedings of the application. This item adds a note to the end of section 79F to clarify that this notice may be required to be given to persons whose interests could be affected by an order under section 79 – for example, a person referred to in paragraphs 79(10)(aa) or (ab), or who may have interests in relation to the matter under Part VIIIAB.

Item 48: Subparagraph 83(2)(a)(i)

96. Subsection 83(2) sets out the matters of which the court must be satisfied before making an order modifying a spousal maintenance order. Subparagraph 83(2)(a)(i) allows the court to make a spousal modification order if it is satisfied that, since the order was made or last varied, the circumstances of a person for whose benefit the order was made have so changed as to justify the court making that order. The amendment in this item clarifies that the change of circumstances includes the person for whose benefit the order was made entering into a stable and continuing de facto relationship.

97. The equivalent de facto maintenance modification provision, subsection 90SI(3) under Part VIIIAB, repeats this ground, so that modification can be ordered if

circumstances have changed on account of the payee entering a stable and continuing de facto relationship.

Item 49: After paragraph 90K(1)(aa)

98. Section 90K sets out the grounds on which the court can set aside a financial agreement or a termination agreement made between parties to a marriage. This amendment inserts a new ground in paragraph 90K(1)(ab) – that either party entered into the agreement for the purpose of defrauding another person who is a party to a de facto relationship with the defrauding party, or to defeat the interests of that other person in relation to his or her possible or pending application for a property order or declaration under Part VIIIAB.

99. This new ground is part of a number of provisions, discussed above under the heading ‘Related matters’, that are intended to recognise and preserve the interests of persons that might be affected by orders or financial agreements in other related matters. Similar provisions already exist in Part VIII to allow the courts to recognise and preserve the interests of creditors, including the trustee in bankruptcy in relation to a bankrupt party to a marriage, when making property orders or declarations under that Part. Those provisions have been replicated for de facto financial matters in various provisions under Part VIIIAB, and the Bill also introduces reciprocating provisions in Parts VIII and VIIIAB that allow the court to deal with the interests of parties in matters under each Part that are related by having a common party.

Item 50: After Part VIIIA

100. Item 50 inserts new Part VIIIAB in the Act that deals with financial arrangements applicable to parties to a de facto relationship. Part VIIIAB contains six Divisions:

- Division 1: Preliminary
- Division 2: Maintenance, declarations of property interests and alterations of property interests
- Division 3: Orders and injunctions binding third parties
- Division 4: Financial agreements
- Division 5: Proceeds of crime and forfeiture
- Division 6: Instruments not liable to duty

Division 1 – Preliminary

101. Division 1 of new Part VIIIAB contains certain preliminary matters, divided into three Subdivisions:

- Subdivision A: Meaning of key terms
- Subdivision B: Relationship with State and Territory laws

- Subdivision C: Declarations about existence of de facto relationships.

Subdivision A – Meaning of key terms

Section 90RA – Participating jurisdictions

102. Section 90RA explains the meaning of ‘participating jurisdictions’ as used in the Act to be each Territory, defined in subsection 4(1) of the Act, and each ‘referring State’, defined in subsection 90RA(2) to mean a State that has provided to the Commonwealth a reference of powers over financial matters relating to the parties to de facto relationships arising out of the breakdown of those relationships for the purpose of paragraph 51(xxxvii) of the Constitution, to the extent that the Commonwealth otherwise would not have those powers. The provision applies equally to States that have not yet, but may, in the future, refer power to the Commonwealth.

103. Subsection 90RA(3) excludes a State as a ‘referring State’, and therefore as a ‘participating jurisdiction’, if the State has only referred to the Commonwealth a limited class of matters referred to in paragraph (2)(a). As mentioned above, the provision applies equally to States that have not yet, but may, in the future, refer power to the Commonwealth. For example, if a State Parliament provided a reference of powers to the Commonwealth for the purpose of paragraph 51(xxxvii) in respect of superannuation matters only arising on the breakdown of de facto relationships, that reference of powers would not be sufficient for that State to qualify as a ‘referring State’ and therefore as a ‘participating jurisdiction’, for the purpose of the Act.

104. The Bill links the application of its provisions in relation to de facto financial matters to ‘participating jurisdictions’ by requiring that a geographical requirement be satisfied for the court to make certain orders and declarations: these requirements are set out in sections 90RG (in proceedings under section 90RD for a declaration of the existence of a de facto relationship), 90SD (for proceedings under sections 90SE or 90SG for maintenance of a party to a de facto relationship), 90SK (for proceedings under section 90SL for a declaration of property interests, or under section 90SM for alteration of property interests), and 90UA (for the making of Part VIIIAB financial agreements).

105. Subsections 90RA(4) and (5) provide that a State is a referring State even if a State law provides that the reference of powers is to terminate in certain circumstances. However, if the State’s reference of powers terminates, then that State ceases to be a referring State.

Section 90RB – Meaning of child of a de facto relationship

106. Section 90RB provides a definition of ‘child of a de facto relationship’ for the purpose of Part VIIIAB. The definition will not affect the operation of other parts of the Act, for example the presumptions of parentage set out in Subdivision D of Division 12 of Part VII.

107. This term is used in significant provisions in Part VIIIAB – for example in section 90RD (as one of the matters about which the court can make a declaration in proceedings under Division 2 or 4 of Part VIIIAB), in section 90SB (in determining

the length of the de facto relationship), and in section 90SF (as a matter relevant to an order for the provision of maintenance of a party to a de facto relationship).

108. Subsection 90RB(1) provides that a ‘child of a de facto relationship’ is:

- a child of whom each of the parties to the de facto relationship are the parents
- a child adopted by the parties to the de facto relationship or by either of them with the consent of the other, or
- a child under subsection 60H(1) is a child of the parties to the de facto relationship.

109. Subsection 90RB(2) provides that a child of a de facto relationship who is adopted by a person who, before the adoption, is not a prescribed adopting parent, ceases to be a child of that de facto relationship for the purposes of Part VIIIAB.

110. Subsection 60H(1) sets out the rules relating to parentage of a child born to a woman as a result of an artificial conception procedure while the woman was married to a man.

111. Subsection 90RB(3) provides that for the purposes of this section, subsection 60H(1) applies to parties to a de facto relationship who are of the same sex in a corresponding way to the way in which it applies to parties to a de facto relationship who are of different sexes. This provision extends the application of subsection 60H(1) to both opposite-sex and same-sex de facto couples.

Subdivision B – Relationship with State and Territory laws

Section 90RC – Relationship with State and Territory laws

112. Subdivision B contains section 90RC that deals with the relationship of the de facto financial provisions in Parts VIIIAB, VIIIAB and VIIIAB of the Act with State and Territory laws. This is a critical provision that delineates the operation of federal de facto financial provisions under the Act, and the continued operation of State and Territory law where federal law does not apply. (Note that section 90RC deals with the application of federal law in relation to State laws in the same field, not the preservation of State laws that may continue to operate for particular State matters after the commencement of the amendments in the Bill, by virtue of the transitional provisions in Part 2 of Schedule 1 to the Bill).

113. The effect of section 90RC is to carve out an ‘exclusion zone’ for the operation of new federal de facto financial provisions, to the exclusion of State and Territory laws dealing with or referring to those matters. Those areas of operation of State and Territory laws excluded by federal law are necessarily confined to the scope of the State referred powers, being in relation to financial matters arising out of the breakdown of de facto relationships, and to the area dealt with under federal law. The de facto financial provisions provided under federal law deal with:

- declarations of the existence of a de facto relationship and declarations of property interests under Part VIIIAB

- orders under Part VIIIAB relating to the maintenance of a party to a de facto relationship and property adjustment orders
- orders and injunctions in relation to third parties in Part VIIIAB proceedings
- Part VIIIAB financial agreements and proceedings relating to financial agreements, and
- Part VIIIIB superannuation provisions applicable to de facto relationships.

114. Subsection 90RC(2) describes the areas of law in which federal law operates to override the application of State law. The effect of this is that State law will apply in areas of law to which paragraphs 90RC(2)(a) and (b) do not apply, such as:

- laws dealing with financial matters arising out of the breakdown of some other kind of relationship – for example, those applying to a close personal relationship between 2 adult persons, one of whom provides the other with domestic support and personal care (*Property (Relationships) Act 1984* (NSW), section 5), or to a relationship that is not in fact a de facto relationship within the meaning of section 4AA of the Family Law Act that has been registered under a State law providing for relationship registration, such as the *Relationships Act 2003* (Tasmania), and
- laws not dealing with financial matters arising out of the breakdown of de facto relationships, as described in subsection 90RC(2) – such as State or Territory property laws that do not provide for the distribution of property between de facto couples (for example, *Real Property Act 1900* (NSW), section 42, providing for the registered proprietor of an interest in land recorded in the Register under that Act to hold the interest free from other interests).

115. Subsections 90RC(3) to (5) set out the exceptions to the operation of subsection 90RC(2), where State and Territory law will continue to operate despite the operation of federal law under the provisions of the Bill, as follows:

- laws of referring States dealing with financial provision, which permit orders to be made in relation to de facto relationships in circumstances where a court could not make an order under Division 2 of Part VIIIAB of the Act: subsection 90RC(3) (reference to section 90SB)
- laws of non-participating States dealing with de facto financial provision, but to which federal law does not apply because there is an insufficient link to a participating jurisdiction: subsection 90RC(3) (references to sections 90SD and 90SK)
- laws facilitating the operation of the Act – for example, State superannuation laws acknowledging superannuation splitting under Part VIIIIB of the Act: subsection 90RC(4), and
- laws prescribed by a State or Territory for the purpose of subsection 90RC(5).

116. As mentioned, subsection 90RC(3) has the effect that State law will apply to a de facto relationship if the geographical requirements under sections 90SD or 90SK cannot be met for orders and declarations to be made about property or maintenance in de facto financial matters under federal law. However, it is important to remember that a geographical connection can be established under section 90UA for the application of federal law in relation to a financial agreement made under the Act on the basis of residence in a participating jurisdiction, which creates another situation where federal law may apply to displace State law, even if the tests required under section 90SD or 90SK are not satisfied. This means that:

- if the parties have made a Part VIIIAB financial agreement then federal law applies to their de facto financial matters (as the parties would need to satisfy the geographical requirement under section 90UA for the making of a Part VIIIAB financial agreement, and thus attract federal law jurisdiction – ‘Part VIIIAB financial agreement’ here includes a State law agreement that is taken to be a Part VIIIAB financial agreement)
- if the parties are unable to make a Part VIIIAB financial agreement because the geographical requirements under section 90UA for making a Part VIIIAB financial agreement cannot be met, then State law applies, and
- if the parties are able to meet the geographical requirement under section 90UA for making a Part VIIIAB financial agreement, but have not made such an agreement, then State law may apply unless and until the parties make a Part VIIIAB financial agreement, when federal law applies to override any previous State orders or financial agreements made in the non-participating jurisdiction.

117. Subsection 90RC(5) provides an exception for the operation of the de facto financial provisions in the Act to the effect that these provisions are not to apply to exclude the operation of State or Territory law if the law is prescribed in regulations made for the purpose of subsection (5). The purpose of these provisions is to offer a mechanism, to be given effect by prescription in the regulations, that will identify any State and Territory laws that should not be excluded by the de facto financial provisions, and which have not otherwise been identified in subsection 90RC.

Subdivision C – Declarations about existence of de facto relationships

Section 90RD – Declarations about existence of de facto relationships

118. Section 90RD enables the court, where a claim is made in support of the application that a de facto relationship existed between the applicant and another person, to make a declaration about the existence of the de facto relationship. Such a declaration may be made for the purpose of proceedings (called the ‘primary proceedings’) involving an application for a maintenance order under sections 90SE or 90SG, or for an order for alteration of property interests under section 90SM, or for a declaration of property interests under section 90SL.

119. A declaration of the existence of the de facto relationship may also declare certain other matters relating to the existence of the relationship set out in subsection 90RD(2). The term ‘parties to a de facto relationship’, has various applications under Part VIIIAB – for example, under section 90SE, a court can make an order for the maintenance of one of the parties to a de facto relationship. The existence of the relationship therefore operates as a threshold matter of fact for the application of substantive provisions under Part VIIIAB.

