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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FEDERAL JUSTICE SYSTEM AMENDMENT (EFFICIENCY MEASURES)
BILL (NO. 1) 2008**

EXPLANATORY MEMORANDUM

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

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OUTLINE

This Bill amends various Acts in order to improve the efficient conduct of business in the federal courts and clarifies and expands the jurisdiction of the Federal Court of Australia under the *International Arbitration Act 1974*. It also responds to the decision of the Full Court of the Family Court of Australia in *Black v Black* [2008] FamCAFC 7, where the Court applied a strict compliance test in relation to certain technical requirements for binding financial agreements made under the *Family Law Act 1975*.

Schedule 1 to the Bill amends the *Federal Court of Australia Act 1976* to allow the Federal Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report. This will be useful in many cases, including where technical expertise is required and it is neither cost effective nor an appropriate use of a judge's time to gain the necessary in-depth expertise in a particular science or trade, or where detailed examination of accounts or other financial records is necessary to assess damages. Giving the Court the power to refer a matter out to a referee will provide the Court with greater flexibility, ensure efficient use of judicial resources and assist in the timely and efficient resolution of disputes for litigants.

To aid the Federal Court in efficient case management, Schedule 1 also amends the *Federal Court of Australia Act 1976* to allow a single Federal Court judge to make an interlocutory order in the original or appellate jurisdiction of the Court in a matter otherwise required to be heard and determined by a Full Court. This will allow the Court to more efficiently manage cases and avoid unnecessary delay for litigants.

Schedule 2 to the Bill amends the *International Arbitration Act 1974* to give the Federal Court concurrent jurisdiction with State and Territory Supreme Courts for matters arising under Parts III and IV of the Act (which adopt the UNCITRAL Model Law on International Commercial Arbitration 1985 and implement the *Convention on the Settlement of Investment Disputes Between States and Nationals of other States 1965*). The amendments also clarify the Federal Court's existing jurisdiction for matters arising under Part II of the Act (giving effect to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*). These amendments will assist in ensuring that the Federal Court is well equipped to operate as a regional hub for commercial litigation.

Schedule 3 to the Bill amends the *Federal Court of Australia Act 1976*, *Family Law Act 1975*, *Native Title Act 1993* and *Administrative Appeals Tribunal Act 1975* to remove the current restrictions on Chief Justices and Presidents acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*. The restrictions, which were introduced at a time when purchasing and building arrangements for federal courts and tribunals were the responsibility of the then Department of the Arts and Administrative Services, are no longer necessary and cause practical impediments to the efficient operation of the courts and tribunals. The Federal Magistrates Court which was established in 1999 is not subject to such a restriction. The Chief Justices

and Presidents will still be required to seek the Attorney-General's approval in order to enter into a contract of an amount exceeding the prescribed amount, which is currently \$1 million.

Schedule 4 to the Bill amends the *Public Order (Protection of Persons and Property) Act 1971* to allow an authorised, non-judicial officer of the Federal Court to make an order specifying that certain premises are 'court premises' for the purposes of the Act. The purpose is to ensure that the areas in which authorised officers are able to exercise powers under the Act in the interests of security—such as the power to remove a person from court premises—are readily identifiable to authorised officers and the public. This will be particularly useful when the Court is sitting 'on country' to hear native title matters. The Bill requires the authorised court official to give notice of a court premises order.

Schedule 5 to the Bill amends binding financial agreement and termination agreement provisions of the *Family Law Act 1975* to relax certain technical requirements that must be strictly satisfied for financial agreements and termination agreements to be binding. These amendments will respond to the concerns about the binding financial agreement provisions of the Act that have arisen following the decision of the Full Family Court in *Black v Black*. The Family Law Council has confirmed that amendments are required to restore confidence in the binding nature of these agreements.

FINANCIAL IMPACT STATEMENT

The proposed Bill will not have any significant financial impact.

NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. Clause 2 provides for the commencement of the Act.
3. Subclause 2(1) provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.
4. Items 1 and 2 of the table provide that clauses 1 to 3 of the Bill and Schedules 1, 2, 3 and 4 to the Bill will commence on the day on which this Act receives the Royal Assent.
5. Item 3 of the table provides that item 1 of Schedule 5 to the Bill will commence on the later of the start of the day that this Act receives the Royal Assent and immediately after the commencement of item 1 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.
6. Item 4 of the table provide that items 2 to 8 of Schedule 5 to the Bill will commence on the day after this Act receives the Royal Assent.
7. Item 5 of the table provides that Part 2 of Schedule 5 to the Bill will commence on the later of the start of the day that this Act receives the Royal Assent and immediately after the commencement of item 1 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.
8. The note at the end of the table explains that the table relates only to the provisions of the Act as originally passed by both Houses of the Parliament and assented to. The table will not be expanded to deal with provisions inserted in the Act after assent.
9. Subclause 2(2) provides that column 3 of the table contains additional information that is not part of the Act. It also clarifies that information in column 3 may be added or edited in any published version of the Act.

Clause 3: Schedule(s)

10. Clause 3 is a formal provision to ensure that the Schedules to the Bill have effect as specified in the Schedules.

SCHEDULE 1 – Federal Court powers

Federal Court of Australia Act 1976

Item 1: Section 4

11. This item inserts a definition of ‘referee’ for the purposes of new section 54A inserted by item 6 below. New section 54A provides that the Court may refer a proceeding, or one or more questions arising in a proceeding, to a referee for inquiry and report in accordance with the Rules of Court. This definition is intended to be broad.

Item 2: After paragraph 20(5)(a)

12. This item inserts new paragraph 20(5)(aa) into subsection 20(5) of the Act to allow a single Judge to make an interlocutory order in a matter coming before the Court as mentioned in subsection 20(2).

13. The general rule found in subsection 20(1) of the Act is that the original jurisdiction of the Court is to be exercised by a single Judge. Subsection 20(2) provides an exception to this general rule. It provides that where a matter coming before the Court is from a tribunal or authority (other than a court) constituted by a Judge of the Court or of another court created by the Parliament, or by members who include a Judge of the Court or of another court created by the Parliament, the jurisdiction of the Court is to be exercised by a Full Court. Subsections 20(3) and (5) qualify this requirement by allowing certain powers to be exercised by a single Judge in relation to such matters (eg joining and removing parties, giving summary judgment, giving directions about the conduct of the matter).

14. The amendment to subsection 20(5) is consistent with the existing qualifications in subsections 20(3) and (5) and will allow a single Judge to make interlocutory orders in relation to such matters.

15. This will reduce the potential for undue delay and facilitate the efficient conduct of proceedings by ensuring a Full Court is not required to be convened unnecessarily.

Item 3: Paragraph 20(5)(da)

16. This item is consequential upon item 2. It amends existing paragraph 20(5)(da) of the Act to allow a single Judge or Full Court to vary or set aside an interlocutory order made under new paragraph 20(5)(aa) inserted by item 2 above. This is consistent with the existing power of a single Judge or Full Court under paragraph 20(5)(da) to vary or set aside other types of orders made under subsection 20(5).

Item 4: After paragraph 25(2B)(aa)

17. This item inserts new paragraph 25(2B)(ab) into subsection 25(2B) of the Act to allow a single Judge to make an interlocutory order pending, or after, the determination of an appeal to the Court.

18. The general rule found in subsection 25(1) of the Act is that the appellate jurisdiction of the Court be exercised by a Full Court. Subsection 25(2B) is one of the qualifications to this rule. It provides that certain powers may also be exercised by a single Judge (eg joining or removing parties to an appeal, giving summary judgment, giving directions about the conduct of an appeal).

