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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ACCESS TO JUSTICE (FEDERAL JURISDICTION)
AMENDMENT BILL 2011**

EXPLANATORY MEMORANDUM

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

ACCESS TO JUSTICE (FEDERAL JURISDICTION) AMENDMENT BILL 2011

GENERAL OUTLINE

The Access to Justice (Federal Jurisdiction) Amendment Bill 2011 amends the *Administrative Appeals Tribunal Act 1975*, *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* and the *Judiciary Act 1903*. It also makes consequential amendments to the *Australian Crime Commission Act 2002*.

The Bill contains provisions to:

- enhance the Federal Court's powers concerning discovery, following the Australian Law Reform Commission's March 2011 report, *Managing Discovery: Discovery of Documents in Federal Courts* (Schedule 1)
- implement in all four federal courts the model Bill of the Standing Committee of Attorneys-General (SCAG) concerning suppression orders and non-publication orders (Schedule 2)
- implement in all four federal courts the SCAG model Bill concerning vexatious proceedings (Schedule 3)
- align the jurisdictional limit for matters heard by the Family Law Magistrates in Western Australia with that of Federal Magistrates Court (Schedule 4), and
- give the Administrative Appeals Tribunal more flexibility when dealing with the payment of fees (Schedule 5).

Schedule 1: Discovery

In its report, *Managing Discovery: Discovery of documents in federal courts*, tabled in Parliament on 25 May 2011, the Australian Law Reform Commission (ALRC) made 27 recommendations aimed at improving the functional operation of discovery laws, and so make civil justice more accessible and effective. The focus of the report is on the need to promote culture change to manage discovery more proactively. Most of the ALRC's recommendations were directed to the Federal Court. This Bill implements two of the Report's recommendations:

- Recommendation 9–2: The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that, without limiting the discretion of the Court or a judge in relation to costs, the Court or judge may make an order that:
 - (i) some or all of the estimated cost of discovery be paid for in advance by the party requesting discovery
 - (ii) a party requesting discovery give security for the payment of the cost of discovery, and
 - (iii) specifies the maximum cost that may be recovered for giving discovery or taking inspection.

- Recommendation 10–1: The *Federal Court of Australia Act 1976* (Cth) should be amended to provide expressly that the Court or a judge may order pre-trial oral examination about discovery.

These recommendations are designed to clarify and reinforce the Federal Court’s powers to limit the costs of discovery and encourage proportionality when dealing with discovery.

Schedule 2: Suppression and non-publication orders

The purpose of Schedule 2 of the Bill is to provide a more robust legislative framework for the exercise of the federal courts’ powers to make suppression orders (which prohibit or restrict the disclosure of information, by publication or otherwise) and non-publication orders (which prohibit or restrict the publication of information) in proceedings.

Schedule 2 of the Bill aims to ensure that suppression and non-publication orders are made only where necessary on the grounds set out in the Bill, taking into account the public interest in open justice, and in terms that clearly define their scope and timing.

A SCAG working group developed model provisions on suppression and non-publication orders, following public consultation process with stakeholders. In May 2010, the SCAG Ministers endorsed the model law and agreed to consider implementing it in their jurisdictions. New South Wales has implemented the model law through the *Court Suppression and Non-publication Orders Act 2010* (NSW). Schedule 2 of the Bill implements the SCAG model law in the High Court of Australia, Federal Court of Australia, Family Court of Australia and the Federal Magistrates Court and other courts exercising jurisdiction under the *Family Law Act 1975*.

The federal courts already have existing powers to make suppression and non-publication orders. However, the legislation supporting those powers is fragmented and varies in detail. Implementation of the Bill will ensure a more comprehensive legislative regime that clearly sets out the circumstances in which suppression orders and non-publication orders can be made, what information they can cover and what details those orders should contain. The Bill will also assist in achieving greater uniformity across Australia of the laws relating to suppression orders and non-publication orders, making it easier to understand in what circumstances such orders can be made and what they must contain.

Schedule 3: Vexatious proceedings

The purpose of Schedule 3 of the Bill is to provide a consistent and more comprehensive legislative framework for the federal courts to deal with vexatious proceedings brought by persons who have frequently instituted or conducted vexatious proceedings in Australian courts and tribunals, or who are acting in concert with others who have done so.

In 2003, SCAG endorsed a model law dealing with vexatious proceedings, based in part on the Western Australian *Vexatious Proceedings Restriction Act 2002*. The purpose of the model law is to harmonise laws dealing with vexatious proceedings across Australia. This is expected to discourage vexatious litigants from forum shopping, curtail vexatious litigants acting in concert with other vexatious litigants from other jurisdictions, and enable similar results consequences between jurisdictions from the making of vexatious proceedings orders.

Legislation based on the SCAG model law has been enacted in Queensland (*Vexatious Proceedings Act 2005*), the Northern Territory (*Vexatious Proceedings Act 2007*) and New South Wales (*Vexatious Proceedings Act 2008*).

Schedule 3 of the Bill will implement the SCAG vexatious proceedings model law at the Commonwealth level, in relation to proceedings in the Family Court of Australia, the Federal Court of Australia, the Federal Magistrates Court and the High Court and other courts exercising jurisdiction under the *Family Law Act 1975*.

The federal courts already have power to deal with vexatious proceedings. However, there is limited legislative authority to support the exercise of that power, with provisions mainly currently being contained under court rules, and varying in detail. Implementation of the Bill will ensure a more comprehensive legislative regime that clearly sets out the circumstances in which vexatious proceedings orders can be made and the kinds of orders that can be made, without affecting the courts' other powers. The Bill will also assist in achieving greater uniformity across Australia of the laws relating to vexatious proceedings.

Schedule 4: Transfer of proceedings from courts of summary jurisdiction

The Bill will remove the \$5 million monetary limit on family property jurisdiction exercisable by Family Law Magistrates in the Magistrates Court of Western Australia under section 46 *Family Law Act 1975*.

This will align the jurisdictional limit for matters heard by Family Law Magistrates in Western Australia with that of Federal Magistrates in the Federal Magistrates Court in other States and Territories, in relation to whom the jurisdictional limit was removed on 1 July 2006. This will provide the Family Court of Western Australia with greater flexibility to allocate work between judges and magistrates, and achieve national consistency.

Additional minor measures in the Bill will:

- ensure that the requirements in section 46 of the *Family Law Act 1975*, which provides that family law property proceedings over a certain amount that are instituted in a court of summary jurisdiction are to be transferred or removed to certain specified superior courts, apply to proceedings transferred to (as well as instituted in) such courts.
- allow certain family law property proceedings in a court of summary jurisdiction to be transferred or removed to a Family Court of a State under section 46 of the *Family Law Act 1975* (an option that is not currently available). This will provide consistency with section 69N of the *Family Law Act 1975*, which allows for the transfer of certain parenting proceedings from courts of summary jurisdiction to a Family Court of a State.
- ensure that the jurisdictional limits set out in section 69N of the *Family Law Act 1975* that apply to courts of summary jurisdiction (other than the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia) regarding parenting orders (other than child maintenance orders) apply to proceedings transferred to those courts, as well as proceedings instituted in those courts.

Schedule 5: Administrative Appeals Tribunal fees

The amendments in Schedule 5 of the Bill will change the way fees are paid in the Administrative Appeals Tribunal. Schedule 5 will provide that an application fee no longer has to be paid at the time an application to the Tribunal is lodged. Instead, Schedule 5 will provide that the Tribunal can dismiss an application if any relevant fee is not paid within a time period to be set out in regulations. This will allow fees to be paid later if the applicant cannot pay them immediately. Schedule 5 will also allow regulations to be made to prescribe fees payable in respect of Tribunal proceedings, and the waiver of such fees. (Currently,

regulations can only prescribe fees in respect of applications made to the Tribunal.) This will allow regulations to be made to impose fees on respondent Government agencies in certain situations.

Financial impact statement

The amendments in this Bill do not have any significant financial implications.

NOTES ON CLAUSES

Clause 1– Short title

1. This clause provides for the Act to be cited as the *Access to Justice (Federal Jurisdiction) Amendment Act 2011*.

Clause 2– Commencement

2. This clause provides that the Act will commence:
 - Schedule 1 (discovery) – the day after the Act receives Royal Assent
 - Schedule 2 (suppression and non-publication orders) – the day after the Act receives Royal Assent
 - Schedule 3 (vexatious proceedings) – the earlier of a date fixed by Proclamation or six months and one day after Royal Assent. (This is intended to give the federal courts time to amend their rules to ensure that they are consistent with the Act.)
 - Schedule 4 (transfer of proceedings from courts of summary jurisdiction) – the day after the Act receives Royal Assent
 - Schedule 5 (Administrative Appeals Tribunal fees) – the earlier of a date fixed by Proclamation or six months and one day after the Act receives Royal Assent. (This is intended to give sufficient time to amend affected provisions of the Administrative Appeals Tribunal Regulations 1976.)

Clause 3– Schedule(s)

3. This clause provides that the Schedules to the Bill will amend or repeal each Act set out in those Schedules as specified in those Schedules, and that any other item in a Schedule has effect as specified.

SCHEDULE 1 – DISCOVERY

Federal Court of Australia Act 1976

1. Item 1 inserts a note in section 4 of the *Federal Court of Australia Act 1976* (at the end of the definition of ‘proceeding’). Section 4 defines a proceeding as a ‘proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal’. The amendment in Item 1 clarifies that discovery is an example of an incidental proceeding under this definition. This amendment will assist the implementation of the amendment made in Item 2.

Item 2 – After paragraph 43(3)(g)

2. Item 2 inserts an additional paragraph 43(3)(h) at the end of subsection 43(3) of the *Federal Court of Australia Act 1976*. Section 43 provides the Federal Court and its judges with broad power to award costs in all proceedings (the definition of which is clarified by Item 1). Item 2 amends subsection 43(3) to clarify that the Court or Judge may, in discovery proceedings, order the party who requests discovery to pay in advance for some or all of the estimated costs of discovery (paragraph 43(3)(h)(i)), give security for the payment of the cost of discovery (paragraph 43(3)(h)(ii)), or make an order stating the maximum costs that may be recovered for discovery or taking inspection (paragraph 43(3)(h)(iii)).

3. The powers in paragraphs 43(3)(h)(i) and (ii) will reinforce the powers in Rule 20.25 of the Federal Court Rules 2011, which commenced on 1 August 2011.

Item 3 – At the end of section 46

4. Item 3 inserts a note at the end of section 46 of the *Federal Court of Australia Act 1976*. Section 46 provides that the Court or a Judge may make orders for examination of witnesses for the purposes of any proceeding, and authorise a person to take such testimony on oath or affirmation. The note inserted by Item 3 clarifies that the Court may make orders for the purposes of incidental proceedings, such as discovery. This is supported by the amendment in Item 1, which clarifies that discovery is an example of an incidental proceeding.

Item 4 – Application of amendments

5. Item 4 provides that the amendments of the *Federal Court of Australia Act 1976* will apply in relation to proceedings pending in the Federal Court immediately before the commencement of the amendments and that are instituted in, or transferred to, the Court on or after the commencement of the amendments.