120. The other matters, set out in subsection 90RD(2), which the court may also declare as part of a section 90RD declaration, are also required to be satisfied before the operative provisions of Part VIIIAB apply in relation to a de facto relationship. As an example, to satisfy the requirements of section 90SB in relation to the length of the parties’ relationship, or the application of time limits under subsections 44(5) and (6).

121. The aim of section 90RD is therefore to facilitate early determination of these ‘gateway’ issues that parties are required to establish in order to meet geographical requirements set out in 90SD, time limits set out in subsections 44(5) and (6), and generally for the application of Part VIIIAB.

Section 90RE – Effect of declarations

122. Section 90RE provides that a section 90RD declaration has effect as a judgement of the court, and that for the purposes of the Act (other than Part VII dealing with children) a section 90RD declaration has effect according to its terms.

Section 90RF – Applying for declarations

123. Section 90RF provides that a party to the primary proceedings may apply for a section 90RD declaration. This allows for an application for a section 90RD declaration to be brought by a party to the primary proceedings who is not a party to the relevant de facto relationship, such as an affected third party, or the trustee in bankruptcy in relation to a bankrupt party.

Section 90RG – Geographical requirement

124. Section 90RG imposes a geographical requirement in relation to section 90RD applications – that one of the persons about whom the declaration is sought was ordinarily resident in a participating jurisdiction when the primary proceedings commenced. Sections 90SD and 90SK impose a geographical requirement for the purpose of the primary proceedings.

Section 90RH – Setting aside declarations

125. Section 90RH allows for a person affected by a section 90RD declaration made in primary proceedings to apply in those proceedings for a variation, or setting aside of the section 90RD declaration, or setting aside and making of another section 90RD declaration if new facts or circumstances arise.

Division 2 – Maintenance, declarations of property interests and alteration of property interests

Subdivision A – Application of Division

Section 90SA – This Division does not apply to certain matters covered by binding financial agreements

126. Subsection 90SA(1) provides that Division 2 of Part VIIIAB does not apply to the maintenance, or property, or financial resources of the parties to a Part VIIIAB financial agreement that applies to those matters. However, subsection 90SA(2) provides that subsection (1) does not apply in certain circumstances, so that the operation of Division 2 of Part VIIIAB is not excluded in relation to maintenance, property or financial resources dealt with in a Part VIIIAB financial agreement. Those circumstances are where there are proceedings between a party to a de facto relationship and the bankruptcy trustee of a bankrupt party to the de facto relationship in relation to the maintenance of the party to the relationship, or in relation to the distribution, after the breakdown of the relationship, of any vested bankruptcy property in relation to the bankrupt party. These provisions are intended to operate similarly, for Division 2 of Part VIIIAB, to section 71A excluding the application of Part VIII to certain matters covered by Part VIIIA binding financial agreements.

127. Subsection 90SA(3) confirms a party to a de facto relationship who is not bound by the Part VIIIAB agreement is not prevented from bringing his or her own application under Part VIIIAB. The example explains that a prior Part VIIIAB financial agreement made between parties to one de facto relationship will not prevent a party to a later de facto relationship (with a common party to the first relationship) from applying for an order or declaration under Division 2 of Part VIIIAB in relation to that second related de facto matter. In any such Division 2 proceedings for orders for maintenance under section 90SE or alteration of property interests under section 90SM, a necessary consideration in the making of that order will be the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship – see paragraph 90SF(3)(s).

Section 90SB – When this Division applies – length of relationship etc

128. Section 90SB creates a requirement that the court be satisfied, before making an order under section 90SE (maintenance of a party to a de facto relationship), 90SG (urgent maintenance) or 90SM (alteration of property interests), or a declaration of property interests under section 90SL, that either:

- the relationship lasted for a period, or periods, totalling 2 years, or
- there is a child of the de facto relationship (defined in section 90RB), or
- 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 serious injustice would result to that party if the order or declaration was not made, or

- the de facto relationship is or was registered under a prescribed law of a State or Territory.

129. This requirement does not arise in proceedings in relation to maintenance or property of parties to a marriage under Part VIII, but is derived from equivalent provisions operating under State law before the commencement of these provisions.

Section 90SC – This Division does not apply in relation to a de facto relationship if the parties marry each other

130. Subsection 90SC(1) provides that Division 2 of Part VIIIAB ceases to apply in relation to a de facto relationship if the parties to the de facto relationship later marry each other. Upon marriage, Part VIII applies to the parties' financial affairs, and it is appropriate to clarify that Part VIIIAB ceases to apply when Part VIII begins to apply, except for the purpose of enforcement or variation to any previous exercise of Part VIIIAB powers.

131. Subsection 90SC(2) provides for the continued operation of declarations, orders or injunctions made in property settlement proceedings under Division 2 for the purpose of enforcement, variation or setting aside, despite the operation of subsection 90SC(1), and subsection 90SC(3) allows for a substituted order to be made under Division 2 if the declaration, order or injunction is set aside. The provision does not need to give continued effect to orders in relation to maintenance of a party to a de facto relationship for enforcement or variation of those orders after the parties marry each other, as those orders cease to have effect upon marriage of the party for whose benefit the order was made – see section 90SJ.

Subdivision B – Maintenance

Section 90SD – Geographical requirement

132. Section 90SD establishes a geographical requirement of which the court must be satisfied before making an order for maintenance or urgent maintenance in relation to a de facto relationship. This is the same requirement imposed under section 90SK in relation to orders and declarations about property, namely that:

- paragraph 90SD(1)(a): 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, and
- paragraph 90SD(1)(b): 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).

133. The residence or contribution described in paragraph 90SD(1)(b) must be in a State that is a participating jurisdiction when the application was made, however it is not necessary that the State was a participating jurisdiction during the de facto relationship. This allows for residence or contributions to be accumulated for the purpose of paragraph 90SD(1)(b) in a State that referred powers to qualify as a

participating jurisdiction after commencement of the Bill but before the maintenance application was made under Subdivision C of Division 2 of Part VIIIAB.

134. Subsection 90SD(3) provides that the geographical requirement in paragraph 90SD(1)(b) will not apply from a date fixed by Proclamation. This will enable, once all States have referred power to the Commonwealth over financial matters relating to the parties to de facto relationships arising from the breakdown of those relationships, the geographical requirement in section 90SD to be limited in relation to new applications for a spouse maintenance order to the ordinary residence of one or both of the parties to the relationship when the application for the order is made. The requirement in paragraph 90SD(1)(b) will revive if, following the giving to the Commonwealth of those references, one State terminates its reference.

Section 90SE – Power of court in maintenance proceedings

135. Section 90SE provides that, after the breakdown of a de facto relationship, the court can make such order as it considers proper for the maintenance of one of the parties to the de facto relationship in accordance with Division 2. This largely replicates the effect of section 74 in relation to parties to a marriage under Part VIII, including provisions in subsections 90SE(2) to (8) dealing with the interaction of family law and bankruptcy proceedings and the role of the bankruptcy trustee as a party to maintenance proceedings.

136. A significant difference in the operation of section 74 and section 90SE is that section 90SE de facto maintenance orders can only be made after the breakdown of a de facto relationship, and in accordance with other requirements that must be established for the operation of Division 2, including section 90SB and subsection 44(5) and (6) requirements. De facto maintenance orders can only be made after the breakdown of the relationship due to the terms of referred powers, relating to de facto financial matters arising on the breakdown of the relationship.

Section 90SF – Matters to be taken into consideration in relation to maintenance

137. Section 90SF provides for the principle that courts must apply in exercising jurisdiction to make an order under section 90SE for the maintenance of a party to a de facto relationship which has broken down.

138. The principle, set out in subsection 90SF(1), is that a party to a de facto relationship must maintain the other party to the relationship only to the extent he or she is reasonably able to do so. Also, this is only if that other party is unable to support himself or herself adequately by reason of having the care and control of a child of the relationship under 18 years, his or her age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason.

139. In applying the principle, courts must take into account the matters set out in subsection 90SF(3). These matters replicate, for de facto spouse maintenance proceedings, the matters which courts are required under subsection 75(2) to take into account in proceedings for the maintenance of a party to a marriage. Paragraphs 90SF(3)(o), (p) and (s) are replicated in equivalent amendments to subsection 75(2), explained above, to require consideration of the terms of orders or declarations that are made or proposed to be made under Part VIIIAB or Part VIII. Also to be

considered are the terms of any Part VIIIAB financial agreement that is binding on one of the parties to the subject relationship, as a mechanism for recognising and preserving the interests of other parties in related matters.

140. The reference in paragraph 90SF(3)(o) to an order or declaration ‘proposed to be made’ under Part VIIIAB would only extend to orders or declarations that are capable of being made under that Part – that is, if the requirements for orders or declarations under that Part can be satisfied, including time limits under subsection 44(5), and geographical requirements under sections 90SD or 90SK.

Section 90SG – Urgent maintenance cases

141. Section 90SG provides for the court, in proceedings with respect to the maintenance of a party to a de facto relationship in accordance with Division 1 of Part VIIIAB, to order payment of urgent maintenance, pending the disposal of the substantive maintenance proceedings. The note is a reminder that the geographical requirements in section 90SD, and other requirements in section 90SB, must be satisfied for the court to make an order under section 90SG for urgent maintenance.

Section 90SH – Specification in orders of payments etc. for maintenance purposes

142. Section 90SH requires that an order requiring the payment of a lump sum or transfer of property for the maintenance of a party to the relationship must specify that it is an order to which section 90SH applies, and the proportion of the payment or transfer attributable to that maintenance.

Section 90SI – Modification of maintenance orders

143. Section 90SI provides for modification of de facto spouse maintenance orders. Subsection 90SI(3) sets out the matters of which the court must be satisfied before making an order modifying the original maintenance order. These matters are currently required to be taken into account by courts before making an order for the modification of an order for the maintenance of a party to a marriage.

144. Subparagraph 90SI(3)(a)(i) allows for modification of a de facto maintenance order if the court is satisfied that the payee’s circumstances have changed, including the person entering into a stable and continuing de facto relationship. A similar ground for modification of spousal maintenance orders is introduced by an amendment to subsection 83(2), explained above.

Section 90SJ – Cessation of maintenance orders

145. Section 90SJ provides for cessation of maintenance orders made under Division 2 of Part VIIIAB, if the payer or the payee dies, or if the payee marries (unless the court otherwise orders in special circumstances). Subsection 90SJ(2) is broadly worded, and would include the situation where the payee and the payer later marry each other, which would cease the operation of the de facto maintenance order.

Subdivision C – Declarations and alterations of property interests

146. Subdivision C contains provisions enabling the court to make a declaration of property interests and orders altering the property interests of parties to de facto relationships.

Section 90SK – Geographical requirement

147. Section 90SK establishes a geographical requirement of which the court must be satisfied before making an order or declaration about property in relation to a de facto relationship. This is the same requirement imposed under section 90SD in relation to orders for maintenance or urgent maintenance, namely that:

- paragraph 90SK(1)(a): 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, and
- paragraph 90SK(1)(b): 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).

148. The residence or contribution described in paragraph 90SK(1)(b) must be in a State that is a participating jurisdiction when the application was made, however it is not necessary that the State was a participating jurisdiction during the de facto relationship. This allows for residence or contributions to be accumulated for the purpose of paragraph 90SK(1)(b) in a State that referred powers to qualify as a participating jurisdiction after commencement of the Bill but before the application for an order or declaration was made under sections 90SM or 90SL.

149. Subsection 90SK(3) provides that the geographical requirement in paragraph 90SK(1)(b) will not apply from a date fixed by Proclamation. This will enable, once all States have referred power to the Commonwealth over financial matters relating to the parties to de facto relationships arising from the breakdown of those relationships, the geographical requirement in section 90SK to be limited in relation to new applications for an order declaring or altering property interests to the ordinary residence of one or both of the parties to the relationship when the application for the order is made. The requirement in paragraph 90SK(1)(b) will revive if, following the giving to the Commonwealth of those references, one State terminates its reference.

Section 90SL – Declaration of interests in property

150. Section 90SL allows the court to declare the title or rights, if any, that a party has in respect of property. The requirements (geographical, length of relationship etc) in sections 90SK and 90SB must be satisfied before a declaration can be made under this section.

Section 90SM – Alteration of property interests

151. Section 90SM provides for orders to be made, in proceedings after the breakdown of a de facto relationship, as the court considers appropriate including an order for a settlement of property in substitution for any interest in the property.