19. The issue of whether a single Judge has the power to make an interlocutory order pending the determination of an appeal to the Full Court arose in *Namu of 2002 v the Minister for Immigration & Multicultural Affairs* [2002] FCA 999. Specifying that a single Judge has the power to grant an interlocutory order in the exercise of the Court's appellate jurisdiction will put the matter beyond doubt and facilitate the efficient conduct of proceedings by ensuring a Full Court is not required to be convened unnecessarily.

20. The amendment is consistent with the amendment made by item 2 above which gives a single Judge the power to make an interlocutory order in the Court's original jurisdiction in a matter otherwise required to be heard and determined by a Full Court.

Item 5: Paragraph 25(2B)(bc)

21. This item is consequential upon item 4. It amends paragraph 25(2B)(bc) of the Act to allow a single Judge or Full Court to vary or set aside an interlocutory order that has been made under new paragraph 25(2B)(ab) inserted by item 4 above. This is consistent with the existing power of a single Judge or Full Court under paragraph 25(2B)(bc) to vary or set aside other types of orders made under subsection 25(2B).

Item 6: After section 54

22. This item inserts a new section 54A into the Act dealing with the referral of questions to a referee. A definition of 'referee' for the purposes of this section is inserted by item 1 above.

23. New subsection 54A(1) gives the Court power to refer matters to a referee in accordance with the Rules of Court. The Court may refer either a whole proceeding or specific questions arising in a proceeding. Item 7, below, gives the Court wide-ranging powers to make Rules of Court to develop flexible procedures for the Court's use of referees.

24. This will be useful in many cases, including where technical expertise is required and it is neither cost effective nor an appropriate use of a judge's time to gain the necessary in-depth expertise in a particular science or trade, or where detailed examination of accounts or other financial records is necessary to assess damages. It will also assist the Court in its management of complex native title matters. Courts in other jurisdictions possess and regularly use such a power to help them determine issues before them. Matters referred to a referee could be matters of fact or law or both.

25. New subsection 54A(2) provides that a referral under subsection 54A(1) may be made at any stage of the proceedings.

26. New subsection 54A(3) describes how the Court may deal with a report provided to it by a referee. The Court has the discretion to deal with a report as it thinks fit. It may adopt the report in whole or in part, vary the report, reject the report and make such orders as it thinks fit in respect of any proceeding or question referred to the referee. The Court retains complete discretion about how it deals with the report and any legal effect of the report.

27. Item 6 also inserts new section 54B which provides that a referee has, in inquiring or reporting on a proceeding or question referred under section 54A, the same protection and immunity as a Judge has in performing the functions of a Judge. This is appropriate given referees are appointed by the Court and perform tasks closely linked to the Court's own functions. The provision is consistent with the protection of mediators and arbitrators under section 53C of the Act.

Item 7: After subsection 59(2B)

28. This item inserts new subsection 59(2C) which sets out matters which the Rules of Court may make provision for in relation to referrals of proceedings or questions to a referee under new section 54A. The intention is to ensure the Court has the necessary rule-making power to develop flexible procedures for the Court's use of referees so as to enable it to manage cases in the most efficient and effective way possible.

29. The matters the Rules of Court may provide for are broad and cover the appointment of referees, procedures to be followed by a referee, participation of persons in an inquiry, fees payable to a referee, time limits to be observed by the parties and any other matters associated with an inquiry or report by a referee.

30. It is envisaged that the Rules of Court may, for example, provide that, subject to any direction by the Court, the referee may conduct the proceedings under the reference in such manner as the referee thinks fit and is not bound by rules of evidence. The intention is that this procedural flexibility will allow referees to quickly get to the core of technical issues and reduce cost and delay for litigants.

31. The matters listed in new subsection 59(2C) are not intended to limit subsections (2), (2A) and (2B) which set out other matters which the Rules of Court may make provision for or in relation to.

32. To allow effective use of referees by the Court, this item also inserts new subsection 59(2D) which states that the Rules of Court may empower the Court or a referee to require that evidence be given on oath or affirmation in an inquiry by a referee or empower a referee to administer an oath or affirmation. This subsection is not intended to limit the Court's rule-making power under subsection (2C).