SCHEDULE 2 – SUPPRESSION AND NON-PUBLICATION ORDERS

PART 1 – MAIN AMENDMENTS

Family Law Act 1975

Item 1 – Insertion of Part XIA – Suppression and non-publication orders

6. Item 1 adds a new Part XIA to the *Family Law Act 1975*. This implements the suppression and non-publication model Bill developed by the Standing Committee of Attorneys-General in respect of courts exercising jurisdiction under the *Family Law Act 1975*.

7. The Family Court already has power to make such orders under section 34 of the *Family Law Act 1975*, which provides that the Family Court has power to make orders of such kinds as it considers appropriate. The Federal Magistrates Court has a similar power under section 15 of the *Federal Magistrates Act 1999*, as well as an express power under section 61 of the *Federal Magistrates Act 1999* to make an order prohibiting or restricting the publication of certain evidence, names of parties or witnesses, information that is likely to enable the identification of parties or witnesses, and access to documents obtained under subpoena or through discovery. The Family Court and the Federal Magistrates Court also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241), which could include the making of suppression and non-publication orders (*Central Equity Ltd v Chua* [1999] FCA 1067).

8. Although the Family Court and the Federal Magistrates Court already have a range of powers to make suppression and non-publication orders, Part XIA sets out more comprehensively in one place when and how such powers can be exercised.

9. The amendments repeal section 61 of the *Federal Magistrates Act 1999* (Item 6), since similar provisions are contained in the amendments inserted by the new Part. While the two courts' more general powers under section 34 of the *Family Law Act 1975* and section 15 of the *Federal Magistrates Act 1999* will not be amended by this Bill, those powers should no longer be used to prohibit or restrict the publication or other disclosure of information in connection with proceedings (section 102PB). The courts' implied powers to regulate their own proceedings will be unaffected (section 102PA).

Division 1 – Preliminary

Section 102P – Definitions

10. Section 102P inserts definitions for this Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Family Law Act 1975*, as their application is limited to the Part.

11. The definition of information is deliberately broad. The term 'document' is defined in the *Acts Interpretation Act 1901*.

12. The definition of news publisher means a person engaged in the business of publishing news or a public or community broadcasting service engaged in publishing news through a public news medium. This definition will extend to news publishers who publish via the internet, as well as the more traditional print, television and radio news publishers (see definition of 'publish'). The definition of 'persons' under the *Acts Interpretation Act 1901* extends to bodies corporate as well as natural persons. This definition of 'news publisher' is

relevant to the provisions giving standing to news publishers to appear upon the hearing of an application for a suppression or non-publication order (paragraph 102PG(2)(d)) and allowing court officials to disclose the existence and contents of suppression and non-publication orders to news publishers (paragraph 102PJ(b)).

13. The definition of *non-publication order* assists in highlighting the difference between this kind of order and a *suppression order*. While a non-publication order prohibits the publication of information (see definition of ‘publish’), it does not prohibit disclosure of that information in another way. For example, a non-publication order might allow the news publishers or the general public access to ascertain information, but not allow them to publish it.

14. The definition of *party* is deliberately broad, and is inclusive, so that it does not operate to exclude other persons who may be defined as parties for the purposes of proceedings under the *Family Law Act 1975*. While criminal proceedings do not often take place under the *Family Law Act 1975*, this element of the definition may be relevant where an application for a suppression or non-publication order is made based on the grounds set out in paragraph 102PF(1)(d) (where the order is necessary to avoid causing undue distress or embarrassment to a party... in criminal proceedings involving an offence of a sexual nature). This is because evidence regarding such matters may be given in family law proceedings.

15. The definition of *publish* means dissemination or provision of access to the public or a section of the public by any means, with some examples being given of means of publication, including the internet.

16. The definition of *suppression order* assists in highlighting the difference between this kind of order and a *non-publication order*. A suppression order not only prohibits the publication of information but also prohibits other forms of disclosure, which could be narrower than publication (for example, disclosure to particular persons).

Section 102PA – Powers of a court not affected

17. Section 102PA clarifies that the powers that are provided for by this Part do not limit or affect other existing powers which a court has (apart from this Part) to regulate its proceedings or deal with a contempt of court. This includes a court’s implied powers. (The federal courts have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241).)

Section 102PB – Other laws not affected

18. Section 102PB clarifies that nothing in this Part affects the operation of provisions in other Acts that prohibit or restrict, or authorise a court to make an order prohibiting or restricting, the publication or other disclosure of information in connection with proceedings, so that any such restrictions in other Acts will continue to operate. (Under the *Acts Interpretation Act 1901*, ‘Act’ means an Act of the Commonwealth Parliament.) The provisions in this Part are intended to govern the granting of suppression and non-publication orders under this Act.

Section 102PC – Relationship with section 121

19. Section 102PC provides that this Part and section 121 of the *Family Law Act 1975* do not limit each other. It is intended that these provisions will operate in parallel.

20. Section 121 of the *Family Law Act 1975* makes it an offence (with certain specified exceptions) to publish information that identifies parties to the proceedings, persons related to or associated with parties or are otherwise allegedly concerned in the matter or witnesses in the proceedings. Subsection 121(9) then provides exceptions for certain types of publications, which include use in court proceedings, lawyers' disciplinary proceedings, and publishing court reports of proceedings (although in practice, both the Federal Magistrates Court and the Family Court already de-identify reports of proceedings before publication).

21. Part XIA of the *Family Law Act 1975* provides powers for a court exercising jurisdiction under the *Family Law Act 1975* to make orders restricting the publication or disclosure of similar kinds of information identifying parties and witnesses and other associated or related persons if certain conditions are met. Hence, a party or witness to proceedings under the *Family Law Act 1975* could apply for an order prohibiting the publication of information that would otherwise be publishable because it fell within one of the exceptions in subsection 121(9). In other words, an order under Part XIA could, in a particular case, extend the prohibitions on publishing identifying information set out in section 121.

22. Additionally, under the provisions of Part XIA, a suppression or non-publication order could also cover other kinds of information not relating to the identity of a party or witness to proceedings. This is because section 102PF sets out additional grounds for making suppression or non-publication orders, such as when the order is necessary to prevent prejudice to national security (paragraph 102PF(1)(b)).

23. It will be possible, therefore, for a court to make an order prohibiting the publication of certain information under Part XIA, even though the publication of that information is not an offence under section 121.

24. Section 121 will continue to apply to create an offence for the publication of identifying information that is not subject to one of the exceptions in subsection 121(9) of the *Family Law Act 1975*. Since orders will only be made under Part XIA that will further prohibit publication (not relax the requirements under section 121), these provisions can operate together without being inconsistent. As such, these provisions are intended to operate side-by-side and not interfere with each other.

Division 2 – Suppression and non-publication orders

Section 102PD – Safeguarding public interest in open justice

25. Section 102PD provides that a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice when deciding whether to make a suppression order or non-publication order. This reinforces that the principle of open justice is fundamentally important and should not be overridden lightly, as recently discussed by the High Court in *Hogan v Hinch* [2011] HCA 4 and *Hogan v Australian Crime Commission* [2010] HCA 21. In particular, his Honour Chief Justice French commented in *Hogan v Hinch* at paragraph 27 of the judgment that any suppression order powers conferred by statute should be construed so as to minimise their intrusion on the open justice principle. These provisions have been drafted bearing this in mind.

Section 102PE – Power to make orders

26. Section 102PE gives courts exercising jurisdiction in proceedings under the *Family Law Act 1975* power to make suppression and non-publication orders. Such orders will bind all members of the public, not just those present at the proceedings.

27. The section specifies the information that can be the subject of a suppression or non-publication order. It allows for information tending to reveal the identity of, or otherwise concerning, a party or witness (or anybody related to or otherwise associated with that person) to be the subject of an order. Such an order will also be able to be made in relation to evidence or information about evidence, information obtained through discovery, produced under a subpoena or lodged with or filed in the court.

28. This provision provides a court with flexibility to determine exactly what information should be subject to an order, and to what extent access to that information should be limited. For example, it allows a court to prevent the identification of, or publication of information about, certain parties or witnesses to proceedings but not others. By way of further example, it may be appropriate to order that certain documents on a court file or certain discovered documents could only be inspected by specified persons.

29. This provision will expressly allow the making of an order in respect of information obtained by the process of discovery, produced under a subpoena or lodged with or filed in court. This will ensure that information can be the subject of a suitable order even if it has not actually been formally produced as evidence before a court. As explained below, the Family Court and the Federal Magistrates Court already have power to make such orders.

30. Section 61 of the *Federal Magistrates Act 1999* presently gives that Court the power to make suppression and non-publication orders in relation to evidence or the names of parties or witnesses, as well as enabling such orders to also be made in relation to documents obtained through discovery or by subpoena. (This existing statutory power will be repealed and replaced by the amendments to be effected by this Bill.)

31. Section 34 of the *Family Law Act 1975* provides that the Family Court has power to make such orders as it considers appropriate. The Federal Magistrates Court has a similar power under section 15 of the *Federal Magistrates Act 1999*, as does the Federal Court under section 23 of the *Federal Court of Australia Act 1976*. The Federal Court has held that this section gives the Court power to make orders suppressing or restricting access to materials, including those discovered or provided on subpoena where those materials are not yet formal evidence before the Court (*SRD v Australian Securities Commission* (1994) 52 FCR 187 at 190; *Commissioner of Taxation v H* (2010) 268 ALR 101 at 105).

32. The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241). The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067).

33. Hence, although there is no expressly conferred power under the *Family Law Act 1975* to grant suppression or non-publication orders, the Family Court already has the power to do so under the broad powers conferred by section 23 of the *Family Law Act 1975*, as well as under its implied powers. The Federal Magistrates Court similarly already has implied powers to grant suppression or non-publication orders, as well as powers under sections 15 and 61 of the *Federal Magistrates Act 1999*.

34. Although the Family Court and the Federal Magistrates Court already have power to make suppression and non-publication orders in family law proceedings, section 102PE will provide a clearer legislative framework for what kind of information can be covered by such orders.

35. Subsection 102PE(2) also provides that a court may make such orders as it think appropriate to give an effect to an order under subsection 102PE(1). This subsection will, for example, give courts the clear power to make a 'take down' order. This is an order directing a publisher to remove certain information the subject of the suppression or non-publication order, and could, for example, be directed to website publishers or individuals who had posted certain content on the internet.

Section 102PF – Grounds for making an order

36. Section 102PF provides that a court can only make suppression or non-publication orders if one of the grounds set out in that section is satisfied. These grounds are that:

- a) the order is necessary to prevent prejudice to the proper administration of justice
- b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security
- c) the order is necessary to protect the safety of any person
- d) the order is necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)

37. Section 50 of the *Federal Court of Australia Act 1976* currently enables suppression or non-publication orders to be made where such an order is necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. The High Court has recently stressed in *Hogan v Australian Crime Commission* [2010] HCA 21 that the test that such an order must be 'necessary' has a high threshold, so that it is insufficient if the making of a suppression order is convenient, reasonable or sensible – it must be necessary. The High Court has also indicated that, if an application is subsequently made to vacate the order, it should be vacated unless the continuation of the order remains necessary under the relevant statutory test.

38. The various grounds that can found a suppression or non-publication order under section 102PF all include the condition that such an order must be 'necessary', and should be read in light of the current jurisprudence about what that means in the context of such orders being made. This reinforces again that such orders cannot be made lightly, bearing in mind the interest in open justice (as recognised by section 102PD).