Subsection 90SM(4) sets out the factors that the court must take into account when considering what property settlement order should be made under section 90SM, if any.

152. The powers of the court under section 90SM also extend to making orders altering the interests of the bankruptcy trustee in relation to vested bankruptcy property, and orders requiring one or both of the parties to the de facto relationship or the bankruptcy trustee to make a settlement or transfer of property for the benefit for the benefit of either or both of the parties to a de facto relationship, or a child of the relationship. Subsections 90SM(15) to (20) provide for the joining of related pending proceedings by the trustee in bankruptcy and the trustee of a personal insolvency agreement to the relevant section 90SM proceedings between the parties to the de facto relationship.

153. Subsection 90SM(10) deals with persons who are entitled to become a party to section 90SM property proceedings in relation to a de facto relationship. An equivalent amendment is made to subsection 79(10) as explained above. Subsection 90SM(1) and the amendment to subsection 79(1) form part of the range of provisions introduced by the Bill dealing with related matters.

154. Subsection 90SM(10) and amended subsection 79(10) allow for third party involvement in de facto property proceedings by a person who is a creditor of a party to the proceedings, and a party to another related de facto relationship or a related marriage who may have affected interests that are actionable under Part VIIIAB or Part VIII in their own right. Subsections 90SM(12) and (13) provide that a third party in these circumstances may apply in the proceedings in their own right for an order under section 90SM or a declaration under section 90SL, or equivalent orders or declarations under sections 79 and 78 respectively, in relation to the de facto relationship or marriage to which they are a party.

Section 90SN – Varying and setting aside orders altering property interests

155. Section 90SN allows for a person affected by a section 90SM order to apply for variation or setting aside of that order. The court must be satisfied that one of a number of specified grounds is established. The grounds are ones that apply under section 79A to set aside an order under section 79 of the Act with respect to the property of parties to a marriage.

Subdivision D – Notification of Application

156. This Subdivision sets out procedural matters that may be provided for in the Rules of Court to require:

- notice by an applicant for an order, or a party to proceedings for an order, under Division 2, to be given to a third party, or the bankruptcy trustee, or the trustee of a personal insolvency agreement of the application: section 90SO
- notice by a bankrupt party to proceedings, or debtor subject to a personal insolvency agreement who becomes a party to proceedings under section 90SE, 90SL, 90SM or 90SN to be given to the bankruptcy trustee: section 90SP

- notice by a party to a de facto relationship that has broken down who is a party to proceedings for an order under Division 2, to be given to the court about a party becoming a bankrupt or subject to a personal insolvency agreement, or of the institution of proceedings under the *Bankruptcy Act 1966*: subsections 90SQ(1) to (3)
- notice by the bankruptcy trustee of a bankrupt party to a de facto relationship that has broken down to be given to the court of the trustee applying under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act: subsection 90SQ(4), and
- notice by the bankruptcy trustee of a bankrupt party to a de facto relationship to be given to a non-bankrupt de facto party of an application 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, if the bankruptcy trustee is aware that the de facto relationship has broken down: section 90SR.

157. Sections 90SO to 90SR in Subdivision D of Division 2 of Part VIIIAB replicate, for de facto property proceedings, the effect of section 79F to 79J in Part VIII applicable to matrimonial property matters. Section 90SO, as with section 79F, will apply to allow Rules of Court to provide for notice of property proceedings to be given to persons whose interests may be affected by the outcome of those proceedings in a related de facto relationship.

Subdivision E – Court powers

Section 90SS – General powers of court

158. Section 90SS sets out the powers of the court when making orders under Division 2, in similar terms to the powers of the court under Part VIII in relation to matrimonial matters. By application to Division 2, these powers apply to proceedings for orders in relation to de facto maintenance and property, and for declarations of property interests.

159. Subsections 114(3) to (7) of the Act provide supplementary injunctive powers to a court exercising jurisdiction in proceedings other than proceedings between parties to a marriage for an order in circumstances arising out of the marital relationship. The effect of new subsections 90SS(5) to (11) is to replicate those section 114 injunctive powers in section 90SS specifically for de facto financial proceedings under Division 2. It also includes them in the range of powers available to the court when making orders under that Division, without limiting the scope of other powers available to the court under subsection 90SS(1).

Section 90ST – Duty of court to end financial relations

Section 90ST provides that in proceedings under Division 2, other than urgent maintenance 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

160. Section 90TA provides for Part VIIIAB of the Act (the provisions of which enable a court to bind persons other than a party to a marriage to give effect to property settlements between parties to a marriage) to have, with necessary modifications, an extended operation in relation to orders and injunctions, or proceedings for orders or injunctions, under Division 2 of new Part VIIIAB relating to the maintenance or property of parties to a de facto relationship.

Division 4 – Financial agreements

161. Division 4 of Part VIIIAB provides for binding financial agreements (Part VIIIAB financial agreements) between parties to a de facto relationship.

162. A Part VIIIAB financial agreement can only deal with matters after the de facto relationship to which the agreement relates has broken down (as confined by the specific terms of referred State powers).

163. To qualify as a Part VIIIAB financial agreement made under section 90UB, 90UC or 90UD, the parties to the de facto relationship must meet the geographical requirement under section 90UA that they be ordinarily resident in a participating jurisdiction when they make the agreement.

164. Division 4 provides for agreements between parties to a de facto relationship that qualify as a ‘Part VIIIAB financial agreement’ to bind them. Division 2 of Part VIIIAB interacts with Division 4, by excluding the operation of Division 2 in relation to the matters dealt with in a ‘Part VIIIAB financial agreement’ (see subsection 90SA(1), subject to subsection 90SA(2) in relation to vested bankruptcy property).

165. The agreements that can be recognised as a Part VIIIAB financial agreement under Division 4 are agreements made about financial arrangements in the event of the breakdown of a de facto relationship:

- under section 90UB, before a de facto relationship, dealing with how all or any of the property or financial resources of either of them at the time when the agreement is made, or at a later time and during the relationship, is to be distributed, or dealing with the maintenance of either of them,
- under section 90UC, during a de facto relationship, dealing with how all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and during the relationship, is to be distributed, or dealing with the maintenance of either of them,
- under section 90UD, after the breakdown of a de facto relationship, dealing with how all or any of the property or financial resources that either or both of them had or acquired during the relationship is to be distributed, or dealing with the maintenance of either of them, and
- under section 90UE, an agreement made under a non-referring State de facto financial law that is taken to be a Part VIIIAB financial agreement in circumstances set out in section 90UE, dealing with how all or any of the

property or financial resources that either or both of them had or acquired during the relationship is to be distributed, or dealing with the maintenance of either of them.

166. A Part VIIIAB financial agreement can include another person or persons as a party to the agreement.

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

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

168. Section 90UE makes special provision for the recognition of certain written financial agreements made under State law in a non-referring State as if they were Part VIIIAB financial agreements, if the parties to them can later meet the section 90UA geographical requirement during the life of the agreement and after commencement of Part VIIIAB. This recognition is given to those agreements that prevent a court making an order with respect to the matters covered by the agreement, or that is inconsistent with the terms of the agreement. For this purpose the power the court has to vary or set aside an agreement, or any one or more of its terms, is to be disregarded. (There are equivalent transitional provisions in Part 2 of Schedule 1 that recognise financial agreements made under the laws of a participating jurisdiction, that deal with equivalent subject matter to Part VIIIAB financial agreements, as if they were Part VIIIAB financial agreements).

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

169. Section 90UF replicates the anti-avoidance effect of section 90DA in relation to Part VIIIA financial agreements that was inserted by the *Family Law Amendment Act 2005* (No. 20/2005). The aim of the provision is to ensure that agreements providing for post-separation arrangements concerning the property or financial resources of the spouse parties to the agreement that are recognised as having effect under the Act are genuine arrangements, and are not used to defeat the interests of creditors. Section 90UF sets out specific requirements for the making of a separation declaration for the agreement to have force and effect.

Section 90UG – Whether and when certain other provisions of financial agreements take effect

170. Section 90UG provides that a binding Part VIIIAB financial agreement, to the extent to which it provides for matters incidental or ancillary to how the property or financial resources of the spouse parties are to be dealt with, is of no force or effect unless or until the de facto relationship between the spouse parties breaks down.

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

171. Section 90UH provides that provisions of Part VIIIAB financial agreements that relate to the maintenance of a party to the agreement or a child or children are void unless they specify certain matters to identify the amount, or the value of the portion of property, attributable to maintenance. Subsection 90UH(2) provides that subsection (1) does not apply in relation to a section 90UE financial agreement, made originally under State law in a non-referring State, that is later regarded as a Part VIIIAB financial agreement.

Section 90UI – Certain provisions in financial agreements

172. Section 90UI provides an exception to the exclusion by a Part VIIIAB financial agreement of the operation of provisions relating to maintenance of a party to a de facto relationship. The exclusion operates if the party's circumstances when the agreement came into effect would leave the party unable to adequately support himself or herself without social security support.

Section 90UJ – When financial agreements are binding

173. Section 90UJ provides that a Part VIIIAB financial agreement is binding on the parties to the agreement if:

- it is signed by all the parties
- certain procedural requirements are complied with, to ensure that the parties entered into the agreement with independent legal advice, and that evidence of that advice was contained in a certificate annexed to the agreement
- that the agreement has not been terminated and has not been set aside by a court, and
- after it is signed, the original agreement is given to one of the spouse parties and a copy is given to each other party.

174. Subsection 90UJ(2) provides that 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 or set aside by a court. State laws applying to the making of de facto financial agreements in substitution for justiciable remedies in relation to maintenance and property adjustment have varying degrees of procedural requirements that do not readily align with the formalities required under section 90UJ. Paragraph 90UM(1)(k) and subsection 90UM(5) allow a court in certain circumstances to set aside a Part VIIIAB financial agreement covered by section 90UE if the procedural requirements under which it was made are not similar to those under section 90UJ. The Bill, in this regard, aims to apply federal law as widely as possible, consistent with the scope of the powers referred by States. The Bill also attempts to maintain any reasonable expectation by parties to agreements made outside the scope of federal law that their agreement will continue to be binding, even if federal law later applies to regulate the legal effect of their agreements.

175. Subsection 90UJ(3) provides that a Part VIIIAB financial agreement ceases to be binding if, after the making of the agreement, the parties to the agreement marry each other. This is consistent with the effect of new section 90SC, that Division 2 ceases to apply in relation to a de facto relationship if the parties marry each other. Parts VIII and VIIIA apply to the parties from the time they are married, with different effect in some respects, and so it is appropriate that the parties' financial matters be entirely and clearly governed by Part VIII and VIIIA.

176. Part VIIIA allows for the making of binding financial agreements made in anticipation of marriage, and during and after marriage, with wider effect than the Part VIIIAB financial agreements. It should be noted that Part VIIIA agreements can be made in respect of arrangements for maintenance of a party to the marriage during the marriage, while Part VIIIAB financial agreements are confined to dealing with financial arrangements in the event of breakdown of the relationship.

Section 90UK – Effect of death of party to financial agreement

177. Section 90UK, dealing with the effect of death of a party to a Part VIIIAB financial agreement, has similar effect to section 90H of Part VIIIA.

Section 90UL – Termination of financial agreement

178. Section 90UL, dealing with termination of a Part VIIIAB financial agreement, has similar effect to section 90J of Part VIIIA.

Section 90UM – Circumstances in which court may set aside a financial agreement or termination agreement

179. Section 90UM provides for the setting aside of Part VIIIAB financial agreements and termination agreements. With one exception, the grounds for setting aside a Part VIIIAB agreement are ones that apply under section 90K to set aside a financial agreement or a termination agreement between parties to a marriage.

180. Section 90UM also provides one significant additional ground, as set out in paragraph 90UM(1)(k) and subsection 90UM(5), specific for Part VIIIAB financial agreements covered by section 90UE. This allows the court to set aside a Part VIIIAB financial agreement covered by section 90UE if the agreement was not compliant with procedural requirements similar to those set out in section 90UJ. It must also be unjust and inequitable, having regard to how the agreement deals with the parties' financial arrangements, if the court does not set the agreement aside.