Item 8: Application of amendments

33. The amendments made by Schedule 1 will apply to all matters, regardless of whether those matters commenced before, on or after the commencement of the Schedule. This is appropriate to ensure that the Court is able to utilise the provisions so as to more effectively manage cases as soon as possible.

SCHEDULE 2 – International arbitration

International Arbitration Act 1974

Item 1: Subsection 3(1) (definition of court)

34. This item amends the definition of court in subsection 3(1) of the *International Arbitration Act 1974* to clarify that the Federal Court has concurrent jurisdiction with State and Territory Supreme Courts to enforce foreign arbitral awards.

Item 2: After subsection 8(2)

35. Consistent with the amendment to the definition of court in subsection 3(1) of the *International Arbitration Act 1974*, this item inserts a new subsection 8(3) clarifying that a foreign award may, by leave of the Court, be enforced in the Federal Court as if the award had been made by the Court. The provision operates subject to Part II of the Act. The grounds when a court may refuse to enforce a foreign arbitral award under Part II are set out in section 8 of the Act.

Item 3: At the end of section 18

36. This item amends section 18 of the *International Arbitration Act 1974* to provide that the Federal Court, in addition to the State and Territory Supreme Courts, is specified as a court competent to perform the functions referred to in Article 6 of the *UNCITRAL Model Law on International Commercial Arbitration*, the English text of which is set out in Schedule 2 of the *International Arbitration Act 1974*. This amendment will enable the Court to perform functions relating to the appointment and challenge of arbitrators and termination of an arbitrator's mandate, the review of an arbitral tribunal's jurisdiction (at the request of a party), and the setting aside of an arbitral award.

Item 4: At the end of section 35

37. This item amends section 35 of the *International Arbitration Act 1974* to designate the Federal Court, in addition to the State and Territory Supreme Courts, as a court for the purposes of Article 54 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the Investment Convention), the English text of which is set out in Schedule 3 of the *International Arbitration Act 1974*. Section 33 of the Act, consistently with Article 53 of the Investment Convention, provides that an award granted under the ICSID Convention is not subject to any appeal or to any other remedy, otherwise than in accordance with the Investment Convention.

SCHEDULE 3 – Land acquisition

Administrative Appeals Tribunal Act 1975

Item 1: Subsection 24A(4)

38. This item repeals and replaces existing subsection 24A(4) of the *Administrative Appeals Tribunal Act 1975*. In doing so it removes existing paragraph 24A(4)(a) which prevents the President of the Administrative Appeals Tribunal from acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*.

39. This will allow the Tribunal to negotiate and execute leases on its own behalf. The existing requirement in paragraph 24A(4)(b) that the President must seek the Minister's approval to enter into a contract of an amount exceeding the prescribed amount (currently \$1 million) will remain.

40. The amendment removes what is a practical impediment to the efficient management and operation of the Tribunal while ensuring that the requirement for Ministerial approval for major purchases continues to apply. The item is consistent with items 2, 3 and 4 which make similar amendments in respect of other federal courts and tribunals.

Family Law Act 1975

Item 2: Subsection 38A(4)

41. This item repeals and replaces existing subsection 38A(4) of the *Family Law Act 1975*. In doing so it removes existing paragraph 38A(4)(a) which prevents the Chief Judge from acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*.

42. This will allow the Family Court to negotiate and execute leases on its own behalf. The existing requirement in paragraph 38A(4)(b) that the Chief Judge must seek the Attorney-General's approval to enter into a contract of an amount exceeding the prescribed amount (currently \$1 million) will remain.

43. The amendment removes what is a practical impediment to the efficient management and operation of the Court while ensuring that the requirement for the Attorney-General's approval for major purchases continues to apply. The item is consistent with items 1, 3 and 4 which make similar amendments in respect of other federal courts and tribunals.