Section 102PG – Procedure for making an order

39. Section 102PG establishes the procedures for making suppression and non-publication orders. Subsection 102PG(1) provides that such an order may be made on the court's own initiative or if a party or another person applies for an order whom the court considers has sufficient interest in the making of the order.

40. Subsection 102PG(2) lists the people who are entitled to appear and be heard when an application for such an order is being considered by the court, being the applicant for the order, a party to the proceedings, the Government or agency of the Commonwealth or a State

or Territory, a news publisher (as defined in section 102P), or any other person who the court considers has a sufficient interest in whether the order is made or not.

41. Subsection 102PG(3) allows such orders to be made at any time during proceedings or after proceedings have concluded. This acknowledges that circumstances might change during or after proceedings that might warrant a suppression or non-publication order being made at that time.

42. Subsection 102PG(4) allows a suppression or a non-publication order to be made subject to such exceptions and conditions as the court thinks fit and specifies in the order. This encourages the court to carefully consider the breadth of the order, and only make the order as wide as it needs to be in the circumstances, as well as requiring the court to fully set out these terms in the order.

43. Subsection 102PG(5) requires the court to specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made. Once again, this requires a court to limit the breadth of the order, covering only what is required to achieve its purpose, bearing in mind the principle of open justice.

Section 102PH – Interim orders

44. Subsection 102PH(1) allows for the making of interim suppression or non-publication orders without requiring a court to assess the merits of the substantive application, pending the substantive application being determined. Once an interim order has been made, subsection 102PH(2) will then require the court to determine the substantive application as a matter of urgency.

45. This section is intended to allow a court to make orders for an interim period in urgent cases until the court has had an opportunity to assess the merits of the substantive application. It is not intended that interim orders remain in place for long periods of time.

Section 102PI – Duration of orders

46. The purpose of section 102PI is to ensure that courts consider, and clearly specify, how long it is appropriate for orders to stay in force, so that orders are not made for durations longer than necessary to achieve their purpose. This is intended to reinforce the principle that suppression and non-publication orders should only be as broad-reaching as is necessary to achieve their aim, consistent with the principle of open justice.

47. Subsection 102PI(1) provides that a suppression or non-publication order operates for the period decided by the court and specified in the order.

48. Subsection 102PI(2) requires a court to ensure that an order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

49. Subsection 102PI(3) allows for the duration of the order to be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

50. In this respect, in *Hogan v Australian Crime Commission* [2010] HCA 21, the High Court noted at paragraph 29 of the judgment that the power to make a suppression order is interlocutory in nature, and that the power to make interlocutory orders includes the power to later vary or vacate that order if there is a change of facts or circumstances that warrants that course of action. While the model bill of the Standing Committee of Attorneys-General on suppression and non-publication orders includes provisions concerning the review and appeal of orders, these provisions have not been included in this Bill. This is because the courts'

usual powers and legislative provisions concerning the variation and vacation of, and appeal from, orders will apply, and there is no need to have a separate legislative regime regarding this for suppression and non-publication orders.

Section 102PJ – Exception for court officials

51. Section 102PJ provides that a suppression order does not prevent a person from disclosing information provided that the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity, either in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or in compliance with any procedure adopted by the court for informing a news publisher of the existence and content of a suppression order or non-publication order made by a court.

52. This provision will ensure that court officials can undertake certain specified duties without infringing a suppression or non-publication order. In particular, court officials must be able to notify news publishers that suppression or non-publication orders have been made so that news publishers can avoid breaching such orders.

Section 102PK – Contravention of order

53. Subsection 102PK(1) provides that a person commits an offence if that person does an act or omits to do an act which contravenes an order made by a court under section 102PE (in order words, for breaching a non-publication or suppression order). It provides for a maximum penalty of 12 months imprisonment, 60 penalty units or both.

54. If a person breaches a non-publication or suppression order, subsections 102PK(2), (3) and (4) provide that that person can either be punished for committing an offence under subsection 102PK(1) or for contempt of court, but not for both. This is to ensure that a person is not subject to double jeopardy (i.e. being punished twice for the same conduct).

55. Subsection 102PK(5) provides that Part XIII A of the *Family Law Act 1975* does not apply in relation to a contravention of suppression and non-publication orders made under section 102PE. Part XIII A provides a separate regime for sanctions for failing to comply with orders made under the *Family Law Act 1975* (other than those that involve children). Excluding Part XIII A ensures that only the sanctions provided for in this section will apply to such offences, and that offences for non-compliance with suppression and non-publication orders are dealt with consistently across Commonwealth court legislation.

Federal Court of Australia Act 1976

Item 2 – Subsection 23HC(1) (note)

56. This item updates the note under subsection 23HC(1) of the *Federal Court of Australia Act 1976* so that it refers to the new Part VAA (dealing with suppression and non-publication orders) instead of section 50 (which is being repealed by this Bill).

Item 3 – At the end of subsection 24(1D)

57. Item 3 adds additional paragraphs (c) and (d) to subsection 24(1D) of the *Federal Court of Australia Act 1976* to make it clear that suppression and non-publication orders made by the Federal Court under section 37AF or the Federal Magistrates Court under section 88F of the *Federal Magistrates Act 1999* are interlocutory in nature and therefore require leave to appeal.

Item 4 – Insertion of Part VAA – Suppression and non-publication orders

Division 1 – Preliminary

58. Item 4 adds a new Part VAA to the *Federal Court of Australia Act 1976*, implementing the suppression and non-publication model Bill developed by the Standing Committee of Attorneys-General.

59. Section 50 of the *Federal Court of Australia Act 1976* currently enables the Federal Court to make an order forbidding or suppressing the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

60. Additionally, the Federal Court has power under section 23 of the *Federal Court of Australia Act 1976* to make orders suppressing or restricting access to materials, including those discovered or provided on subpoena where those materials are not yet formal evidence before the court (*SRD v Australian Securities Commission* (1994) 52 FCR 187 at 190; *Commissioner of Taxation v H* (2010) 268 ALR 101 at 105).

61. The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241). The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067).

62. Hence, although the Federal Court already has a range of powers to make suppression and non-publication orders, Part VAA sets out more explicitly in one place when and how such powers can be exercised. These amendments repeal section 50 of the *Federal Court Act 1976* (item 5), since similar provisions are contained in the amendments inserted by the Part. While the Court's more general powers under section 23 of the *Federal Court of Australia Act 1976* will not be amended by this Bill, those more general powers will no longer be used to prohibit or restrict the publication or other disclosure of information in connection with proceedings (section 37AC). The Court's implied powers to regulate its own proceedings are unaffected (section 37AB).

Section 37AA - Definitions

63. Section 37AA inserts definitions for this Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Federal Court of Australia Act 1976*, as their application is limited to the Part.

64. The definition of information is deliberately broad. The term 'document' is defined in the *Acts Interpretation Act 1901*.

65. The definition of *news publisher* means persons engaged in the business of publishing news or a public or community broadcasting service engaged in publishing news through a public news medium. This definition will extend to news publishers who publish via the internet, as well as the more traditional print, television and radio news publishers (see definition of 'publish'). The definition of 'persons' under the *Acts Interpretation Act 1901* extends to bodies corporate as well as natural persons. This definition of 'news publisher' is relevant to the provisions giving standing to news publishers to appear upon the hearing of an application for a suppression or non-publication order (paragraph 37AH(2)(d)) and allowing court officials to disclose the existence and contents of suppression and non-publication orders to news publishers (paragraph 37AK(b)).

66. The definition of *non-publication order* assists in highlighting the difference between this kind of order and a *suppression order*. While a non-publication order prohibits the publication of information (see definition of ‘publish’), it does not prohibit disclosure of that information in another way. For example, a non-publication order might allow the news publishers or the general public access to certain information, but not allow them to publish it.

67. The definition of party is deliberately broad, and is inclusive, so that it does not operate to exclude other persons who may be defined as parties for the purposes of proceedings under the Act. While criminal proceedings do not often take place in the Federal Court, this element of the definition may be relevant where an application for a suppression or non-publication order is made based on the grounds set out in paragraph 37AG(1)(d) (where the order is necessary to avoid causing undue distress or embarrassment to a party... in criminal proceedings involving an offence of a sexual nature). This is because evidence of such matters may be given in Federal Court proceedings.

68. The definition of publish means dissemination or provision of access to the public or a section of the public by any means, with some examples being given of means of publication, including the internet.

69. The definition of *suppression order* assists in highlighting the difference between this kind of order and a *non-publication order*. A suppression order not only prohibits the publication of information but also prohibits other forms of disclosure, which could be narrower than publication (for example, disclosure to particular persons).

Section 37AB – Powers of the Court not affected

70. Section 37AB clarifies that the powers that are provided for by this Part do not limit or affect other existing powers which the Federal Court has (apart from this Part) to regulate its proceedings or deal with a contempt of court. This includes the Court’s implied powers (the federal courts have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241).)

Section 37AC – Other laws not affected

71. Section 37AC clarifies that nothing in this Part affects the operation of provisions in other Acts that prohibit or restrict, or authorise the Federal Court to make an order prohibiting or restricting, the publication or other disclosure of information in connection with proceedings, so that any such restrictions in other Acts will continue to operate. (Under the *Acts Interpretation Act 1901*, ‘Act’ means an Act of the Commonwealth Parliament.) The provisions in this Part are intended to govern the granting of suppression and non-publication orders under this Act.

Section 37AD – No limit on section 23HC

72. Section 37AD makes clear that Part VAA does not limit section 23HC (which deals with protecting witnesses in criminal proceedings in the Federal Court).

Division 2 – Suppression and non-publication orders

Section 37AE – Safeguarding public interest in open justice

73. Section 37AE provides that the Federal Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice when deciding whether to make a suppression order or non-publication order. This reinforces

that the principle of open justice is fundamentally important and should not be overridden lightly, as recently discussed by the High Court in *Hogan v Hinch* [2011] HCA 4 and *Hogan v Australian Crime Commission* [2010] HCA 21. In particular, his Honour Chief Justice French commented in *Hogan v Hinch* at paragraph 27 of the judgment that any suppression order powers conferred by statute should be construed so as to minimise their intrusion on the open justice principle. These provisions have been drafted bearing this in mind.

Section 37AF – Power to make orders

74. Section 37AF gives the Federal Court power to make suppression and non-publication orders. Such orders will bind all members of the public, not just those present at the proceedings.

75. The section specifies the information which can be the subject of a suppression or non-publication order. It allows for information tending to reveal the identity of, or otherwise concerning, a party or witness (or anybody related to or otherwise associated with that person) to be the subject of an order. Such an order will also be able to be made in relation to evidence or information about evidence, information obtained through discovery, produced under a subpoena or lodged with or filed in the court.

76. This provision will provide the Federal Court with flexibility to determine exactly what information should be subject to an order, and to what extent access to that information should be limited. For example, it allows the Court to prevent the identification of, or publication of information about, certain parties or witnesses to proceedings but not others. By way of further example, it may be appropriate to order that certain documents on a Court file or certain discovered documents could only be inspected by specified persons.