Section 90UN – Validity, enforceability and effect of financial agreements and termination agreements

181. Section 90UN replicates section 90KA in providing that the principles of law and equity applicable in determining the validity, enforceability and effect of contracts and purported contracts apply to determining whether a Part VIIIAB financial agreement is valid, enforceable or effective.

Division 5 – Proceeds of crime and forfeiture

182. Division 5 of Part VIIIAB contains sections 90VA to 90VD, which replicate the proceeds of crime and forfeiture provisions of Part VIII, with necessary modifications, to apply to applications under Division 2 of new Part VIIIAB relating to the maintenance or property of parties to a de facto relationship. Section 90VA contains, in subsections 90VA(2) and (4) respectively, two criminal offences that now apply to parties to de facto property settlement or maintenance proceedings under Part VIIIAB, replicating similar offence provisions of Part VIII.

Division 6 – Instruments not liable to duty

Section 90WA – Certain instruments not liable to duty

183. Subsection 90WA(1) will provide exemption from duty or charge under State or Territory, or Commonwealth law that applies only in relation to a Territory, for a deed or other instrument executed under an order made under Division 2 of the Act. Also exempted are Part VIIIAB financial agreements, Part VIIIAB termination agreements, and deeds or other instruments executed under an order or financial agreement made under Division 4.

184. Provisions relating to ‘relevant maintenance agreements’ as mentioned in the equivalent provision for married property arrangements, section 90 of the Act, have not been replicated here as registration and approval of maintenance agreements were repealed in 2000, and no such agreements will be made under the new de facto financial matter provisions.

185. Paragraphs 90(1)(b) and (c) and subsections 90(2) and (3) of the Act will remain unchanged, however, as they may apply to existing (very old) registered maintenance agreements.

186. The exemption will not, under subsection 90WA(2), apply to a liability to pay duty or charge in relation to a financial agreement made under the law of a non-referring State that becomes a Part VIIIAB financial agreement under section 90UE. This will be the case, provided the liability arose before the parties acquired a geographic link with a participating jurisdiction.

187. Subsection 90WA(3) will override State and Territory laws which provide that an instrument on which duty or charge has not been paid is not available for use in law or equity for any purpose and may not be given in evidence in a court.

Item 51: Section 90MA

188. Section 90MA sets out the object of Part VIIIIB of the Act. This item, as part of the extension of the application of Part VIIIIB to superannuation interests held by a party to a de facto relationship, inserts the words ‘the parties to a de facto relationship’ in section 90MA to provide that the object of Part VIIIIB is to allow certain payments in respect of a superannuation interest to be allocated between the parties to a marriage or the parties to a de facto relationship.

Items 52 and 53: Section 90MC, and at the end of section 90MC

189. Items 52 and 53 insert new subsection 90MC(2) to provide that a superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of ‘de facto financial cause’ inserted by item 3 of Schedule 1 to the Bill. Under new Division 2 of Part V, inserted by item 33 of Schedule 1 to the Bill, de facto financial causes may be instituted in the Family Court of Australia, the Federal Magistrates Court, the Supreme Court of the Northern Territory and courts of summary jurisdiction of a participating jurisdiction. The effect of new subsection 90MC(2) is that proceedings dealing with a superannuation interest of a party to a de facto relationship will be able to be instituted in those courts.

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

190. Sections 90MI and MP of the Act require that a separation declaration be made before a superannuation agreement splitting or flagging a superannuation interest is served on the trustee of a superannuation fund. A separation declaration need only be signed by one of the parties to the agreement, and it is possible that both parties may sign separate declarations. Item 54 amends the definition of ‘declaration time’ in section 90MD to clarify that there is a unique declaration time for each separation declaration.

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

191. This item, as part of the extension of the application of Part VIIIIB to superannuation interests held by a party to a de facto relationship, inserts the words ‘the parties to a de facto relationship’ in the definition of ‘spouse’ in section 90MD.

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

192. Like the position in relation to superannuation agreements between parties to a marriage, a superannuation agreement between parties to a de facto relationship will form part of a more general financial agreement, dealing with the distribution of property on the breakdown of the relationship.

193. New section 90MHA, inserted by item 59 of Schedule 1 to the Bill, and replicating a provision in similar terms (section 90MH) applying in relation to superannuation agreements between parties to a marriage, will provide that:

- a Part VIIIAB financial agreement between parties to a de facto relationship may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property, and
- the provisions of that Part VIIIAB financial agreement that deal with superannuation interests is a superannuation agreement for the purposes of Part VIIIIB.

194. Item 56 amends the definition of ‘superannuation agreement’ in section 90MD to provide that a superannuation agreement has, in addition to the meaning given by section 90MH (which is the meaning that the term has when the agreement is between parties to a marriage), the meaning given by section 90MHA.

Items 57 and 58: After subsection 90MG(1), and subsection 90MG(2)

195. As part of the extension of the application of Part VIII B to superannuation interests held by a party to a de facto relationship, these items insert:

- new subsection 90MG(1A) to provide that a Part VIII AB financial agreement, between parties to a de facto relationship, is in force at any time that it is binding on the parties in accordance with section 90UJ (in new Division 4 of Part VIII AB, inserted by item 50 of Schedule 1 of the Bill), and
- the words ‘or relevant Part VIII AB financial agreement’ in subsection 90MG(2), to provide that a superannuation agreement is in force at any time when the relevant Part VIII AB financial agreement is in force.

Item 59: After 90MH

196. This item, as part of the extension of the application of Part VIII B to superannuation interests held by a party to a de facto relationship, inserts new section 90MHA.

197. Like the position in relation to superannuation agreements between parties to a marriage, a superannuation agreement between parties to a de facto relationship will form part of a more general financial agreement, dealing with the distribution of property on the breakdown of the relationship.

198. New section 90MHA provides, replicating a provision in similar terms (section 90MH) applying in relation to superannuation agreements between parties to a marriage, that:

- a Part VIII AB financial agreement may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property
- the provisions of that Part VIII AB financial agreement that deal with superannuation interests is a superannuation agreement for the purposes of Part VIII B
- a superannuation agreement will have effect only in accordance with Part VIII B and, in particular, will not be able to be enforced under the provisions of Part VIII AB relating to financial agreements between parties to a de facto relationship
- a superannuation agreement that is included in a financial agreement made in contemplation of a de facto relationship will have no effect until the parties enter into that relationship, and
- a superannuation interest of a party to a Part VIII AB financial agreement is treated as having been acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

Item 60: Before paragraph 90MJ(1)(e)

199. This item inserts new paragraph 90MJ(1)(db) to ensure that, where a superannuation agreement or a flag lifting agreement relates to a de facto relationship, a split pursuant to subsection 90MJ(3) of a future payment in respect of a superannuation interest to which the agreement relates only operates if the de facto relationship is broken down at the time that the agreement commences to operate. A flag lifting agreement is defined in section 90MN of the *Family Law Act* as an agreement the spouses may make at any time when a payment flag is operating on a superannuation interest.

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

200. This item replaces paragraph (a) of the definition of ‘service time’ in subsection 90MK(2) with new paragraphs (a) and (aa) to reflect that a superannuation agreement may be made between parties to a de facto relationship.

Items 62 and 63: Section 90MM, and at the end of section 90MM

201. Items 62 and 63 insert new subsection 90MM(2) to provide that, if a court sets aside a Part VIIIAB financial agreement between parties to a de facto relationship providing that a superannuation interest is to be subject to a payment flag, the court may also make an order terminating the flag.

Item 64: Subsection 90MN(4)

202. This item inserts new subparagraph 90MN(4)(b) to provide that a court may set aside a flag lifting agreement or a termination agreement on a ground (other the one set out in paragraph 90UM(1)(i)) on which it is able to set aside a Part VIIIAB financial agreement between parties to a de facto relationship.

203. A flag lifting agreement is one made by parties to an earlier superannuation agreement, providing that a superannuation interest is to be subject to a payment flag, that the flag is to cease to operate.

204. A termination agreement is one made by parties to a financial agreement, which can include a payment flag, that terminates that agreement.

205. The ground set out in paragraph 90UM(1)(i) provides that a court may set aside a financial agreement where there is no reasonable likelihood that a payment flag operating under Part VIIIAB on a superannuation interest covered by the agreement will be terminated by a flag lifting agreement. That ground is predicated on there being a payment flag in operation, which there will not be if it has been terminated by the flag lifting agreement or the termination agreement.

Item 65: At the end of subsection 90MN(5)

206. This item, as part of the extension of the application of Part VIIIAB to superannuation interests held by a party to a de facto relationship, inserts the words ‘or Part VIIIAB financial agreement’ at the end of subsection 90MN(5). This provides that an order setting aside a flag lifting agreement also operates to set aside the related Part VIIIAB financial agreement between parties to a de facto relationship.

Item 66: At the end of section 90MN

207. This item inserts new subsection 90MN(7) to provide that an order under section 90UM setting aside a Part VIIIAB financial agreement also operates to set aside the related flag lifting agreement.

Item 67: Subsection 90MO(1)

208. This item, as part of the extension of the application of Part VIIIIB to superannuation interests held by a party to a de facto relationship, inserts a reference to section 90SM, the provision in new Part VIIIAB (being inserted by item 50 of Schedule 1 to the Bill) providing for the alteration of property interests, in section 90MO.

209. Including the reference will prohibit courts from making an order under section 90SM with respect to a superannuation interest if it is covered by a superannuation agreement that is in force. It also covers where a payment flag is operating on the interest or the interest has been earlier split under an agreement and entitlements under that split have been waived.

Items 68 to 71: After subsection 90MP(2), subsection 90MP(5), subsection 90MP(6), and at the end of section 90MP

210. Section 90MP sets out the requirements for separation declarations that are required to accompany superannuation agreements when they are served on superannuation fund trustees. Items 68 to 70 confine the existing requirements to spouses who are married. Item 71 inserts new subsections 90MP(7) to (11) to replicate those requirements for parties to a de facto relationship.

211. Different requirements relating to the content of a declaration apply depending on whether section 90MQ applies to the declaration. Section 90MQ applies to the declaration if the party whose interest is being split by the agreement has superannuation interests totalling more than the low rate cap amount for the financial year in which the declaration was signed. For the 2007-2008 income year, that amount is \$140,000. Concessional tax arrangements apply below that amount.

Items 72 to 75: Subsection 90MS(1), subsection 90MS(1) (note 1), at the end of subsection 90MS(1), and subsection 90MS(2)

212. Section 90MS provides for courts, in proceedings under section 79 of the Act for the alteration of the interests of parties to a marriage in their property, to make orders, in accordance with Part VIIIIB, in relation to superannuation interests of the parties.

213. As part of the extension of the application of Part VIIIIB to superannuation interests held by a party to a de facto relationship, items 72 and 75 insert references in section 90MS to new section 90SM, which provides for the alteration of property interests of parties to such a relationship. Item 73 makes a consequential change to a note below section 90MS. Item 74 inserts a further note below section 90MS to draw attention to limits to the type of orders that can be made under section 90SM, and the circumstances in which they can be made.

Item 76: Subsection 90MV(1)

214. As part of the extension of the application of Part VIII B to superannuation interests held by a party to a de facto relationship, this item insert references to new section 90SM in subsection 90MV(1). Subsection 90MV(1) enables a court, in proceedings under section 79 of the Act for the alteration of the interests of parties to a marriage in their property, to make an order terminating a payment split.

Items 77 and 78: Subsection 90MX(3) (example), and at the end of subsection 90MX(3)

215. These items insert an additional example below section 90MX, setting out how Part VIII B would apply to a splittable payment of \$100 payable in respect of an interest that is subject to three payment splits in respect of a member spouse's marriage and earlier de facto relationships.

Item 79: Subsection 105(2A)

216. Subsection 105(2A) makes it clear that the requirement in subsection 105(2), that a court cannot hear enforcement proceedings in relation to a decree of another court without the decree being registered in the court hearing the proceedings, does not prevent the court making an order enforcing a financial agreement between parties to a marriage.

217. Such an agreement can, under paragraph 90KA(c), be enforced as if it were an order of a court.

218. This item inserts in subsection 105(2A) a reference to paragraph 90UN(c), the equivalent provision in Part VIII AB to paragraph 90KA(c), to make it clear that subsection 105(2) does not prevent the court making an order enforcing a Part VIII AB financial agreement between parties to a de facto relationship.