Federal Court of Australia Act 1976

Item 3: Subsection 18A(4)

44. This item repeals and replaces existing subsection 18A(4) of the *Federal Court of Australia Act 1976*. In doing so it removes existing paragraph 18A(4)(a) which prevents the Chief Justice from acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*.

45. This will allow the Federal Court to negotiate and execute leases on its own behalf. The existing requirement in paragraph 18A(4)(b) that the Chief Justice must seek the Attorney-General's approval to enter into a contract of an amount exceeding the prescribed amount (currently \$1 million) will remain.

46. The amendment removes what is a practical impediment to the efficient management and operation of the Court while ensuring that the requirement for the Attorney-General's approval for major purchases continues to apply. The item is consistent with items 1, 2 and 4 which make similar amendments in respect of other federal courts and tribunals.

Native Title Act 1993

Item 4: Subsection 128(4)

47. This item repeals and replaces existing subsection 128(4) of the *Native Title Act 1993*. In doing so it removes existing paragraph 128(4)(a) which prevents the President of the National Native Title Tribunal from acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*.

48. This will allow the Tribunal to negotiate and execute leases on its own behalf. The existing requirement in paragraph 128(4)(b) that the President must seek the Minister's approval to enter into a contract of an amount exceeding the prescribed amount (currently \$1 million) will remain.

49. The amendment removes what is a practical impediment to the efficient management and operation of the Tribunal while ensuring that the requirement for Ministerial approval for major purchases continues to apply. The item is consistent with items 1, 2 and 3 which make similar amendments in respect of other federal courts and tribunals.

Item 5: Saving of regulations

50. This item is a technical item which is consequential upon items 1 to 4 above. The item preserves regulations which prescribe the maximum amount that the heads of courts and tribunals may agree to pay or receive on behalf of the Commonwealth without the approval of the relevant Minister.

51. The item is necessary because items 1 to 4 change the numbering of the relevant provisions in the principal Acts.

SCHEDULE 4 – Court premises

Public Order (Protection of Persons and Property) Act 1971

Item 1: Section 13A (definition of *court premises*)

52. This item amends the definition of 'court premises' in section 13A of the *Public Order (Protection of Persons and Property) Act 1971*. Currently the term is limited to

any court premises occupied or used in connection with the sittings, or any other operations, of the court. This item expands the definition in relation to the Federal Court to include premises in respect of which a ‘court premises order’ made under new section 13AA inserted by item 2, is in effect.

53. The purpose of this amendment is to allow areas apart from normal court rooms to be designated for a period as court premises. This will make sure it is clear where authorised court officers can exercise powers under the Act in the interests of court security. The amendment will be particularly useful for hearings ‘on country’ in native title matters.

Item 2: After section 13A

54. This item amends the Act to insert new section 13AA into Part IIA of the Act. Part IIA provides for the maintenance of public order in premises occupied by federal courts and tribunals. It gives authorised officers certain powers to deal with persons who are on ‘court premises’ if they believe it is necessary in the interests of security.

55. Subsection 13AA(1) provides that an authorised court official, defined by new subsection (8), may make a written order, called a ‘court premises order’ which specifies that certain premises are court premises for the purposes of the definition inserted by item 1 above.

56. Subsection 13AA(2) provides that an authorised court official may make a court premises order in respect of particular premises where the court official is satisfied that the premises are likely to be occupied or used in connection with sittings or other operations of the Federal Court. Subsections 13AA(1) and (2) provide certainty to court officials and members of the public as to where the powers under the Act might be exercised.

57. Paragraph 13AA(3)(a) requires that a court premises order must describe the premises to which it relates. It is intended that a court premises order could describe buildings other than the Court’s usual courthouses but also places other than buildings – such as where the Court is sitting on open land. Where the Court is sitting on open land, the premises could be described as an area within a certain radius of the Bench.

58. Paragraph 13AA(3)(b) provides that a court premises order has effect for the period specified in the order or until it is revoked.