77. This provision expressly allows the making of an order in respect of information obtained by the process of discovery, produced under a subpoena or lodged with or filed in Court. This will ensure that information can be the subject of a suitable order even if it has not actually been formally produced as evidence before the Court. As explained below, the Federal Court already has power to make such orders.

78. Section 50 of the *Federal Court of Australia Act 1976* currently gives that Court the power to make suppression and non-publication orders in relation to evidence or the names of parties or witnesses. (This existing statutory power is being repealed and replaced by the amendments to be effected by this Bill.)

79. Section 23 of the *Federal Court of Australia Act 1976* provides that the Federal Court has power to make such orders as it considers appropriate. The Federal Court has held that this section gives the Court power to make orders suppressing or restricting access to materials, including those discovered or provided on subpoena where those materials are not yet formal evidence before the Court (*SRD v Australian Securities Commission* (1994) 52 FCR 187 at 190; *Commissioner of Taxation v H* (2010) 268 ALR 101 at 105).

80. The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241). The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067).

81. Although the Federal Court already currently has power to make suppression and non-publication orders in family law proceedings, section 37AF provides a clearer legislative framework for what kind of information can be covered by such orders.

82. Subsection 37AF(2) also provides that the Court may make such orders as it think appropriate to give an effect to an order under subsection 37AF(1). This subsection, for example, gives the Court the clear power to make a ‘take down’ order. This is an order directing a publisher to remove certain information the subject of the suppression or non-publication order, and could, for example, be directed to website publishers or individuals who had posted certain content on the internet.

Section 37AG – Grounds for making an order

83. Section 37AG provides that the Federal Court can only make suppression or non-publication orders if one of the grounds set out in that section is satisfied. These grounds are that:

- a) the order is necessary to prevent prejudice to the proper administration of justice
- b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security
- c) the order is necessary to protect the safety of any person
- d) the order is necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)

84. Section 50 of the *Federal Court of Australia Act 1976* currently enables suppression or non-publication orders to be made where such an order is necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. The High Court has recently stressed in *Hogan v Australian Crime Commission* [2010] HCA 21 that the test that such an order must be ‘necessary’ has a high threshold so that it is insufficient if the making of a suppression order is convenient, reasonable or sensible – it must be necessary. The High Court has also indicated that, if an application is subsequently made to vacate the order, it should be vacated unless the continuation of the order remains necessary under the relevant statutory test.

85. The various grounds that can found a suppression or non-publication order under section 37AG all include the condition that such an order must be ‘necessary’, and should be read in light of the current jurisprudence about what that means in the context of such orders being made. This reinforces again that such orders cannot be made lightly, bearing in mind the interest in open justice (as recognised by section 37AE).

Section 37AH – Procedure for making an order

86. Section 37AH establishes the procedures for making suppression and non-publication orders. Subsection 37AH(1) provides that such an order may be made on the Court’s own initiative or if a party or another person applies for an order whom the Court considers has sufficient interest in the making of the order.

87. Subsection 37AH(2) lists the people who are entitled to appear and be heard when an application for such an order is being considered by the Court, being the applicant for the order, a party to the proceedings, the Government or agency of the Commonwealth or a State or Territory, a news publisher (as defined in section 37AA), or any other person who the Court considers has a sufficient interest in whether the order is made or not.

88. Subsection 37AH(3) allows such orders to be made at any time during proceedings or after proceedings have concluded. This acknowledges that circumstances might change

during or after proceedings that might warrant a suppression or non-publication order being made at that time.

89. Subsection 37AH(4) allows a suppression or a non-publication order to be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order. This encourages the Court to carefully consider the breadth of the order, and only make the order as wide as it needs to be in the circumstances, as well as requiring the Court to fully set out these terms in the order.

90. Subsection 37AH(5) requires the Court to specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made. This provision requires the Court to limit the breadth of the order, covering only what is required to achieve its purpose, bearing in mind the principle of open justice.

Section 37AI – Interim orders

91. Subsection 37AI(1) allows for the making of interim suppression or non-publication orders without requiring the Court to assess the merits of the substantive application, pending the substantive application being determined. Once an interim order had been made, subsection 37AI(2) will then require the Court to determine the substantive application as a matter of urgency.

92. This section is intended to allow the Court to make an order for an interim period in urgent cases until the Court has had an opportunity to assess the merits of the substantive application. It is not intended that interim orders remain in place for long periods of time.

Section 37AJ – Duration of orders

93. The purpose of section 37AJ is to ensure that the Court considers, and clearly specifies, how long it is appropriate for orders to stay in force, so that orders are not made for durations longer than necessary to achieve their purpose. This is intended to reinforce the principle that suppression and non-publication orders should only be as broad-reaching as is necessary to achieve their aim, consistent with the principles of open justice.

94. Subsection 37AJ(1) provides that a suppression or non-publication order operates for the period decided by the Court and specified in the order.

95. Subsection 37AJ(2) requires the Court to ensure that an order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

96. Subsection 37AJ(3) allows for the duration of the order to be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

97. In this respect, in *Hogan v Australian Crime Commission* [2010] HCA 21, the High Court noted at paragraph 29 of the judgment that the power to make a suppression order is interlocutory in nature, and that the power to make interlocutory orders includes the power to later vary or vacate that order if there is a change of facts or circumstances that warrants that course of action. While the Standing Committee of Attorneys-General model bill on suppression and non-publication orders includes provisions concerning the review and appeal of orders, these have not been included in this Bill. That is because the Federal Court's usual powers and legislative provisions concerning the variation and vacation of, and appeal from, orders will apply, and there is no need to have a separate legislative regime regarding this for suppression and non-publication orders.

Section 37AK – Exception for court officials

98. Section 37AK provides that a suppression order does not prevent a person from disclosing information provided that the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity, either in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or in compliance with any procedure adopted by the Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

99. This provision ensures that Court officials can undertake certain specified duties without infringing a suppression or non-publication order. In particular, Court officials must be able to notify news publishers that suppression or non-publication orders have been made so that news publishers can avoid breaching such orders.

Section 37AL – Contravention of order

100. Subsection 37AL(1) provides that a person commits an offence if that person does an act or omits to do an act which contravenes an order made by the Court under section 37AF (in other words, for breaching a non-publication or suppression order). It provides for a maximum penalty of 12 months imprisonment, 60 penalty units or both.

101. If a person breaches a non-publication or suppression order, subsections 37AL(2), (3) and (4) provide that that person can either be punished for committing an offence under subsection 37AL(1) or for contempt of court, but not for both. This is to ensure that a person is not subject to double jeopardy (i.e. being punished twice for the same conduct).

Item 5 – Section 50

102. Item 5 of the Bill repeals section 50 of the *Federal Court of Australia Act 1976*. This section will no longer be necessary, since a more comprehensive regime for making suppression and non-publication orders will be set out in Part VAA of the *Federal Court of Australia Act 1976*.

Federal Magistrates Act 1999

Item 6 – Section 61

103. Item 6 of the Bill repeals section 61 of the *Federal Magistrates Act 1999*. This section will no longer be necessary, since a more comprehensive regime for making suppression and non-publication orders will be set out in Part 6A of the *Federal Magistrates Act 1999*.

Item 7 – Insertion of Part 6A – Suppression and non-publication orders

104. Item 7 adds a new Part 6A to the *Federal Magistrates Act 1999*, implementing the model Bill of the Standing Committee of Attorneys-General on suppression and non-publication model orders.

105. Section 61 of the *Federal Magistrates Act 1999* currently enables the Federal Magistrates Court to make an order forbidding or restricting the publication of particular evidence, the name of a party or witness, or access to documents obtained through discovery or by subpoena, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

106. The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central*

Authority (2000) 201 CLR 226 at 240-241). The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067).

107. Hence, although the Federal Magistrates Court already has a range of powers to make suppression and non-publication orders, Part 6A will set out more comprehensively in one place when and how such powers can be exercised.

108. The amendments repeal section 61 of the *Federal Magistrates Act 1999* (item 6), since similar provisions are contained in the amendments inserted by the Part. While the Court's more general powers under section 15 of the *Federal Magistrates Act 1999* will not be amended by this Bill, those more general powers will no longer be used to prohibit or restrict the publication or other disclosure of information in connection with proceedings (section 88C). The Court's implied powers to regulate its own proceedings will be unaffected (section 88B).

Division 1 – Preliminary

Section 88A - Definitions

109. Section 88A inserts definitions for this Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Federal Magistrates Act 1999*, as their application is limited to the Part.

110. The definition of information is deliberately broad. The term 'document' is defined in *Acts Interpretation Act 1901*.

111. The definition of news publisher means persons engaged in the business of publishing news or a public or community broadcasting service engaged in publishing news through a public news medium. This definition will extend to news publishers who publish via the internet, as well as the more traditional print, television and radio news publishers (see definition of 'publish'). The definition of 'persons' under the *Acts Interpretation Act 1901* extends to bodies corporate as well as natural persons. This definition of 'news publisher' is relevant to the provisions giving standing to news publishers to appear upon the hearing of an application for a suppression or non-publication order (paragraph 88H(2)(d)) and allowing court officials to disclose the existence and contents of suppression and non-publication orders to news publishers (paragraph 88L(b)).

112. The definition of *non-publication order* assists in highlighting the difference between this kind of order and a *suppression order*. While a non-publication order prohibits the publication of information (see definition of 'publish'), it does not prohibit disclosure of that information in another way. For example, a non-publication order might allow the news publishers or the general public access to certain information, but not allow them to publish it.

113. The definition of *party* is deliberately broad, and is inclusive, so that it does not operate to exclude other persons who may be defined as parties for the purposes of proceedings under the Act. While criminal proceedings do not usually place in the Federal Magistrates Court, this element of the definition may be relevant where an application for a suppression or non-publication order is made based on the grounds set out in paragraph 88G(1)(d) (where the order is necessary to avoid causing undue distress or embarrassment to a party... in criminal proceedings involving an offence of a sexual nature). This is because evidence of such matters may be given in Federal Magistrates Court proceedings.

114. The definition of *publish* means dissemination or provision of access to the public or a section of the public by any means, with some examples being given of means of publication, including the internet.

115. The definition of *suppression order* assists in highlighting the difference between this kind of order and a *non-publication order*. A suppression order not only prohibits the publication of information but also prohibits other forms of disclosure, which could be narrower than publication (for example, disclosure to particular persons).

Section 88B – Powers of Federal Magistrates Court not affected

116. Section 88B clarifies that the powers that are provided for by this Part do not limit or affect other existing powers which the Federal Magistrates Court has (apart from this Part) to regulate its proceedings or deal with a contempt of court. This includes the Court's implied powers (the federal courts have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241).)

Section 88C – Other laws not affected

117. Section 88C clarifies that nothing in this Part affects the operation of provisions in other Acts that prohibit or restrict, or authorise the Federal Magistrates Court to make an order prohibiting or restricting, the publication or other disclosure of information in connection with proceedings, so that any such restrictions in other Acts will continue to operate. (Under the *Acts Interpretation Act 1901*, 'Act' means an Act of the Commonwealth Parliament.) The provisions in this Part are intended to govern the granting of suppression and non-publication orders under this Act.