Items 80 and 81: Paragraph 106B(1A)(a), and paragraph 106B(1B)(a)

219. Subsections 106B(1A) and (1B) enable courts to set aside or restrain the making of an instrument or disposition made by:

- a bankrupt party to a marriage, or
- a party to a marriage who is a debtor subject to a personal insolvency agreement,

to defeat an existing or anticipated order in proceedings under the Act.

220. This item inserts the words ‘, or a party to a de facto relationship,’ in each of paragraphs 106B(1A)(a) and (1B)(a) to enable courts to set aside those instruments or dispositions where they are made by a bankrupt party to a de facto relationship, or a such a party who is a debtor subject to a personal insolvency agreement.

Item 82: Subsection 106B(4A)

221. Subsection 106B(4A) provides that in addition to the powers the court has under section 106B, the court may also exercise the general powers of court provided under subsection 80(1) in relation to orders under Part VIII. These powers include orders requiring:

- payments of lump sums or period sums, which may be wholly or partly secured as the court directs
- a specified transfer or settlement of property be made by way of maintenance for a party to a marriage
- the execution of any necessary deed or instrument
- the appointment or removal of trustees, or
- payments direct to a party to the marriage, to a trustee or to a public authority for the benefit of a party to the marriage.

222. This item inserts into subsection 106B(4A) a reference to subsection 90SS(1) which provides an equivalent provision to subsection 80(1) in relation to orders under Part VIIIAB.

Item 83: At the end of subsection 107(1)

223. This item amends section 107, by inserting the words ‘or de facto financial cause’ at the end of subsection 107(1), so that section 107 prevents a person from being imprisoned or otherwise placed in custody for contravention of an order for the payment of money made in a de facto financial cause. Subsection 107(1) currently prevents a person from being punished in that way for contravention of such an order made in a matrimonial cause.

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

224. This item amends paragraph (b) of the definition of ‘order under this Act’ in section 112AA, which defines terms used in the provisions of Part XIII A. Part XIII A enables sanctions to be imposed for failure to comply with orders made under the Act other than those relating to children.

225. Paragraph (b) currently includes an injunction granted under section 114 of the Act, except so far as it relates to the protection of a child, within the definition. Section 114 enables injunctions to be granted in proceedings for an order in circumstances arising out of a marital relationship.

226. The item amends paragraph (b) to also include an injunction granted under new section 90ST, except so far as it relates to the protection of a child, within the definition of the term. New section 90SS enables an injunction to be granted in proceedings under new Part VIIIAB between parties to a de facto relationship.

Part 2 – Transitional provisions

227. Part 2 of Schedule 1 to the Bill contains transitional provisions relating to the application of the amendments made by the Bill to de facto relationships to which State or Territory laws currently apply.

Division 1 - Introduction

Item 85: Interpretation

228. This item sets out definitions of terms for the purpose of Part 2 of Schedule 1, in particular: ‘commencement’, ‘earlier participating jurisdiction’, ‘later participating jurisdiction’, ‘new Act’, ‘Part VIII B’, ‘preserved law’ and ‘transition time’.

Division 2 – New Act does not apply to de facto relationships breaking down before commencement

Item 86: De facto relationships that broke down before commencement

229. This item provides that Parts VIII AB and VIII B of the new Act, containing provisions relating to de facto financial matters, do not extend to a de facto relationship that broke down before commencement of new Part VIII AB.

Division 3 – De facto relationships linked to earlier participating jurisdictions

230. Division 3 of Part 2 of Schedule 1 to the Bill provides for the application of federal law under the amendments made by the Bill in relation to certain agreements made in a State or Territory that are participating jurisdictions at commencement of new Part VIII AB.

Item 87: Pre-commencement agreements – made in contemplation of de facto relationships

231. This item provides that federal law under the amendments made by the Bill will apply to certain written financial agreements made before commencement of new Part VIII AB under the law of a State or Territory that is a participating jurisdiction at that commencement, as if they were Part VIII AB financial agreements.

232. Federal law under the amendments made by the Bill will so apply to those agreements that prevent a State or Territory court making an order that is inconsistent with the terms of the agreement. For this purpose the power that a State or Territory court has to vary or set aside the agreement, or any one or more of its provisions, is to be disregarded.

233. These agreements will be able to be enforced or, where the parties agree, terminated, under Part VIII AB of the *Family Law Act 1975* as if they were agreements made under that Part. A court will also, where a ground for doing so exists, be able to set these agreements aside. Where an agreement was made under a law of a State or Territory without complying with procedural requirements similar to those set out in section 90UJ applying for Part VIII AB financial agreements, the agreement can be set

aside on the additional ground set out in paragraph 90UM(1)(k) and subsection 90UM(5), explained above.

234. This item covers agreements made before commencement of new Part VIIIAB in a participating jurisdiction, while agreements made before or after that commencement in a non-referring State are addressed in section 90UE of the Act. Those agreements will continue to be governed by State law unless they are transformed into Part VIIIAB financial agreements under section 90UE, by the parties acquiring a geographical nexus with a participating jurisdiction. Agreements made in contemplation of a de facto relationship before or after commencement of new Part VIIIAB in a non-referring State that subsequently becomes a participating jurisdiction are covered by item 91.

Item 88: Pre-commencement agreements – made during de facto relationships

235. This item replicates the effect of item 87 for agreements, made in contemplation of a de facto relationship before commencement of new Part VIIIAB under the law of a State or Territory that is a participating jurisdiction at that commencement, for written financial agreements made during de facto relationships. Agreements made during a de facto relationship before or after commencement of new Part VIIIAB in a non-referring State that subsequently becomes a participating jurisdiction are covered by item 92.

Division 4 – De facto relationships linked to later participating jurisdictions

236. Division 4 of Part 2 of Schedule 1 to the Bill provides for the application of the amendments made by the Bill to de facto relationships to which the law of a State that is not a participating jurisdiction at commencement of new Part VIIAB applies, where the State subsequently becomes a participating jurisdiction. Such a State will become a participating jurisdiction following its referral of power to the Parliament of the Commonwealth of financial matters relating to parties to de facto relationships arising out of the breakdown of those relationships.

Item 89: When this Division applies

237. This item provides for the application of Division 4 of Part 2 of Schedule 1 to the Bill where a State becomes a participating jurisdiction after the commencement of new Part VIIIAB.

Item 90: De facto relationships that break down before transition time for a later participating jurisdiction

238. This item provides that Parts VIIIAB and VIIIB of the new Act, containing provisions relating to de facto financial matters, do not extend to a de facto relationship that broke down before the State becomes a participating jurisdiction.

Item 91: Pre-transition time agreements – made in contemplation of de facto relationships

239. This item provides that federal law under the amendments made by the Bill will apply, after a State becomes a participating jurisdiction, to certain written financial

agreements made under a law of the State before that time, as if they were Part VIIIAB financial agreements.

240. Federal law under the amendments in the Bill will so apply to those agreements that prevent a State court making an order with respect to the matters covered by the agreement, or that is inconsistent with the terms of the agreement. For this purpose the power that a State court has to vary or set aside the agreement, or any one or more of its provisions, is to be disregarded.

241. These agreements will be able to be enforced or, where the parties agree, terminated, under Part VIIIAB of the *Family Law Act 1975* as if they were agreements made under that Part. A court will also, where a ground for doing so exists, be able to set these agreements aside. Where an agreement was made under the law of a State that becomes a participating jurisdiction without complying with procedural requirements similar to those set out in section 90UI applying for Part VIIIAB financial agreements, the agreement can be set aside on the additional ground set out in paragraph 90UM(1)(k) and subsection 90UM(5), explained above.

Item 92: Pre-transition time agreements – made during de facto relationships

242. This item replicates the effect of item 91 for agreements, made in contemplation of a de facto relationship under the law of a State that becomes a participating jurisdiction after commencement of new Part VIIIAB, for written financial agreements made during de facto relationships.

Division 5 – Application of new Act to transitioning agreements

Item 93: Application of new Act to agreements covered by this Part

243. This item sets out how the amendments under the Act apply or do not apply to agreements made under a State or Territory law and covered by items 87, 88, 91 or 92.

244. Subitem 93(2) confirms that, despite any State or Territory law, a failure to discharge a liability covered by paragraph (g) of subitem 1 – that is, a liability to pay duty or charge in relation to the agreement if the liability arises before commencement – has no effect for the purposes of the Act. In particular, the failure does not effect whether the agreement may be presented as evidence in a court for the purposes of the new Act. This addresses the situation where the law of the State or Territory operates to link the fact of the making of an agreement under that law with a liability to pay stamp duty or other charges on the agreement. Subitem 93(2) makes it clear that a State or Territory law operating in such a way to the agreement does not have any effect under federal law in a State or Territory that is a participating jurisdiction at the commencement of new Part VIIIAB, or from the time any State subsequently becomes a participating jurisdiction.

SCHEDULE 2 – CONSEQUENTIAL AMENDMENTS RELATING TO DE FACTO FINANCIAL MATTERS

A New Tax System (Family Assistance) Act 1999

Item 1: Subparagraph 19(2)(c)(iii)

245. This item inserts the words ‘, a financial agreement (within the meaning of the *Family Law Act 1975*), a Part VIIIAB financial agreement (within the meaning of that Act)’ in subparagraph 19(2)(c)(iii) of the *A New Tax System (Family Assistance) Act 1999*. This amendment ensures that a consistent approach to the treatment of sources of maintenance is made to all financial agreements made under the Family Law Act for the purpose of the A New Tax System (Family Assistance) Act.

Item 2: Subparagraph 20A(10)(b)(iii) of Schedule 1

246. This item inserts the words ‘, or Part VIIIAB financial agreement,’ in subparagraph 20A(10)(b)(iii) of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*. This will ensure that financial agreements between parties to a de facto relationship made under new Part VIIIAB are included in the definition of a ‘maintenance liability’ for the purposes of determining the annualised amount of maintenance income of a person under that Act.

Item 3: Subparagraph 24(3)(a)(iii) of Schedule 1

247. This item inserts the words ‘, or Part VIIIAB financial agreement,’ in subparagraph 24(3)(a)(iii) of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999* to include a reference, in section 24 of that Act, to financial agreements between parties to a de facto relationship made under new Part VIIIAB. Section 24 of the A New Tax System (Family Assistance) Act apportions, for the purposes of that Act, capitalised maintenance income, received by a person, over the period for which it was received.

Bankruptcy Act 1966

Item 4: Subsection 5(1) (definition of *maintenance agreement*)

248. This item inserts the words ‘, or Part VIIIAB financial agreement,’ into the definition of ‘maintenance agreement’ in subsection 5(1) of the *Bankruptcy Act 1966*. This amendment extends the definition of maintenance agreement to make it clear that financial agreements between parties to a de facto relationship made under Part VIIIAB of the *Family Law Act 1975* are not maintenance agreements under the Bankruptcy Act.

Item 5, 6 and 7: After Subsection 35(1), subsection 35(2), and at the end of section 35

249. These items insert new subsection 35(1A) in the *Bankruptcy Act 1966*. Where:

- a party to a de facto relationship is bankrupt, and
- the trustee of the bankrupt’s estate is a party either to property settlement proceedings under the *Family Law Act 1975* in relation to the relationship or to proceedings for the maintenance of the other party to the relationship, or has applied to set aside or vary a property settlement order under that Act

new subsection 35(1A) will confer jurisdiction on the Family Court of Australia in any matter connected with or arising out of the bankruptcy of the bankrupt party to the de facto relationship.

250. Item 5 mirrors the existing provisions in subsection 35(1) of the *Bankruptcy Act 1966* providing the Family Court of Australia with concurrent bankruptcy and family law jurisdiction where a party to a marriage is bankrupt.

Items 8 and 9: Subsection 35B(1), after subsection 35B(1)

251. Section 35B of the *Bankruptcy Act 1966* confers the concurrent bankruptcy and family law jurisdiction that the Family Court of Australia has on the Family Court of Western Australia. The effect of these items is to limit that conferral on the Family Court of Western Australia to concurrent bankruptcy and family law jurisdiction where a party to a marriage is bankrupt. Western Australia has not referred powers on financial matters relating to parties to a de facto relationship in the terms referred by the several other States.