59. Subsection 13AA(4) requires that the relevant court official must give notice of the court premises order to anyone likely to be directly affected. Subsection 13AA(5) sets out how this notice may be given. Subparagraph 13AA(5)(a)(i) requires that before the premises to which the order relates are occupied or used by the Federal Court, a copy of the order is to be posted in a prominent place in the vicinity of the premises. Subparagraph 13AA(5)(a)(ii) requires that if the premises are occupied or used for the purposes of a sitting or proceeding, an announcement must be made at the beginning of, or during, the sitting or proceeding describing the order and its effect.

60. Additionally, paragraph 13AA(5)(b) provides that if regulations are in force in relation to the giving of notice, the requirements prescribed by the regulations must also be complied with. Subsection 13AA(6) provides that the regulations may prescribe the form and content of the notice and the manner in which it is given.

61. The requirement that members of the public be notified that a court premises order has been made and as to the premises to which it applies is appropriate given that the powers conferred on authorised officers under Part IIA of the Act involve interference with the liberty of the individual and criminal sanctions may apply for non-compliance. The notice requirements are consistent with notice provisions in comparable areas of Commonwealth law such as trespass. Decisions to make court premises orders will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

62. Subsection 13AA(7) states that a court premises order is not a legislative instrument. This provision is included to avoid doubt, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

63. Subsection 13AA(8) defines ‘authorised court official’, for the purposes of the section, to mean the Registrar of the Federal Court, or a Federal Court officer authorised in writing by the Registrar of the Federal Court for the purposes of the section. It also defines ‘Federal Court’ as the Federal Court of Australia and ‘Federal Court officer’ as an officer within the meaning of subsection 18N(1) of the *Federal Court of Australia Act 1976* which sets out the officers who, in addition to the Registrar, are officers of the Court.

SCHEDULE 5 – Binding financial agreements

Part 1—Financial agreements

Family Law Act 1975

Item 1: Subsection 4(1) (after paragraph (a) of the definition of *spouse party*)

64. The definition of ‘spouse party’ in subsection 4(1) of the *Family Law Act 1975* clarifies that financial agreements under Part VIIIA of that Act between parties to a marriage can include another person or persons as a party to the agreement. This definition will be replaced by a more comprehensive definition of ‘spouse party’ for the purposes of Part VIIIA and Part VIIIAB financial agreements by item 18 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

65. This item inserts paragraph (aa) into definition of ‘spouse party’ in subsection 4(1) of the *Family Law Act 1975* to clarify that a termination agreement under Part VIIIA of the *Family Law Act 1975*, 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 covered by paragraph (a) of the definition of ‘spouse party’, which includes a party to the contemplated marriage

(section 90B), marriage (section 90C), or former marriage (section 90D) to which the agreement relates.

66. This item will commence on the later of the start of the day that this Bill receives the Royal Assent or immediately after the commencement of item 1 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

Items 2, 3 and 4

67. Section 90G of the Family Law Act currently provides that a financial agreement is binding on the parties to the agreement if, and only if:

- it is signed by all parties
- certain technical requirements are complied with, to ensure that the spouse parties entered into the agreement with independent legal advice, and that evidence of that advice was contained in a certificate annexed to the agreement
- 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 of the other parties.

68. Item 2 substitutes paragraphs 90G(1)(b) and 90G(1)(c) with a new paragraph 90G(1)(b) to relax the requirements in relation to evidence that the spouse parties to the agreement must provide in relation to the obtaining of independent legal advice when entering into a financial agreement. Spouse parties to a financial agreement will be required to obtain independent legal advice from a legal practitioner about the effect of the agreement on their rights, and the advantages and disadvantages, at the time that the advice was provided, of making the agreement. Spouse parties will also be required to obtain a signed statement from the legal practitioner giving the advice stating that the advice was given.