Section 88D – This Part does not apply to proceedings under the Family Law Act 1975

118. Section 88D provides that Part 6A does not apply to proceedings in the Federal Magistrates Court under the *Family Law Act 1975*. Instead, new Part XIA of the *Family Law Act 1975* will apply to the making of suppression and non-publication orders in the Federal Magistrates Court when it exercises jurisdiction under the *Family Law Act 1975*.

Division 2 – Suppression and non-publication orders

Section 88E – Safeguarding public interest in open justice

119. Section 88E provides that the Federal Magistrates Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice when deciding whether to make a suppression order or non-publication order. This reinforces that the principle of open justice is fundamentally important and should not be overridden lightly, as recently discussed by the High Court in *Hogan v Hinch* [2011] HCA 4 and *Hogan v Australian Crime Commission* [2010] HCA 21. In particular, his Honour Chief Justice French commented in *Hogan v Hinch* at paragraph 27 of the judgment that any suppression order powers conferred by statute should be construed so as to minimise their intrusion on the open justice principle. These provisions have been drafted bearing this in mind.

Section 88F – Power to make orders

120. Section 88F gives the Federal Magistrates Court power to make suppression and non-publication orders. Such orders will bind all members of the public, not just those present at the proceedings.

121. The section specifies the information which can be the subject of a suppression or non-publication order. It allows for information tending to reveal the identity of, or otherwise concerning, a party or witness (or anybody related to or otherwise associated with that person) to be the subject of an order. Such an order will also be able to be made in relation to evidence or information about evidence, information obtained through discovery, produced under a subpoena or lodged with or filed in the court.

122. This provision will provide the Federal Magistrates Court with flexibility to determine exactly what information should be subject to an order, and to what extent access to that information should be limited. For example, it allows the Court to prevent the identification of, or publication of information about, certain parties or witnesses to proceedings but not others. By way of further example, it may be appropriate to order that certain documents on a Court file or certain discovered documents could only be inspected by specified persons.

123. This provision will expressly allow the making of an order in respect of information obtained by the process of discovery, produced under a subpoena or lodged with or filed in court. This will ensure that information can be the subject of a suitable order even if it has not actually been formally produced as evidence before the Court. As explained below, the Federal Magistrates Court already has power to make such orders.

124. Section 61 of the *Federal Magistrates Act 1999* presently gives the Court the power to make suppression and non-publication orders in relation to evidence or the names of parties or witnesses, as well as enabling such orders to also be made in relation to documents obtained through discovery or by subpoena. (This existing statutory power is being repealed and replaced by the amendments to be effected by this Bill.)

125. Section 15 of the *Federal Magistrates Act 1999* provides that the Federal Magistrates Court has power to make such orders as it considers appropriate. The Federal Court has a similar power under section 23 of the *Federal Court of Australia Act 1976*, which the Federal Court has held gives that Court power to make orders suppressing or restricting access to materials, including those discovered or provided on subpoena where those materials are not yet formal evidence before the Court (*SRD v Australian Securities Commission* (1994) 52 FCR 187 at 190; *Commissioner of Taxation v H* (2010) 268 ALR 101 at 105).

126. The federal courts also have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241). The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court (*Central Equity Ltd v Chua* [1999] FCA 1067). By analogy, this could also be said for the Federal Magistrates Court.

127. Although the Federal Magistrates Court already has power to make suppression and non-publication orders, section 88F provides a clearer legislative framework for what kind of information can be covered by such orders.

128. Subsection 88F(2) also provides that the Court may make such orders as it think appropriate to give an effect to an order under subsection 88F(1). This subsection will, for example, give the Court the clear power to make a ‘take down’ order. This is an order directing a publisher to remove certain information the subject of the suppression or non-publication order, and could, for example, be directed to website publishers or individuals who had posted certain content on the internet.

Section 88G – Grounds for making an order

129. Section 88G provides that the Federal Magistrates Court can only make suppression or non-publication orders if one of the grounds set out in that section is satisfied. These grounds are that:

- a) the order is necessary to prevent prejudice to the proper administration of justice
- b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security
- c) the order is necessary to protect the safety of any person
- d) the order is necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence with a sexual nature (including an act of indecency)

130. Section 50 of the *Federal Court of Australia Act 1976* currently enables suppression or non-publication orders to be made where such an order is necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. The High Court has recently stressed in *Hogan v Australian Crime Commission* [2010] HCA 21 that the test that such an order must be ‘necessary’ has a high threshold so that it is insufficient if the making of a suppression order is convenient, reasonable or sensible – it must be necessary. The High Court has also indicated that, if an application is subsequently made to vacate the order, it should be vacated unless the continuation of the order remains necessary under the relevant statutory test.

131. The various grounds that can found a suppression or non-publication order under section 88G all include the condition that such an order must be ‘necessary’, and should be read in light of the current jurisprudence about what that means in the context of such orders being made. This reinforces again that such orders cannot be made lightly, bearing in mind the interest in open justice (as recognised by section 88E).

Section 88H – Procedure for making an order

132. Section 88H establishes the procedures for making suppression and non-publication orders. Subsection 88H(1) provides that such an order may be made on the Court’s own initiative or if a party or another person applies for an order whom the Court considers has sufficient interest in the making of the order.

133. Subsection 88H(2) lists the people who will be entitled to appear and be heard when an application for such an order is being considered by the Court, being the applicant for the order, a party to the proceedings, the Government or agency of the Commonwealth or a State or Territory, a news publisher (as defined in section 88A), or any other person who the Court considers has a sufficient interest in whether the order is made or not.

134. Subsection 88H(3) allows such orders to be made at any time during proceedings or after proceedings have concluded. This acknowledges that circumstances might change during or after proceedings that might warrant a suppression or non-publication order being made at that time.

135. Subsection 88H(4) allows a suppression or a non-publication order to be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order. This encourages the Court to carefully consider the breadth of the order, and only make the order as wide as it needs to be in the circumstances, as well as requiring the Court to fully set out these terms in the order.

136. Subsection 88H(5) requires the Court to specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made. This provision requires the Court to limit the breadth of the order, covering only what is required to achieve its purpose, bearing in mind the principle of open justice.

Section 88J – Interim orders

137. Subsection 88J(1) allows for the making of interim suppression or non-publication orders without requiring the Court to assess the merits of the substantive application, pending the substantive application being determined. Once an interim order has been made, subsection 88J(2) will then require the Court to determine the substantive application as a matter of urgency.

138. This section is intended to allow the Court to make an order for an interim period in urgent cases until the Court has had an opportunity to assess the merits of the substantive application. It is not intended that interim orders remain in place for long periods of time.

Section 88K – Duration of orders

139. The purpose of section 88K is to ensure that the Court considers, and clearly specifies, how long it is appropriate for orders to stay in force, so that orders are not made for durations longer than necessary to achieve their purpose. This is intended to reinforce the principle that suppression and non-publication orders should only be as broad-reaching as is necessary to achieve their aim, consistent with the principles of open justice.

140. Subsection 88K(1) provides that a suppression or non-publication order operates for the period decided by the Court and specified in the order.

141. Subsection 88K(2) requires the Court to ensure that an order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

142. Subsection 37AJ(3) allows for the duration of the order to be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

143. In this respect, in *Hogan v Australian Crime Commission* [2010] HCA 21, the High Court noted at paragraph 29 of the judgment that the power to make a suppression order is interlocutory in nature, and that the power to make interlocutory orders includes the power to later vary or vacate that order if there is a change of facts or circumstances that warrants that course of action. While the Standing Committee of Attorneys-General model bill on suppression and non-publication orders includes provisions concerning the review and appeal of orders, these have not been included in this Bill. That is because the Federal Magistrate Court's usual powers and legislative provisions concerning the variation and vacation of, and

appeal from, orders will apply, and there is no need to have a separate legislative regime regarding this for suppression and non-publication orders.

Section 88L – Exception for court officials

144. Section 88L provides that a suppression order does not prevent a person from disclosing information provided that the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity, either in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or in compliance with any procedure adopted by the Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

145. This provision ensures that Court officials can undertake certain specified duties without infringing a suppression or non-publication order. In particular, Court officials must be able to notify news publishers that suppression or non-publication orders have been made so that news publishers can avoid breaching such orders.

Section 88M – Contravention of order

146. Subsection 88M(1) provides that a person commits an offence if that person does an act or omits to do an act which contravenes an order made by the Court under section 88F (in order words, for breaching a non-publication or suppression order). It provides for a maximum penalty of 12 months imprisonment, 60 penalty units or both.

147. If a person breaches a non-publication or suppression order, subsections 88M(2), (3) and (4) provide that that person can either be punished for committing an offence under subsection 37AL(1) or for contempt of court, but not for both. This is to ensure that a person is not subject to double jeopardy (i.e. being punished twice for the same conduct).

Judiciary Act 1903

Item 8 – Insertion of Part XAA – Suppression and non-publication orders

148. Item 8 adds a new Part XAA to the *Judiciary Act 1903*, implementing the suppression and non-publication model Bill developed by the Standing Committee of Attorneys-General in relation to the High Court.

149. There are no express legislative provisions in the *Judiciary Act 1903* or the *High Court of Australia Act 1979* allowing the High Court to make suppression or non-publication orders. Part XAA of the *Judiciary Act 1903* will set expressly and clearly when and how such orders can be made.

150. While the Court's general powers under the *Judiciary Act 1903* are not being amended by this Bill, those powers should not be used to prohibit or restrict the publication or other disclosure of information in connection with proceedings (section 77RC). The Court's implied powers to regulate its own proceedings will be unaffected (section 77RB).

Division 1 – Preliminary

Section 77RA - Definitions

151. Section 77RA inserts definitions for this Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Judiciary Act 1903*, as their application is limited to the Part.

152. The definition of *information* is deliberately broad. The term 'document' is defined in *Acts Interpretation Act 1901*.

153. The definition of *news publisher* means persons engaged in the business of publishing news or a public or community broadcasting service engaged in publishing news through a public news medium. This definition will extend to news publishers who publish via the internet, as well as the more traditional print, television and radio news publishers (see definition of ‘publish’). The definition of ‘persons’ under the *Acts Interpretation Act 1901* extends to bodies corporate as well as natural persons. This definition of ‘news publisher’ is relevant to the provisions giving standing to news publishers to appear upon the hearing of an application for a suppression or non-publication order (paragraph 77RG(2)(d)) and allowing court officials to disclose the existence and contents of suppression and non-publication orders to news publishers (paragraph 77RJ(b)).

154. The definition of *non-publication order* assists in highlighting the difference between this kind of order and a *suppression order*. While a non-publication order prohibits the publication of information (see definition of ‘publish’), it does not prohibit disclosure of that information in another way. For example, a non-publication order might allow the news publishers or the general public access to certain information, but not allow them to publish it.

155. The definition of *party* is deliberately broad, and is inclusive, so that it does not operate to exclude other persons who may be defined as parties for the purposes of proceedings under the Act.

156. The definition of *publish* means dissemination or provision of access to the public or a section of the public by any means, with some examples being given of means of publication, including the internet.

157. The definition of *suppression order* assists in highlighting the difference between this kind of order and a *non-publication order*. A suppression order not only prohibits the publication of information but also prohibits other forms of disclosure, which could be narrower than publication (for example, disclosure to particular persons).