Item 10: Paragraph 40(1)(o)

252. This item amends paragraph 40(1)(o) of the *Bankruptcy Act 1966* to provide that a debtor commits an act of bankruptcy when he or she becomes insolvent as a result of one or more transfers of property in accordance with a Part VIIIAB financial agreement (within the meaning of the *Family Law Act 1975*).

Item 11: Section 59A

253. This item inserts a reference to new Part VIIIAB of the *Family Law Act 1975* into section 59A of the *Bankruptcy Act 1966* which provides that sections 58 and 59 of that Act, which deal with the vesting of property upon bankruptcy, or upon a second or subsequent bankruptcy, have effect subject to an order under Part VIII of the Family Law Act. The effect of this item is to provide that sections 58 and 59 of the Bankruptcy Act also have effect subject to an order under new Part VIIIAB of the Family Law Act.

Item 12: Paragraph 116(2)(q)

254. This item amends paragraph 116(2)(q) of the *Bankruptcy Act 1966* to clarify that property that a trustee of a bankrupt estate is required to transfer under an order under Part VIII of the *Family Law Act 1975* to a former spouse of the bankrupt after the dissolution of their marriage is not property that is divisible amongst the creditors of the bankrupt.

Item 13: At the end of subsection 116(2)

255. This item inserts new paragraph 116(2)(r) to provide that, any property that, under an order under Part VIIIAB of the *Family Law Act 1975*, a trustee of a bankrupt estate is required to transfer to a former de facto spouse of the bankrupt, is not property that can be divisible amongst creditors of the bankrupt. This section replicates existing provisions for parties to a de facto relationship.

Item 14: Paragraph 120(5)(e)

256. This item amends paragraph 120(5)(e) of the *Bankruptcy Act 1966* to clarify that a grant of a right of residence, by a person who later becomes bankrupt, to his or her former spouse following the dissolution of their marriage, in property transferred to that former spouse has no value as consideration, for the purposes of determining whether it is void against the trustee of the bankrupt's estate as an undervalued transaction, unless the transfer relates to a property settlement or agreement under the *Family Law Act 1975*.

Item 15: At the end of subsection 120(5)

257. This item replicates, for parties to a de facto relationship, existing paragraph 120(5)(e) of the *Bankruptcy Act 1966*. The effect of paragraph 120(5)(e) is explained in the immediately preceding paragraph.

Item 16: Paragraph 121(6)(e)

258. This item amends paragraph 121(6)(e) of the *Bankruptcy Act 1966* to clarify that a grant of a right of residence, by a person who later becomes bankrupt, to his or her former spouse following the dissolution of their marriage, in property transferred to that former spouse has no value as consideration, for the purposes of determining whether it is void against the trustee of the bankrupt's estate as one to defeat creditors, unless the transfer relates to a property settlement or agreement under the *Family Law Act 1975*.

Item 17: At the end of subsection 121(6)

259. This item replicates, for parties to a de facto relationship, existing paragraph 121(6)(e) of the *Bankruptcy Act 1966*. The effect of paragraph 121(6)(e) is explained in the immediately preceding paragraph.

Item 18: Subsection 140(11)

260. This item amends subsection 140(11) of the *Bankruptcy Act 1966* to provide that the provisions of section 140 of that Act, relating to declaration and distribution of dividends of the estate of a bankrupt amongst the bankrupt's creditors, have effect subject to an order under new section 90SS made in proceedings under new Part VIIIAB between parties to a de facto relationship.

261. Those provisions currently have effect subject to an order under section 114 of the *Family Law Act 1975* which deals with interlocutory injunctions.

Child Support (Assessment) Act 1989

Item 19: At the end of subsection 84(5)

262. This item inserts the words ‘a Part VIIIAB financial agreement (within the meaning of that Act)’ in subsection 84(5) of the *Child Support (Assessment) Act 1989* so that it is clear that a child support agreement under that Act and a financial agreement between parties to a de facto relationship made under Part VIIIAB of the *Family Law Act 1975* can be included in the one document.

Items 20 and 21: Paragraph 152(1)(b), and subsection 152(1)

263. These items extend the operation of section 152 of the *Child Support (Assessment) Act 1989* to include financial agreements between parties to a de facto relationship made under Part VIIIAB of the *Family Law Act 1975*. Section 152 of the *Child Support (Assessment) Act* ceases the effect of a court order, maintenance agreement or financial agreement under which child support is payable, at the time child support becomes payable under an administrative assessment under that Act.

Child Support (Registration and Collection) Act 1988

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

264. This item inserts the word ‘or’, for consistency with modern drafting style, at the end of subparagraph (a)(i) of the definition of ‘collection agency maintenance liability’ in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988*.

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

265. This item inserts new subparagraph (a)(iv) in the definition of ‘collection agency maintenance liability’ in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988* to include within that definition a liability of a party to a de facto relationship to pay a periodic amount for the maintenance of the other party to the relationship.

Item 24 and 25: Subsection 4(1) (definition of maintenance agreement)

266. These items extend the definition of a ‘maintenance agreement’ contained in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988* to include agreements in writing that make provision in relation to the maintenance of a party to a de facto relationship, including a financial agreement between parties to a de facto relationship made under Part VIIIAB of the *Family Law Act 1975*.

Item 26: Subsection 4(1)

267. This item inserts a definition of ‘party to a de facto relationship’ in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988* having the same meaning as in the *Family Law Act 1975*.

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

268. This item inserts new paragraph (daa) in the definition of ‘terminating event’ in subsection 4(1) of the *Child Support (Registration and Collection) Act 1988* to provide that where an enforceable maintenance liability under that Act relates to the maintenance of a party to a de facto relationship, the subsequent marriage of the person is a terminating event unless otherwise specified in the relevant court order, maintenance agreement or by force of law. New paragraph (da) replicates, for parties to a de facto relationship, existing paragraph (d) of the definition .

Items 28 and 29: Section 18, at the end of section 18

269. These items replicate, for parties to a de facto relationship, existing section 18 of the *Child Support (Registration and Collection) Act 1988* which provides when a liability is a registrable maintenance liability.

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

270. This item adds the word ‘or’ at the end of subparagraph 112(1)(b)(ii), to connect this subparagraph with new subparagraph 112(1)(b)(iii) inserted in the next item.

Item 31: After subparagraph 112(1)(b)(ii)

271. This item extends the operation of section 112 of the *Child Support (Registration and Collection) Act 1988* to parties to a de facto relationship by inserting new subparagraph 112(1)(b)(iii) that replicates, for those parties, existing subparagraph 112(1)(b)(ii). Section 112 requires that where, under the *Family Law Act 1975* or the law of a State or Territory, an order is made by, or registered in a court, or a maintenance agreement is registered in or approved by a court and the order or agreement makes provision for:

- the maintenance of a child; or
- the maintenance by a party to a marriage of the other party to a marriage; or
- the maintenance by a party to a de facto relationship of the other party to the relationship

the registrar or other responsible officer of the court send a sealed copy of the order or agreement to the Child Support Registrar within 28 days.

Federal Magistrates Act 1999

Item 32: Subparagraph 102(2)(l)(i)

272. This item amends subparagraph 102(2)(l)(i) of the *Federal Magistrates Act 1999* to enable a Registrar of the Federal Magistrates Court to exercise the power of the Court to make an urgent de facto spouse maintenance order under proposed new section 90SG. Section 102 of the Federal Magistrates Act provides for a range of powers of the Federal Magistrates Court to be exercised by a Registrar of the Court, including the power under section 77 of the *Family Law Act 1975* to make an urgent spouse maintenance order.

First Home Saver Accounts Act 2008

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

273. This item will amend the definition of ‘family law obligation’ in section 18 of the *First Home Saver Accounts Act 2008* (the FHSA Act). A first home saver account will be able to be split by an order made under section 79 or section 90SM or in accordance with a financial agreement made between parties to a marriage under Part VIIIA of that Act. Generally, a first home saver account can only be split to a first home saver account or a superannuation account held by a person to whom the account holder is or has been married, or with whom the account holder has been in a de facto relationship.

274. The effect of the amendment made by this item to the definition of ‘family law obligation’ in FHSA Act section 18 is to provide that a first home saver account will be able to split in accordance with a financial agreement made between parties to a de facto relationship under Part VIIIAB of the Family Law Act.

Income Tax Assessment Act 1997

Items 34 to 37: After paragraph 126-5(1)(d), subsection 126-5(3A), after paragraph 126-15(1)(d), and subsection 126-15(5)

275. These items insert new paragraphs 126-5(1)(da) and 126-15(1)(da) in the *Income Tax Assessment Act 1997* (ITAA 1997), and amend ITAA 1997 subsections 126-5(3A) and 126-15(5). The amendments extend the capital gains tax (CGT) marriage breakdown roll-over provided under ITAA 1997 Subdivision 126-A, now applying for transfers of assets under a binding written agreement made between parties to a de facto relationship under certain State or Territory laws, to transfer of assets under:

- an agreement made between such parties under Part VIIIAB of the *Family Law Act 1975* that is binding under section 90UJ of that Act, and
- a corresponding written agreement that is binding under corresponding foreign laws.

Items 38 to 41: Paragraph 126-140(2A)(h), paragraph 126-140(2B)(b), paragraph 126-140(2B)(c), and after paragraph 126-140(2B)(d)

276. These items insert new paragraphs 126-140(2B)(da) in the *Income Tax Assessment Act 1997* (ITAA 1997), and amend ITAA 1997 paragraphs 126-140(2B)(b) and (c). The amendments extend the capital gains tax (CGT) marriage breakdown roll-over provided under ITAA 1997 Subdivision 126-D. ITAA 1997 Subdivision 126-D roll-over now applies for the transfer of an asset reflecting the personal interest of a party to a de facto relationship in a small superannuation fund from that fund to another complying superannuation fund in accordance with a court order or a binding written agreement under certain State or Territory laws. The amendments will extend that roll-over to the transfer of an asset of that character between those funds in accordance with:

- a court order made under section 90SM of the *Family Law Act 1975* (or under subsection 90AE(2) or AF(2) of that Act as modified by section 90TA of that Act), and
- an agreement made between the parties to the de facto relationship under Part VIIIAB of the Family Law Act that is binding because of section 90UJ of that Act.

Proceeds of Crime Act 2002

Items 42 and 43: After subparagraph 330(4)(ba)(i) and subparagraph 330(4)(ba)(ii)

277. These items insert new subparagraph 330(4)(ba)(ia) and insert the words ‘, or Part VIIIAB financial agreement,’ in subparagraph 330(4)(ba)(ii) of the *Proceeds of Crime Act 2002* to exclude property distributed in accordance with:

- an order under the *Family Law Act 1975* with respect to the property of the parties to a de facto relationship, or
- a financial agreement between parties to a de facto relationship made under Part VIIIAB of that Act

from being proceeds of or instruments of an offence, and subject to forfeiture under the *Proceeds of Crime Act*, when six years has elapsed since that distribution.

Social Security Act 1991

Items 44 to 47: Subparagraphs 9A(2)(h)(iva), 9B(2)(h)(iva), 9BA(2)(f)(vi), and paragraph 9C(b)

278. These items omit the word ‘spouse’ and insert the word ‘partner’ in subparagraphs 9A(2)(h)(iva), 9B(2)(h)(iva), 9BA(2)(f)(vi), and paragraph 9C(b) of the *Social Security Act 1991*.

Veterans' Entitlements Act 1986

Items 48 to 51: Subparagraph 5JA(2)(h)(iva), 5JB(2)(h)(iva), 5JBA(2)(f)(vi), and paragraph 5JC(b)

279. These items omit the word 'spouse' and insert the word 'partner' in subparagraphs 5JA(2)(h)(iva), 5JB(2)(h)(iva) and 5JBA(2)(f)(vi) of the *Veterans' Entitlements Act 1986*.

Item 52: Subparagraph 51(3)(a)(ia)

280. This item inserts the words ' , or Part VIIIAB financial agreements within the meaning of' in subparagraph 51(3)(a)(ia) of the *Veterans' Entitlements Act 1986* to include a reference to financial agreements made between parties to a de facto relationship under Part VIIIAB of the *Family Law Act 1975* in section 51 of the *Veterans' Entitlements Act*. Section 51 of the *Veterans' Entitlements Act* apportions, for the purposes of that Act, capitalised maintenance income received by a person over the period of time it was received.