69. Item 4 repeals paragraph 90G(1)(e) to remove the requirement that the original agreement be given to one of the spouse parties and a copy be given to each of the other parties. Item 3 makes a minor technical amendment to paragraph 90G(1)(d) as a consequence of the amendment made by item 4 of this Schedule.

Items 5, 6 and 7

70. In a similar fashion to section 90G of the *Family Law Act 1975*, section 90J provides that a termination agreement is binding on the parties to the agreement if, and only if:

- it is signed by all parties
- certain technical requirements are complied with, to ensure that the spouse parties entered into the agreement with independent legal advice, and that evidence of that advice was contained in a certificate annexed to the agreement
- 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 of the other parties.

71. Item 5 substitutes paragraphs 90J(2)(b) and 90J(2)(c) with a new paragraph 90J(2)(b) to relax the requirements in relation to evidence that the spouse parties to the agreement must provide in relation to the obtaining of independent legal advice when entering into a termination agreement. Spouse parties to a termination agreement will be required to obtain independent legal advice from a legal practitioner about the effect of the agreement on their rights, and the advantages and disadvantages, at the time that the advice was provided, of making the agreement. Spouse parties will also be required to obtain a signed statement from the legal practitioner giving the advice stating that the advice was given.

72. Item 7 repeals paragraph 90J(2)(e) to remove the requirement that the original agreement be given to one of the spouse parties and a copy be given to each of the other parties. Item 6 makes a minor technical amendment to paragraph 90J(2)(d) as a consequence of the amendment made by item 7 of this Schedule.

Item 8: Application

73. Subitem (1) deals with the application of the amendments made by items 2 to 7 of this Schedule to financial and termination agreements that have already been made. The amendments will apply to agreements made on or after 27 December 2000 – the date of commencement of the *Family Law Amendment Act 2000* which inserted the financial agreement provisions into the *Family Law Act 1975*.

74. However, subitem (2) provides that the amendments made by items 2 to 7 of this Schedule will not apply to an agreement where a court has made an order setting aside the agreement.

Part 2—Financial matters relating to de facto relationships

Family Law Act 1975

Item 9: Subsection 4(1) (at the end of the definition of *spouse party*)

75. This item will insert paragraph (c) into the definition of ‘spouse party’ as amended by item 21 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. It will have the same effect as the amendment made by item 1 of this Schedule, except in relation to termination agreements made under Part VIIIAB of the *Family Law Act 1975*.

Items 10, 11 and 12

76. These items will amend section 90UJ, dealing with the requirements for a Part VIIIAB financial agreement. They will have the same effect to the amendments made by items 2, 3 and 4 of this Schedule, except in relation to financial agreements between de facto couples.

Item 13, 14 and 15

77. These items will amend section 90UL of the *Family Law Act 1975*, dealing with the termination of a Part VIIIAB financial agreement. They will have the same effect to the amendments made by items 5, 6 and 7 of this Schedule, except in relation to financial agreements between de facto couples.

Item 16: Subsection 90UM(5)

78. 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 those that apply under section 90K to set aside a financial agreement or a termination agreement between parties to a marriage.

79. 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. Section 90UE provides for the continued operation of written agreements made by de facto couples under the de facto financial law of a non-referring State covering property settlement or spouse maintenance matters if the couples later satisfy a geographical connection with a referring State or Territory.

80. This item substitutes subsection 90UM(5) with a new subsection, which will allow the court to set aside a Part VIIIAB financial agreement covered by section 90UE if the agreement was made in compliance with requirements similar to those set out in section 90UJ as amended by items 10, 11 and 12 of this Schedule. 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.

Item 17: Application

81. Subitem (1) deals with the application of the amendments made by items 10 to 15 of this Schedule to agreements made under sections 90UB, 90UC and 90UD of the *Family Law Act 1975* and Part VIIIAB termination agreements. The amendments will apply to these agreements made on or after the day of commencement of item 1 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

82. However, subitem (2) provides that the amendments made by items 10 to 15 of this Schedule will not apply to an agreement where a court has made an order setting aside the agreement.