Section 77RB – Powers of High Court not affected

158. Section 77RB clarifies that the powers that are provided for by this Part do not limit or affect other existing powers which the High Court has (apart from this Part) to regulate its proceedings or deal with a contempt of court. This includes the Court’s implied powers. (The federal courts have such implied powers as are incidental and necessary to exercise the jurisdiction or express powers conferred on them by statute (*DJL v The Central Authority* (2000) 201 CLR 226 at 240-241).)

Section 77RC – Other laws not affected

159. Section 77RC clarifies that nothing in this Part affects the operation of provisions in other Acts that prohibit or restrict, or authorise the High Court to make an order prohibiting of restricting, the publication or other disclosure of information in connection with proceedings, so that any such restrictions in other Acts will continue to operate. (Under the *Acts Interpretation Act 1901*, ‘Act’ means an Act of the Commonwealth Parliament.) The provisions in this Part are intended to govern the granting of suppression and non-publication orders under this Act.

Division 2 – Suppression and non-publication orders

Section 77RD – Safeguarding public interest in open justice

160. Section 77RD provides that the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice when deciding whether to make a suppression order or non-publication order. This reinforces that the principle of open justice is fundamentally important and should not be overridden lightly, as recently discussed by the High Court in *Hogan v Hinch* [2011] HCA 4 and *Hogan v Australian Crime Commission* [2010] HCA 21. In particular, his Honour Chief Justice French commented in *Hogan v Hinch* at paragraph 27 of the judgment that any suppression order powers conferred by statute should be construed so as to minimise their intrusion on the open justice principle. These provisions have been drafted bearing this in mind.

Section 77RE – Power to make orders

161. Section 77RE gives the High Court an express power to make suppression and non-publication orders. Such orders will bind all members of the public, not just those present at the proceedings.

162. The section specifies the information which can be the subject of a suppression or non-publication order. It will allow for information tending to reveal the identity of, or otherwise concerning, a party or witness (or anybody related to or otherwise associated with that person) to be the subject of an order. Such an order will also be able to be made in relation to evidence or information about evidence, information obtained through discovery, produced under a subpoena or lodged with or filed in the court.

163. This provision will provide the High Court with flexibility to determine exactly what information should be subject to an order, and to what extent access to that information should be limited. For example, it allows the Court to prevent the identification of, or publication of information about, certain parties or witnesses to proceedings but not others. By way of further example, it may be appropriate to order that certain documents on a court file or certain discovered documents could only be inspected by specified persons.

164. This provision expressly allows the making of an order in respect of information obtained by the process of discovery, produced under a subpoena or lodged with or filed in Court. This will ensure that information can be the subject of an appropriate order even if it has not actually been formally produced as evidence before the Court.

165. Section 77RE provides a clear legislative framework for what kind of information can be covered by such orders.

166. Subsection 77RE(2) also provides that the Court may make such orders as it think appropriate to give an effect to an order under subsection 77RE(1). This subsection will, for example, give the Court the clear power to make a ‘take down’ order. This is an order directing a publisher to remove certain information the subject of the suppression or non-publication order, and could, for example, be directed to website publishers or individuals who had posted certain content on the internet.

Section 77RF – Grounds for making an order

167. Section 77RF provides that the High Court can only make suppression or non-publication orders if one of the grounds set out in that section is satisfied. These grounds are that:

- a) the order is necessary to prevent prejudice to the proper administration of justice
- b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security
- c) the order is necessary to protect the safety of any person
- d) the order is necessary to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)

168. Section 50 of the *Federal Court of Australia Act 1976* currently enables suppression or non-publication orders to be made where such an order is necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. The High Court has recently stressed in *Hogan v Australian Crime Commission* [2010] HCA 21 that the test that such an order must be ‘necessary’ has a high threshold so that it is insufficient if the making of a suppression order is convenient, reasonable or sensible – it must be necessary. The High Court has also indicated that, if an application is subsequently made to vacate the order, it should be vacated unless the continuation of the order remains necessary under the relevant statutory test.

169. The various grounds that can found a suppression or non-publication order under section 77RF all include the condition that such an order must be ‘necessary’, and should be read in light of the current jurisprudence about what that means in the context of such orders being made. This reinforces again that such orders cannot be made lightly, bearing in mind the interest in open justice (as recognised by section 77RD).

Section 77RG – Procedure for making an order

170. Section 77RG establishes the procedures for making suppression and non-publication orders. Subsection 77RG(1) provides that such an order may be made on the Court’s own initiative or if a party or another person applies for an order whom the Court considers has sufficient interest in the making of the order.

171. Subsection 77RG(2) lists the people who will be entitled to appear and be heard when an application for such an order is being considered by the Court, being the applicant for the order, a party to the proceedings, the Government or agency of the Commonwealth or a State or Territory, a news publisher (as defined in section 77RA), or any other person who the Court considers has a sufficient interest in whether the order is made or not.

172. Subsection 77RG(3) allows such orders to be made at any time during proceedings or after proceedings have concluded. This acknowledges that circumstances might change during or after proceedings that might warrant a suppression or non-publication order being made at that time.

173. Subsection 77RG(4) allows a suppression or a non-publication order to be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order. This encourages the Court to carefully consider the breadth of the order, and only make the

order as wide as it needs to be in the circumstances, as well as requiring the Court to fully set out these terms in the order.

174. Subsection 77RG(5) requires the Court to specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made. This provision requires the Court to limit the breadth of the order, covering only what is required to achieve its purpose, bearing in mind the principle of open justice.

Section 77RH – Interim orders

175. Subsection 77RH(1) allows for the making of interim suppression or non-publication orders without requiring the Court to assess the merits of the substantive application, pending the substantive application being determined. Once an interim order has been made, subsection 77RH(2) will then require the Court to determine the substantive application as a matter of urgency.

176. This section is intended to allow the Court to make an order for an interim period in urgent cases until the Court has had an opportunity to assess the merits of the substantive application. It is not intended that interim orders remain in place for long periods of time.

Section 77RI – Duration of orders

177. The purpose of section 77RI is to ensure that the Court considers, and clearly specifies, how long it is appropriate for orders to stay in force, so that orders are not made for durations longer than necessary to achieve their purpose. This is intended to reinforce the principle that suppression and non-publication orders should only be as broad-reaching as is necessary to achieve their aim, consistent with the principles of open justice.

178. Subsection 77RI(1) provides that a suppression or non-publication order operates for the period decided by the Court and specified in the order.

179. Subsection 77RI(2) requires the Court to ensure that an order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

180. Subsection 77RI(3) allows for the duration of the order to be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

181. In this respect, in *Hogan v Australian Crime Commission* [2010] HCA 21, the High Court noted at paragraph 29 of the judgment that the power to make a suppression order is interlocutory in nature, and that the power to make interlocutory orders includes the power to later vary or vacate that order if there is a change of facts or circumstances that warrants that course of action. While the Standing Committee of Attorneys-General model bill on suppression and non-publication orders includes provisions concerning the review and appeal of orders, these have not been included in this Bill. That is because the High Court's usual powers and legislative provisions concerning the variation and vacation of, and appeal from, orders will apply, and there is no need to have a separate legislative regime regarding this for suppression and non-publication orders.

Section 77RJ – Exception for court officials

182. Section 77RJ provides that a suppression order does not prevent a person from disclosing information provided that the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity, either in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or in compliance with any procedure adopted by the Court for

informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

183. This provision ensures that Court officials can undertake certain specified duties without infringing a suppression or non-publication order. In particular, Court officials must be able to notify news publishers that suppression or non-publication orders have been made so that news publishers can avoid breaching such orders.

Section 77RK – Contravention of order

184. Subsection 77RK(1) provides that a person commits an offence if that person does an act or omits to do an act which contravenes an order made by the Court under section 77RE (in order words, for breaching a non-publication or suppression order). It provides for a maximum penalty of 12 months imprisonment, 60 penalty units or both.

185. If a person breaches a non-publication or suppression order, subsections 77RK(2), (3) and (4) provide that that person can either be punished for committing an offence under subsection 77RK(1) or for contempt of court, but not for both. This is to ensure that a person is not subject to double jeopardy (i.e. being punished twice for the same conduct).

PART 2 – CONSEQUENTIAL AMENDMENTS

Australian Crime Commission Act 2002

Items 9 and 10 – Schedule 1

186. Items 9 and 10 amend Schedule 1 to the *Australian Crime Commission Act 2002*, which contains a list of provisions prescribed for the purposes of section 20 of that Act. Section 20 of the *Australian Crime Commission Act 2002* provides that, subject to a prescribed provision, a person shall not refuse or fail to comply with a notice to produce certain information under that section. Currently, section 50 of the *Federal Court of Australia Act 1976* and section 61 of the *Federal Magistrates Act 1999* are prescribed provisions.

187. This omits reference to section 50 of the *Federal Court of Australia Act 1976* and section 61 of the *Federal Magistrates Act 1999*, since these provisions are being repealed by this Part. Instead, reference will be included to the new provisions dealing with suppression and non-publication orders, being Part XIA of the *Family Law Act 1975*, Part VAA of the *Federal Court of Australia Act 1976*, Part 6A of the *Federal Magistrates Act 1999* and Part XAA of the *Judiciary Act 1903*.

PART 3 – APPLICATION, SAVINGS AND TRANSITIONAL PROVISIONS

188. Part 3 contains the application, savings and transitional provisions for Schedule 2 of the Bill.

Item 11 – Application of amendments

189. Item 11 provides that the amendments made by Part 1 (the main amendments) only apply to proceedings (including interlocutory proceedings) that are instituted in, or transferred to, a court on or after that Part commences, or that are already pending in a court before that Part commences. The previous law will apply to proceedings that have already been heard or determined by a court before Part 1 commences (see item 12).

Item 12 – Saving – proceedings already heard

190. Sub-items 12(1) and (2) preserve the operation of section 50 of the *Federal Court of Australia Act 1976* (despite its repeal by item 5 of Schedule 2 of the Bill) for the purposes of proceedings heard or orders made before its repeal.

191. Sub-items 12(3) and (4) preserve the operation of section 61 of the *Federal Magistrates Act 1999* (despite its repeal by item 6 of Schedule 2 of the Bill) for the purposes of proceedings heard or orders made before its repeal.

Item 13 – Transitional – Australian Crime Commission Act 2002

192. Item 13 is a transitional provision for Schedule 1 to the *Australian Crimes Commission Act 2002*, which provides that a reference to the new Part VAA of the *Federal Court of Australia Act 1976* is taken to include a reference to section 50 of that Act, and a reference to Part 6A of the *Federal Magistrates Act 1999* is taken to include a reference to section 61 of that Act. This is necessary since those particular sections are being repealed by items 5 and 6 of Schedule 2 of this Bill (except to the extent that their operation is preserved by items 11 and 12 of the Schedule).

SCHEDULE 3 – VEXATIOUS PROCEEDINGS

PART 1 –AMENDMENTS

Family Law Act 1975

Item 1 – Subsection 97(1)

193. Item 1 makes a consequential amendment by replacing the words ‘subsection (1A) and (2)’ with ‘this Act’ in subsection 97(1) of the *Family Law Act 1975*. Section 97 currently provides for a general presumption that proceedings will be heard in open court subject to various exceptions, including those in subsections 97(1A) and (2). However, section 102QF will allow a court to determine certain applications for leave to institute proceedings (by a person who is the subject of a vexatious proceedings order) in Chambers.