SCHEDULE 3 – AMENDMENTS RELATING TO FINANCIAL AGREEMENTS ABOUT MARRIAGE

Part 1 – Clarifying that other persons can be parties

Family Law Act 1975

281. A binding financial agreement enables persons intending to marry and married couples to provide in writing for how property will be distributed between them on marriage breakdown, and can be made to give effect to a property settlement on separation or divorce.

282. The amendments in Part 1 of Schedule 3 clarify that:

- binding financial agreements between spouses can include another person (a third party) as a party to the agreement, and
- a binding financial agreement can make provision on other matters beyond those incidental or ancillary to property settlement or maintenance issues between the spouses.

283. Financial agreements can be made in contemplation of a marriage, during a marriage, or after a divorce order is made.

284. The amendments address issues that occasionally arise when the financial affairs of married couples are intermingled with other family members, including where family assets are held within a corporate or tax structure.

285. It is intended that a third party should only be able to be a party to a binding financial agreement to the extent that the agreement provides for:

- how the property or financial resources of the spouses is to be dealt with in the event of marriage breakdown, or
- the maintenance of one of them after that time.

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

286. This item inserts in subsection 4(1) a definition for ‘spouse party’, being a party to the marriage who is also a party to the financial agreement.

Item 2: Subsection 4(1) (definition of *third party*)

287. This item inserts in subsection 4(1) a definition for ‘third party’, being a party to the financial agreement who is not a spouse party.

Item 3: Paragraph 90B(1)(aa)

288. Section 90B deals with financial agreements made before marriage. Subsection 90B(1) sets out the requirements for such agreements, including that at the time of the making of the agreement, no other agreement is in force between the

parties with respect to any of those matters, whether made before marriage under this section, during marriage under section 90C, or after a divorce order is made under section 90D.

289. This item clarifies that at the time of the making of an agreement under subsection 90B, there is to be no other agreement in force between the spouse parties with respect to any of those matters, whether made before marriage under this section, during marriage under section 90C, or after a divorce order is made under section 90D.

Item 4: At the end of Subsection 90B(1)

290. This item clarifies that financial agreements made before marriage can include persons other than a spouse party (a third party) as a party to the agreement.

Item 5: Subsection 90B(2)

291. Subsection 90B(2) provides that the matters that may be included in financial agreements made before marriage are matters relating to:

- how all or any of the property or financial resources of the parties is to be dealt with in the event of the breakdown of the marriage, and
- spouse maintenance for either of them during the marriage, or after divorce, or both during the marriage and after divorce.

292. This item amends subsection 90B(2) to clarify that the property or financial resources dealt with in the financial agreement is to be the property or financial resources of the spouse parties.

Item 6: Subsections 90B(3) and (4):

293. Subsection 90B(3) provides that a financial agreement made before marriage under subsection 90B(1) may contain matters incidental or ancillary to:

- how all or any of the property or financial resources of the parties is to be dealt with in the event of the breakdown of the marriage, and
- spouse maintenance for either of them during the marriage, or after divorce, or both during the marriage and after divorce.

294. This item extends the operation of subsection 90B(3) so that a financial agreement made under subsection 90B(1) is able to contain matters other than those incidental or ancillary to those mentioned in subsection 90B(2).

295. Subsection 90B(4) provides that a later financial agreement may terminate a previous financial agreement made under subsection 90B(1) between the same parties. This item also clarifies that under subsection 90B(4), a later financial agreement may terminate a previous financial agreement made under subsection 90B(1) only if all the parties to the previous agreement, including any party who is not a spouse party, are parties to the new agreement.

Item 7: Paragraph 90C(1)(aa)

296. Section 90C deals with financial agreements made during marriage. Subsection 90C(1) sets out the requirements for such agreements, including that at the time of the making of the agreement, no other agreement is in force between the parties with respect to any of those matters, whether made before marriage under section 90B, during marriage under this section, or after a divorce order is made under section 90D.

297. This item clarifies that at the time of the making of an agreement under subsection 90C, there is to be no other agreement in force between the spouse parties with respect to any of those matters, whether made before marriage under section 90B, during marriage under this section, or after a divorce order is made under section 90D.

Item 8: At the end of subsection 90C(1)

298. This item clarifies that a financial agreement made during marriage can include other persons (third parties) to the agreement.

Item 9: Subsection 90C(2)

299. Subsection 90C(2) provides that the matters that may be included in financial agreements made during marriage are matters relating to:

- how all or any of the property or financial resources of the parties is to be dealt with in the event of the breakdown of the marriage, and
- spouse maintenance for either of them during the marriage, or after divorce, or both during the marriage and after divorce.

300. This item amends subsection 90C(2) to clarify that the property or financial resources dealt with in the financial agreement is to be the property or financial resources of the spouse parties.

Item 10: Subsections 90C(3) and(4)

301. Subsection 90C(3) provides that a financial agreement made during marriage under subsection 90C(1) may contain matters incidental or ancillary to:

- how all or any of the property or financial resources of the parties is to be dealt with in the event of the breakdown of the marriage, and
- spouse maintenance for either of them during the marriage, or after divorce, or both during the marriage and after divorce.

302. This item extends the operation of subsection 90C(3) so that a financial agreement made under subsection 90C(1) is able to contain matters other than those incidental or ancillary to those mentioned in subsection 90C(2).

303. Subsection 90C(4) provides that a later financial agreement may terminate a previous financial agreement made under subsection 90C(1) between the same parties.

This item also clarifies that under subsection 90C(4), a later financial agreement may terminate a previous financial agreement made under subsection 90C(1) only if all the parties to the previous agreement, including any party who is not a spouse party, are parties to the new agreement.

Item 11: Paragraph 90D(1)(aa)

304. Section 90D deals with financial agreements made after a divorce order is made. Subsection 90D(1) sets out the requirements for such agreements, including that at the time of the making of the agreement, no other agreement is in force between the parties with respect to any of those matters, whether made before marriage under section 90B, during marriage under section 90C, or after a divorce order is made under this section.

305. This item clarifies that at the time of the making of an agreement under subsection 90D, there is to be no other agreement in force between the spouse parties with respect to any of those matters, whether made before marriage under section 90B, during marriage under section 90C, or after a divorce order is made under this section.

Item 12: Subsection 90D(1)

306. This item clarifies that a financial agreement made after a divorce order can include other persons (third parties) to the agreement.

Item 13: Subsection 90D(2)

307. This item inserts the term ‘spouse parties’, which is defined as a party to the marriage who is also a party to the financial agreement.

308. Subsection 90D(2) provides that the matters that may be included in financial agreements made after divorce are matters relating to:

- how all or any of the property or financial resources of the parties is to be dealt with, and
- spouse maintenance for either of them.

309. This item amends subsection 90D(2) to clarify that the property or financial resources dealt with in the financial agreement is to be the property or financial resources of the spouse parties.

Item 14: Subsections 90D(3) and (4)

310. Subsection 90D(3) provides that a financial agreement made after divorce under subsection 90D(1) may contain matters incidental or ancillary to:

- how all or any of the property or financial resources of the parties is to be dealt with, and
- spouse maintenance for either of them.

311. This item extends the operation of subsection 90D(3) so that a financial agreement made under subsection 90D(1) is able to contain matters other than those incidental or ancillary to those mentioned in subsection 90D(2).

312. Subsection 90D(4) provides that a later financial agreement may terminate a previous financial agreement made under subsection 90D(1) between the same parties. This item also clarifies that under subsection 90D(4), a later financial agreement may terminate a previous financial agreement made under subsection 90D(1) only if all the parties to the previous agreement, including any party who is not a spouse party, are parties to the new agreement.

Item 15: Subsections 90DA(3) and (4)

313. Subsection 90DA(1) provides that a financial agreement between two people is of no force or effect until a separation declaration is made. Subsection 90DA(2) states that a separation declaration is a written declaration that complies with subsections 90DA(3) and 90DA(4).

314. Subsection 90DA(3) requires a separation declaration to be signed by at least one of the parties to the financial agreement.

315. This item amends subsection 90DA(3) to clarify that the declaration must be signed by one or both of the spouse parties.

316. Subsection 90DA(4) requires a separation declaration to state that the parties have separated and are living separately and apart at the declaration time and, in the opinion of the parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

317. This item amends subsection 90DA(4) to clarify that the requirement relates to spouse parties.

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

318. Subsection 90DA(5) defines the term ‘declaration time’ for the purpose of section 90DA to mean the time when the declaration was signed by a party to the financial agreement (or last signed by a party to the agreement, if both parties to the agreement have signed).

319. This item clarifies that the spouse parties must sign the declaration.

Item 17: After section 90DA

320. This item inserts new section 90DB to provide that a binding financial agreement, to the extent to which it provides for a party to the agreement who is not a spouse party to contribute to the maintenance of a spouse party during the marriage to which the agreement relates, is of no force or effect. Any such agreement for a person to contribute to the maintenance of a spouse party during marriage must be contained in a separate agreement enforceable in a court of general jurisdiction.

321. New section 90DB also provides that a binding financial agreement, to extent to which it provides for a matter beyond those incidental or ancillary to how the property

or financial resources of the spouse parties are dealt with on marriage breakdown or the maintenance of the spouse parties, is of no force or effect unless or until the marriage between the spouse parties breaks down.

Item 18: Section 90E

322. Section 90E provides that provisions of a financial agreement that relate to the maintenance of a party to the agreement or a child or children are void unless they specify certain matters to identify the amount, or the value of the portion of property, attributable to maintenance.

323. This item clarifies that section 90E applies to provisions of a financial agreement that relate to a spouse party to the agreement.

Item 19: Subsection 90F(2)

324. Subsection 90F(2) clarifies that a financial agreement providing for property or financial resources of a party to the agreement to continue in the ownership of that party is a financial agreement for the purposes of Part VIIIA of the Act.

325. This item clarifies that subsection 90F(2) applies where the financial agreement contains a provision of that kind in relation to property or financial resources of a spouse party to the agreement.

Item 20: Paragraph 90G(1)(a)

326. Section 90G provides for the requirements that need to be satisfied before a financial agreement is binding on the parties to the agreement.

327. This item, by omitting ‘both’ and substituting ‘all’ in paragraph 90G(1)(a), clarifies that an agreement must be signed or lawfully executed by all the parties to the agreement.

Item 21: Paragraph 90G(1)(b)

328. Section 90G provides for the requirements that need to be satisfied before a financial agreement is binding on the parties to the agreement.

329. This item, by omitting “‘party’ (first occurring)” in paragraph 90G(1)(b) and substituting ‘spouse party’, clarifies that the requirement to obtain legal advice prior to signing a binding financial agreement applies only to spouse parties to the agreement. A third party is treated differently from a spouse party to the agreement because the requirement to obtain prior legal advice is not necessary for any third party who, through signing a binding financial agreement, does not lose any existing rights under the *Family Law Act 1975*.

Item 22: Paragraph 90G(1)(e)

330. Section 90G provides for the requirements that need to be satisfied before a financial agreement is binding on the parties to the agreement.

331. This item recasts paragraph 90G(1)(e) to require that the original of the financial agreement must be given to one of the spouse parties and a copy given to each of the other parties to the agreement.

Item 23: Paragraph 90J(2)(a)

332. Section 90J deals with the termination of financial agreements, reflecting a policy that it is desirable, where the parties deal with all their property and financial resources in a binding financial agreement, for courts under the *Family Law Act 1975* to consider one agreement. Where new arrangements are subsequently negotiated, parties are required to terminate all prior binding financial agreements, alleviating the need for courts to go through a succession of documents to determine whether Part VIII applies to the property or financial resources of parties to a marriage (see section 71A). An agreement terminating a binding financial agreement is a termination agreement. Subsection 90J(2) provides for the requirements that need to be satisfied before a termination agreement is binding on the parties to the agreement.

333. This item amends paragraph 90J(2)(a) so that the provision requires a termination agreement to be signed or lawfully executed by all of the parties to the agreement.

Item 24: Paragraph 90J(2)(b)

334. This item, by omitting “‘party’ (first occurring)” in paragraph 90J(2)(b) and substituting ‘spouse party’, clarifies that the requirement to obtain legal advice prior to signing a termination agreement applies only to spouse parties to the agreement.

Item 25: Paragraph 90J(2)(e)

335. This item recasts paragraph 90J(2)(e) to require that the original of the termination agreement must be given to one of the spouse parties and a copy given to each of the other parties to the agreement.

Item 26: Paragraph 90K(1)(aa)

336. Section 90K provides for the grounds on which a court may set aside a binding financial agreement or a termination agreement. One such ground is where either party to the agreement entered into the agreement for the purpose of defrauding or defeating a creditor of the party.

337. This item amends paragraph 90K(1)(aa), so that the ground is available where the agreement was entered into for the purpose of defrauding or defeating a creditor of any party to the agreement.

Item 27: Subsection 90MH(1)

338. Subsection 90MH(1) provides that a financial agreement may include an agreement that deals with the superannuation interests of either or both of the parties to the agreement.

339. This item limits subsection 90MH(1) to superannuation interests of either or both of the spouse parties to the agreement.

Item 28: Subsection 90MH(4)

340. Subsection 90MH(4) provides that a superannuation agreement included in a financial agreement made before marriage by persons contemplating marriage has no effect until the parties marry.

341. This item clarifies that subsection 90MH(4) applies to spouse parties to the financial agreement.

Item 29: Subsection 90MH(5)

342. Subsection 90MH(5) provides that for the purpose of applying particular provisions in Part VIIIA of the Act to Part VIIIB of the Act, a superannuation interest of a party to a financial agreement is treated as having been acquired at the time when the party first became a member of the relevant eligible superannuation plan.

343. This item clarifies that subsection 90MH(5) applies to a superannuation interest held by a spouse party to a financial agreement.

Part 2 – Separation declarations

Family Law Act 1975

344. The amendments to Part 2 of Schedule 3 make a number of amendments in relation to separation declarations under Part VIIIA and Part VIIIB of the Act where the parties to a financial agreement have divorced or the spouse to which the declaration was made has died.

Item 30: Subsection 90DA(1)

345. Section 90DA sets out the requirements for the making of a separation declaration under Part VIIIA of the Act before certain provisions of a financial agreement can take effect.

346. This item, in new subsection 90DA(1A), clarifies that a separation declaration is not necessary for the binding financial agreement to have force or effect if the spouse parties divorce, or either or both of them die. The item also recasts subsection 90DA(1) to reflect that a person other than a spouse party to a financial agreement can be a party to the agreement.

Item 31: Subsection 90DA(2)

347. This item amends subsection 90DA(2) to enable a separation declaration made under Part VIIIA of the Act to be incorporated into a financial agreement. A financial agreement may be made during the marriage to which it relates but after its breakdown.

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

348. The definition of ‘declaration time’ in section 90MD provides that the term means the time when the separation declaration was signed by a spouse (or last signed by a spouse, if both spouses have signed). This item adds a note beneath the definition of ‘declaration time’ to clarify that where a spouse has died, the separation declaration may be signed by the spouse’s legal personal representative.

Items 33, 34 and 35: Section 90MI, paragraph 90MI(a), and at the end of section 90MI

349. These items amend paragraph 90MI(a) and insert new subsection 90MI(2), consequential on the amendment to subsection 90DA(2) enabling a separation declaration to be incorporated into a superannuation agreement.

Item 36: After paragraph 90MJ(1)(d)

350. Section 90MJ deals with payment splits under superannuation agreements or flag lifting agreements. A flag lifting agreement is defined in section 90MN of the Act as an agreement the spouses may make at any time when a payment flag is operating on a superannuation interest.

351. Consequential on the insertion of new subsection 90MZG(4), explained below in relation to item 41 of Schedule 3 to the Bill, it is necessary to remove the possibility that a superannuation agreement might be used to split superannuation where the spouse’s marriage had not in fact broken down before the spouse died.

352. This item inserts new paragraph 90MJ(1)(da) to ensure that, where a superannuation agreement or a flag lifting agreement relates to a marriage, a split pursuant to subsection 90MJ(3) of a future payment in respect of a superannuation interest to which the agreement relates only operates if the marriage is broken down at the time the agreement commences to operate.

Item 37: Subsection 90MP(1)

353. This item amends subsection 90MP(1) to enable a separation declaration made under Part VIIIB of the Act to be incorporated into a superannuation agreement. A superannuation agreement may be included in a financial agreement made during the marriage to which it relates but after its breakdown.

Item 38: At the end of subsection 90MP(2)

354. This item amends subsection 90MP(2) to clarify that where a spouse has died, the separation declaration may be signed by the spouse’s legal personal representative.

Item 39: After subsection 90MP(4)

355. This item inserts new subsection 90MP(4A) to amend the requirements for separation declarations to allow for a situation where one or both of the spouses has died.

356. Paragraph 90MP(4A)(a) requires that where section 90MQ applies to the separation declaration, the separation declaration must state that at the most recent time when both spouses were alive:

- the spouses were married, but
- the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time.

357. Paragraph 90MP(4A)(b) requires that where section 90MQ does not apply to the separation declaration, the separation declaration must state that at the most recent time when both spouses were alive, the spouses were married but separated.

Item 40: Subsection 90MQ(1)

358. Section 90MQ applies where the ‘total withdrawal value’ is more than the member spouse’s ‘low rate cap amount’ (determined in accordance with the *Income Tax Assessment Act 1997*). For the 2007-2008 income year, that amount is \$140,000. The term ‘total withdrawal value’ is defined in regulation 20 of the *Family Law (Superannuation) Regulations 2001* to mean the amount determined by adding together the withdrawal benefits for each superannuation interest the member spouse has in any eligible superannuation plan at that time. This item amends subsection 90MQ(1) consequential on new subsection 90MP(4A) inserted by item 39 of Schedule 3 to the Bill.

Item 41: At the end of section 90MZG

359. Subsection 90MZG(1) provides that a person is guilty of an offence if he or she makes a false or misleading statement in a superannuation declaration. This item inserts new subsection 90MZG(4) having the effect that a person is not guilty of that offence if the spouse to which the declaration relates died before the declaration was made. Where that spouse has died, the declaration might be made by the deceased spouse’s legal personal representative. In those circumstances, criminal sanctions for the making of a statement in the declaration are inappropriate given that the legal personal representative will have no first hand knowledge of the state of the spouse’s marriage before he or she died.

Part 3 – Matrimonial causes

Family Law Act 1975

360. The amendments in Part 3 of Schedule 3 make provision in relation to the jurisdiction of courts exercising jurisdiction under the Act in relation to financial agreements.

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

361. This item makes an amendment to paragraph (eaa) of the definition of ‘matrimonial cause’ in subsection 4(1) of the Act, the effect of which is that courts can deal with matrimonial causes which are proceedings between any combination of the parties to the agreement and the legal personal representatives of a party to the agreement who has died. Under subsection 90H of the Act, a binding financial agreement continues despite the death of a party to the agreement, and operates in favour of, and is binding on, the legal personal representative of that deceased party.

Items 43 and 44: Paragraphs 4A(1)(a) and (b), and subsection 4A(2) (definition of *creditor*)

362. This item makes amendments to section 4A of the Act, which provides for the meaning of the term ‘third party proceedings’ for the purpose of paragraph (eab) of the definition of ‘matrimonial cause’ in subsection 4(1) of the Act. Paragraph (eab) of that definition provides that courts can deal with third party proceedings to set aside a financial agreement. Third party proceedings are defined to mean proceedings between particular persons or bodies to set aside a financial agreement on the ground set out in paragraph 90K(1)(aa) of the Act. Paragraph 90K(1)(aa), as amended by item 26 of Schedule 3 to the Bill, enables a financial agreement to be set aside where a party to the agreement entered into the agreement for the purpose of defrauding or defeating a creditor of the party. The particular persons or bodies between whom the third party proceedings must be taken are one or both of the parties to the agreement and a creditor or government agency acting in the interests of a creditor.

363. Item 43 extends the meaning of the term ‘third party proceedings’ so that it also includes proceedings between any combination of the parties to the agreement and the legal personal representatives of a party to the agreement who has died and, in addition to a creditor or a government body acting in the interests of a creditor, the legal personal representative of a creditor who has died.

364. Item 44 extends the meaning of the term ‘creditor’ for the purpose of the meaning of the term ‘third party proceedings’ so that it includes the legal personal representative of any person who has died.

Part 4 – Other amendments

Family Law Act 1975

Item 45: Subsection 90F(2)

365. This item amends existing subsection 90F(2) of the *Family Law Act 1975* to ensure that it applies to all financial agreements that can be made under Part VIIIA, correcting a technical omission of reference in the existing provision to agreements made before marriage under subsection 90B(1).

366. The new provision that replicates section 90F for Part VIIIAB agreements, subsection 90UH(3), also applies to the equivalent of subsection 90B(1) financial

agreements – agreements made before the de facto relationship, under subsection 90UB(1).

Item 46: Paragraph 90MU(1)(b)

367. This item amends paragraph 90MU(1)(b) to adjust the notification requirement relating to splittable payments that become payable in respect of a superannuation interest has been flagged by a court order to bring it into line with the requirement, under subsection 90ML(5), relating to those payments when a superannuation interest has been flagged by a superannuation agreement.

368. Currently, section 90MU requires the relevant superannuation fund trustee to notify the court which made the flagging order of the next occasion when a splittable payment becomes payable in respect of a superannuation interest it has flagged. Under subsection 90ML(5), the relevant fund trustee is required to notify the spouse parties in relation to splittable payments that become payable in respect of a superannuation interest which has been flagged by a superannuation agreement. Where a superannuation interest has been flagged by a court order, the court which made the order may no longer have current contact details for the spouse parties, which are more likely to be held by the fund.

369. Reflecting the requirement when a superannuation interest is flagged by a superannuation agreement, the amendment made by this item will, when the superannuation interest has been flagged by a court order, require the fund trustee to notify the spouse parties.

Items 47 and 48: Subsection 90MZB(8) (after paragraph (a) of the definition of *eligible person*), subsection 90MZB(8) (after paragraph (b) of the definition of *eligible person*)

370. Section 90MZB provides for procedures permitting an ‘eligible person’ to make an application to a superannuation fund trustee for information about a superannuation interest in the fund. An ‘eligible person’ is defined, under subsection 90MZB(8) to mean, in relation to a superannuation interest of a member of a superannuation fund, the member, his or her former spouse, or a person intending to enter into a superannuation agreement with the member.

371. These items amend subsection 90MZB(8) to include, as an ‘eligible person’, the legal personal representative of a member, or the spouse of a member, who has died.

372. Most of the information required, under Division 7.2 of the *Family Law (Superannuation) Regulations 2001*, to be provided by a fund trustee in response to an application, relates to the value of the superannuation interest. When property settlement negotiations have led to court proceedings, and one of the spouses then dies, the proceedings can be continued by or against the legal personal representative of the spouse who has died. While information about the value of the spouse’s superannuation interest will have been earlier obtained, updating valuation information will generally be required if the proceedings go to trial.

SCHEDULE 4 – OTHER MEASURES

Family Law Act 1975

Item 1: At the end of subsection 60I(8)

373. This item inserts a new paragraph in subsection 60I(8)(d) of the *Family Law Act 1975* to add an additional circumstance in which a family dispute resolution practitioner may give a certificate to a person which can be filed with an application to a court to hear an application for an order under Part VII of the Act as required under subsection 60I(7).

374. The additional certificate is required to cover the situation where a family dispute resolution practitioner becomes aware during the course of the family dispute resolution that it would be inappropriate to continue the family dispute resolution due to factors prescribed in the *Family Law Regulations 1984*. These are envisaged as including:

- the history of violence (if any) among the parties
- the likely safety of the parties
- the equality of the bargaining power among the parties
- the risk that a child may suffer abuse
- the emotional, psychological and physical health of the parties, and
- any other matter that the family dispute resolution practitioner considers relevant to the continuation of the family dispute resolution.

375. The certificate currently provided for in paragraph 60I(8)(aa) of the Act is insufficient for this purpose as it only enables the issue of a certificate on these grounds on the basis of the intake and assessment process that occurs prior to the conduct of family dispute resolution.

Proceeds of Crime Act 2002

Item 2: Paragraph 330(4)(ba)

376. This item makes a drafting correction to the opening words of paragraph 330(4)(ba) of the *Proceeds of Crime Act 2002*, to correct a grammatical error in the original version of that Act. The commencement provisions in the table set out in clause 2 of the Bill apply this amendment from the commencement of that Act, in accordance with drafting practice for rectifying technical errors of a statute law revision nature.