194. Accordingly, subsection 97(1) is being amended to provide that the presumption of hearings being held in open court is subject to the Act generally, rather than just subsections 97(1A) and (2).

Item 2 – Insertion of Part XIB – Vexatious proceedings

195. Item 1 adds a new Part XIB to the *Family Law Act 1975*. This will implement the Standing Committee of Attorneys-General vexatious proceedings model law in respect of courts exercising jurisdiction under the *Family Law Act 1975*.

Division 1 – Preliminary

Section 102Q - Definitions

196. Section 102Q inserts the relevant definitions for this new Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Family Law Act 1975*, as their application is limited to the Part.

197. The definition of *appropriate court official* is necessary because a number of courts exercise jurisdiction under the *Family Law Act 1975* and each court’s officials have slightly different titles and functions. For example, section 102QC provides that a person may request a certificate from the *appropriate court official* indicating whether a particular person is the subject of a vexatious proceedings order. Depending on the court, the title of that official varies. Accordingly, an *appropriate court official* is:

- a) in relation to the Family Court of Australia—the Chief Executive Officer or Principal Registrar of the Court; and
- b) in relation to the Federal Magistrates Court—the Chief Executive Officer of the Court; and
- c) in relation to the Family Court of Western Australia—the Principal Registrar of the Court; and
- d) in relation to any other court—the chief executive officer or principal registrar (however described) of the court

198. The definition of *Australian court or tribunal* means a Commonwealth, State or Territory court or tribunal.

199. The definition of *institute* in relation to proceedings is inclusive, and covers instituting civil, criminal and tribunal proceedings as well as appeals.

200. The definition of *proceedings* covers both court and tribunal proceedings. For court proceedings, the Bill adopts the definition in subsection 4(1) of the *Family Law Act 1975*. That subsection provides that ‘proceedings’ means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding. In relation to a tribunal, proceedings means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

201. The definition of *proceedings of a particular type* includes proceedings in relation to a particular matter or against a particular person. This phrase is used in subsection 102QB(2), a provision which provides courts with the power to make vexatious proceedings orders. This purpose of using this phrase is to make it clear that a court could prohibit a person from instituting a specific class of proceedings (for example, concerning a particular subject matter or against a particular person) where that is appropriate.

202. The definition of *vexatious proceedings* is an inclusive definition, which lists some examples of various kinds of proceedings which could give rise to a vexatious proceedings order, namely:

- a) proceedings that are an abuse of the process of a court or tribunal; and
- b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and
- d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

203. The definition of *vexatious proceedings order* means an order made pursuant to subsection 102QB(2).

204. Subsection 102Q(2) clarifies that a person acting as a lawyer or a legally recognised representative of a person is not a ‘a person acting in concert’ with that person for the purposes of this Part. The term ‘representative’ could include, for example, the representatives of persons under a disability, deceased persons or children. This clarification is necessary, since under section 102QB, a court can order that a person acting in concert with a person subject to a vexatious proceedings order can also be prohibited from instituting proceedings. It is not intended that this power be able to be used against lawyers or other legally recognised representatives of a litigant if their only role is acting as the litigant’s representative.

Section 102QA – Powers of a court not affected

205. Section 102QA clarifies that Part XIB does not limit or otherwise affect any other powers (including implied powers) that a court has apart from that Part to deal with vexatious proceedings. For example, Part XIB will not affect a court’s existing powers to dismiss or otherwise deal with a particular vexatious proceeding brought by a person who did not have a history of bringing vexatious proceedings.

Division 2 – Vexatious proceedings orders

Section 102QB – Making vexatious proceedings orders

206. Section 102QB provides the power for a court to make a vexatious proceedings order.

207. Subsection 102QB(1) establishes the threshold which needs to be met before such an order could be made. It will require a court to be satisfied either that:

- a) the person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- b) the person acting in concert with a second person has instituted or conducted vexatious proceedings in an Australian court or tribunal (i.e. no frequency test).

208. However, where it is claimed that a person ‘acting in concert’ with another, the court will also have to be satisfied that the second person was subject to a vexatious proceedings order or had frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. This is designed to ensure that a person who is already subject to a vexatious proceedings order or at risk of such an order could not avoid its consequences by arranging for another person to initiate proceedings instead. This approach is consistent with the provisions enacted in vexatious litigant laws in Queensland (*Vexatious Proceedings Act 2005*), the Northern Territory (*Vexatious Proceedings Act 2007*) and New South Wales (*Vexatious Proceedings Act 2008*).

209. Subsection 102QB(1) expressly allows a court to take into account vexatious proceedings instituted or conducted by a person in any other Australian court or tribunal, as well as in that particular court, so that a person need not have a history of vexatious proceedings just in that particular court before the court could consider making a vexatious proceedings order against them. One of the purposes of this provision is to minimise the possibility of a person unsuccessfully pursuing vexatious proceedings in one court, and then trying again with similar vexatious proceedings in another court.

210. The threshold that will need to be met under paragraph 102QB(1)(a) is that a person has instituted or conducted vexatious proceedings in Australian courts and tribunals ‘frequently’. Clause 5 of the Standing Committee of Attorneys-General vexatious proceedings model law provides a choice between this ‘frequency’ test and a test that requires a court to be satisfied that a person has ‘habitually and persistently’ instituted and conducted vexatious proceedings, which was the traditional test.

211. Queensland, Northern Territory and New South Wales have adopted the frequency test. This Bill also uses this test, which furthers the objectives of promoting consistency in how courts across Australia deal with vexatious litigants and discouraging forum shopping or acting in concert by vexatious litigants.

212. Subsection 102QB(2) provides a court with power to make any or all of the following kinds of orders (defined in section 102Q as a vexatious proceedings order):

- a) an order staying or dismissing all or part of any proceedings in the court already instituted by the person;
- b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, under this Act in a court having jurisdiction under this Act;

- c) any other order the court considers appropriate in relation to the person.

213. This subsection provides the court with a broad discretion to make orders tailored to fit the circumstances of the particular person or proceedings. Orders could range from preventing any proceedings being instituted under the *Family Law Act 1975* by that person at all (subject to the leave of a court – see Division 3), to a narrower order preventing that person from bringing certain kinds of proceedings under the Act (see definition of *proceedings of a particular type* in section 102Q), or just dismissing particular proceedings instituted by that person. Paragraph 102QB(2)(c) also makes it clear that a court can choose not to dismiss vexatious proceedings brought by a person, but deal with that person in another way. Some examples of what this might be are set out in the note under that clause. Furthermore, a court could choose to deal with vexatious proceedings under its other general practice and procedure and case management powers (made clear by section 102QA), such as, for example, by striking out parts of a document filed with the court or ordering that a document be amended by a certain time.

214. The power allowing a court to prohibit a person from instituting proceedings under the *Family Law Act 1975* in any court having jurisdiction under the Act reflects the power already contained in section 118 of the *Family Law Act 1975*, which is being repealed and replaced by the amendments to be made by item 3 of this Schedule. Division 3 will then empower a court to give leave to institute proceedings in that particular court to a person subject to a vexatious proceedings order which otherwise prohibited the institution of proceedings. This power is also currently contained in the existing section 118 of the *Family Law Act 1975*.

215. Subsection 102QB(3) provides that a court could make a vexatious proceedings order on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the appropriate court official (as defined in section 102Q)
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

216. Although the Standing Committee of Attorneys-General vexatious proceedings model law requires the categories of person set out in paragraphs (c) and (d) to seek leave of the court to make an application, this requirement has not been included in subsection 102QB(3). This is because, usually, the application for leave is heard at the same time as the substantive application and, as a result, there is little practical difference in requiring leave to be granted. Furthermore, not requiring leave should simplify the process, reducing costs and complexity.

217. Subsection 102QB(4) provides that a court must not make a vexatious proceedings order in relation to a person without giving that person a hearing or the opportunity to be heard. This provision will ensure that procedural fairness is accorded to persons who may be subject to a vexatious proceedings order, given the potentially serious consequences of such orders.

218. Subsection 102QB(5) provides that a vexatious proceedings order made under paragraph 102QB(2)(a) or (b) is a final order (as opposed to an interlocutory or interim order). Since there is inconsistent case law on this issue, this provision is provided for clarificatory purposes.

219. Subsection 102QB(6) provides examples of the conduct that a court could consider under subsection 102QB(1), when deciding whether to make a vexatious proceedings order under subsection 102QB(2).

Section 102QC – Notification of vexatious proceedings orders

220. Subsection 102QC(1) allows a person to request a certificate from the appropriate court official (as defined in section 102Q) stating whether a person named in the request is or has been the subject of a vexatious proceedings order made by the court. This provision will enable a member of the public to obtain authoritative information about vexatious proceedings orders. It is envisaged that such certificates will mainly be sought by persons who may wish to seek a vexatious proceedings order against that person in another court.

221. Subsection 102QC(2) provides that, upon receiving a request for a certificate under subsection (1), if a person named in the request is or has been the subject of a vexatious proceedings order made by the court, the appropriate court official must provide the person making the request with a certificate specifying the date of the order and any other information prescribed by the applicable Rules of Court. This will allow the detail of information to be included in the certificate to be prescribed by court rules.

222. Section 102QC has been included in the Bill as an alternative to the establishment of a register of vexatious proceedings orders (included in the Standing Committee of Attorneys-General vexatious proceedings model law). Anyone who wishes to find out whether a person is subject to a vexatious proceedings order will be able to seek a certificate.

223. Subsection 102QC(3) clarifies that the provision of information under this section is subject to any Commonwealth law or court orders prohibiting or restricting the publication or disclosure of the name of a party to court proceedings. This includes section 121 of the *Family Law Act 1975*, which creates an offence for publishing information that is sufficient to identify a party to proceedings under the *Family Law Act 1975*.

224. The offence provisions under section 121 of the *Family Law Act 1975* will not prevent the issuing of such a certificate (since this is not a publication) but they will still restrict what use could be made of such a certificate, so that such a certificate could not be published. There is an exception under paragraph 121(9)(a) regarding court proceedings, which will enable the certificate to be used in another court's proceedings.

225. The note to section 102QC directs people to section 155 of the *Evidence Act 1995* and highlights that a certificate issued under this section stating that a person is subject to a vexatious proceedings order could be adduced as evidence of that fact. This section is mentioned in preference to section 157 of the *Evidence Act 1995*, since that section only facilitates proof of court judgments or other process – it will assist in determining whether a vexatious proceedings order had been made against a person, but not whether such an order was still in force.

Division 3 – Particular consequences of vexatious proceedings orders

Section 102QD – Proceedings in contravention of vexatious proceedings order

226. Section 102QD prevents a person who is subject to a vexatious proceedings order made under the *Family Law Act 1975* from instituting proceedings prohibited under that order, as well as providing for the consequences of instituting proceedings in contravention of such an order.

227. Paragraph 102QD(1)(a) provides that if a person is subject to a vexatious proceedings order preventing the person from instituting proceedings (or proceedings of a particular kind) under the *Family Law Act 1975*, in a court having jurisdiction under that Act, then that person can only institute proceedings (or proceedings of the type the subject of the order) in the court if that court gives leave to do so under section 102QG. Similarly, paragraph 102QD(1)(b) provides that if another person is acting in concert with a person the subject of a vexatious proceedings order, that first person can only institute proceedings (or proceedings of the kind the subject to the order) in the court if that court gives leave to do so under section 102QG.

228. Subsection 102QD(2) provides that if proceedings are instituted in contravention of subsection 102QD(1) (i.e. without obtaining the leave of the relevant court), those proceedings are automatically stayed.

229. Subsection 102QD(3) provides the court with further powers to deal with proceedings brought in defiance of a vexatious proceedings order. This will enable the court to declare that certain proceedings are proceedings to which subsection 102QD(2) applies (thereby clarifying that those proceedings are stayed). Additionally the court will be able to make any other relevant orders in respect of those stayed proceedings it considered appropriate, including an order for costs.

230. Subsection 102QD(4) provides that a court may make an order under subsection 102QD(3) either on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the appropriate court official (defined in section 102Q)
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

231. This list will mirror the list of those people who have standing to apply for a vexatious proceedings order under subsection 102QB(3). As such, those persons who have standing to make an application for a vexatious proceedings order will also have standing to make an application if such an order were breached.

Section 102QE – Application for leave to institute proceedings

232. Section 102QE deals with the process by which a person who is subject to a vexatious proceedings order prohibiting that person from instituting proceedings (or proceedings of a particular type) could seek leave to institute new proceedings notwithstanding the existence of that order.

233. Subsection 102QE(1) provides that the section applies to a person who is subject to a vexatious proceedings order prohibiting the person from instituting proceedings (or proceedings of a particular type) under the *Family Law Act 1975* in a court having jurisdiction under that Act, or to a person who is acting in concert with such a person (in either case, referred to in this section as the applicant).

234. Subsection 102QE(2) allows the applicant to apply to the court for leave to institute proceedings that are subject to the vexatious proceedings order. Accordingly, this subsection allows an applicant to seek leave to institute proceedings despite being subject to a vexatious proceedings order otherwise preventing the institution of such proceedings.

235. Subsection 102QE(3) lists the information that an applicant must include in an affidavit that must be filed with the application under subsection 102QE(2), being:

- a) all the occasions on which the applicant has applied for leave under this section; and
- b) all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
- c) all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

236. This information is designed to ensure that the applicant makes full disclosure of relevant information to assist the court in reaching a decision as to whether to grant leave to the applicant to institute the proceedings. Pursuant to its general case management powers, a court could also request such further evidence or making such other directions as it considered appropriate before reaching its decision (such powers being preserved under section 102QA).

237. Subsection 102QE(4) provides that the applicant must not serve the application or affidavit on anyone unless the court makes an order to do so under section 102QG(1)(a). This is designed to prevent potential respondents' time being unnecessarily taken up with possibly vexatious proceedings.

Section 102QF – Dismissing application for leave

238. Section 102QF establishes how and in what circumstances a court could make an order dismissing an application under section 102QE for leave to institute proceedings.

239. Subsection 102QF(1) provides that a court may make an order dismissing an application for leave to institute proceedings made under section 102QE if the court considers that the affidavit filed by the applicant did not substantially comply with subsection 102QE(3). This will give the court the discretionary power to dismiss the application on such grounds.

240. Subsection 102QF(2) compels a court to dismiss an application for leave to institute proceedings under section 102QE if it considered the proceedings to be vexatious proceedings. The definition of vexatious proceedings is set out in section 102Q, and includes proceedings that are an abuse of process, proceedings instituted or conducted in a way to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and proceedings instituted or pursued without reasonable ground. This will incorporate proceedings that have no reasonable likelihood of success.

241. Subsection 102QF(3) provides that the court may dismiss an application without an oral hearing (either with or without the consent of the applicant). This subsection will preserve the court's discretion to conduct an oral hearing if it chose to do so. Subsection 102QF(4) provides that the court may make an order under this section in Chambers.

242. These two subsections are intended to provide the court with an efficient way of dealing with unmeritorious litigation sought to be brought by persons already subject to vexatious proceedings orders. The court can still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the court the flexibility to determine applications by a person subject to a vexatious

proceedings order on the papers alone in chambers, while not mandating this as a course of action.

Section 102QG – Granting application for leave

243. Section 102QG establishes how and in what circumstances a court could make an order granting an application made under section 102QE for leave to institute proceedings.

244. Subsection 102QG(1) establishes what a court must do prior to making an order granting an application for leave to institute proceedings. The court must order that the applicant serve the respondent(s) and such other persons as it orders with a copy of the application and affidavit in support, and a notice that the person is entitled to be heard on the application. Such persons must be given an opportunity, if they choose to appear, to be heard at the hearing of the application.

245. Subsection 102QG(2) allows, at the hearing of the application, the court to receive as evidence any record of evidence given or affidavit filed in any proceedings in any Australian court or tribunal in which the applicant is (or was) involved as a party or as a person acting in concert with a party. This will enable a court to receive with minimal formality evidence regarding other proceedings in which the applicant has been involved.

246. Subsection 102QG(3) provides the court with the power to grant the application allowing a person subject to a vexatious proceedings order to commence fresh proceedings in that court. That order could be made subject to such conditions as the court considers appropriate. It could, for example, grant an applicant the right to institute proceedings only in relation to a specific matter or against a particular person.

247. Subsection 102QG(4) clarifies that a court can only grant leave if it is satisfied that the proceedings are not vexatious. This reinforces the restriction in subsection 102QF(2), requiring the court to dismiss an application for leave if it considers the proceedings to be vexatious.

Item 3 – Section 118

248. Item 3 repeals existing section 118 and substitutes a new section 118 in its place. The effect of the amendments is to omit existing paragraphs 118(1)(c) and subsection 118(2), since the issues dealt with by those provisions are covered by the new Part XIB. The current paragraphs in existing paragraphs 118(1)(a) and (b) will effectively be retained. This will retain the courts' powers to deal with an individual vexatious proceeding, which may not necessarily be brought by a person who might be the subject of a vexatious proceedings order under Part XIB.

Item 4 – After paragraph 123(1)(d)

249. Item 4 inserts a new paragraph 123(1)(e) into the *Family Law Act 1975*. This additional paragraph provides the Family Court with the express power to make Rules of Court for or in relation to the prevention or termination of vexatious proceedings. This mirrors the express rule-making power that the Federal Court and Federal Magistrates Court already have on this issue. This amendment is clarificatory only, since the Family Court already has power under its general rule making power in subsection 123(1) to make rules 'for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business' in courts exercising jurisdiction under the Act. Such general rule-making power already extends to making rules concerning vexatious proceedings.

Federal Court of Australia Act 1976

Item 5 – Subsection 17(1)

250. Item 5 replaces the reference to ‘section’ in subsection 17(1) of the *Federal Court of Australia Act 1976* with a reference to ‘Act’. Subsection 17(1) currently provides that, except where, as authorized by this section or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court. This amendment clarifies that provisions of the Act generally (in addition to other Acts) can specify what jurisdiction can be exercised in Chambers. Under section 37AS, the Court will be able to determine certain applications for leave to institute proceedings (by a person who is the subject of a vexatious proceedings order) in Chambers.

Item 6 – Paragraph 24(1D)(c)

251. Item 6 adds additional references to sections 37AS and 37AT into paragraph 24(1D)(c) of the *Federal Court of Australia Act 1976*. This clarifies that a decision made by the Federal Court to dismiss or grant (respectively) an application made by a person subject to a vexatious proceedings order for leave to institute proceedings is interlocutory in nature and therefore requires leave to appeal.

Item 7 – Paragraph 24(1D)(d)

252. Item 7 adds additional references to sections 88U and 88V into paragraph 24(1D)(d) of the *Federal Court of Australia Act 1976*. This makes it clear that a decision made by the Federal Magistrates Court to dismiss or grant (respectively) an application made by a person subject to a vexatious proceedings order for leave to institute proceedings is interlocutory in nature and therefore requires leave to appeal. (Appeals from orders of the Federal Magistrates Court are heard in the Federal Court.)

Item 8 – Insertion of new Part VAAA – Vexatious proceedings

253. Item 1 adds a new Part VAAA to the *Federal Court of Australia Act 1976*. This implements the Standing Committee of Attorneys-General vexatious proceedings model law in respect of the Federal Court.

Division 1 – Preliminary

Section 37AM - Definitions

254. Section 37AM inserts the relevant definitions for this new Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Federal Court of Australia Act 1976*, as their application is limited to the Part.

255. The definition of *Australian court or tribunal* means a Commonwealth, State or Territory court or tribunal.

256. The definition of *institute* in relation to proceedings is inclusive, and covers instituting civil, criminal and tribunal proceedings as well as appeals.

257. The definition of *proceeding* covers both court and tribunal proceedings. For court proceedings, the Bill adopts the definition in section 4 of the *Federal Court of Australia Act 1976*. That section provides that ‘proceeding’ means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of or in connection with a proceeding, and also includes an appeal. In relation to a tribunal, ‘proceeding’ means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

258. The definition of *proceedings of a particular type* includes proceedings in relation to a particular matter or against a particular person. This phrase is used in subsection 37AO(2), which provides the Court with the power to make vexatious proceedings orders. This purpose of using this phrase is to make it clear that the Court can prohibit a person from instituting a specific class of proceedings (for example, concerning a particular subject matter or against a particular person) where that is appropriate.

259. The definition of *vexatious proceeding* is an inclusive definition, which lists some examples of various kinds of proceedings which could give rise to a vexatious proceedings order, namely:

- a) a proceeding that is an abuse of the process of a court or tribunal; and
- b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

260. The definition of *vexatious proceedings order* means an order made pursuant to subsection 37AO(2).

261. Subsection 37AM(2) clarifies that a person acting as a lawyer or a legally recognised representative of a person is not a ‘a person acting in concert’ with that person for the purposes of this Part. The term ‘representative’ could include, for example, the representatives of persons under a disability, deceased persons or children. This clarification is necessary, since under section 37AM, the Court can order that a person acting in concert with a person subject to a vexatious proceedings order can also be prohibited from instituting proceedings. It is not intended that this power be able to be used against lawyers or other legally recognised representatives of a litigant if their only role is acting as the litigant’s representative.

Section 37AN – Powers of the Court not affected

262. Section 37AN clarifies that Part VAAA does not limit or otherwise affect any other powers (including implied powers) that the Federal Court has apart from that Part to deal with vexatious proceedings. For example, Part VAAA will not affect the Court’s existing powers to dismiss or otherwise deal with an individual vexatious proceeding brought by a person who did not have a history of bringing vexatious proceedings. Similarly, the Court’s powers under section 20A of the *Federal Court of Australia Act 1976* (which, among other things, allows the Court to deal with frivolous and vexatious civil matters without an oral hearing) will not be affected by Part VAAA.

Division 2 – Vexatious proceedings orders

Section 37 AO – Making vexatious proceedings orders

263. Section 37AO provides the power for the Court to make a vexatious proceedings order.

264. Subsection 37AO(1) establishes the threshold which needs to be met before such an order could be made. The Court must be satisfied either that:

- a) the person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- b) the person acting in concert with a second person has instituted or conducted vexatious proceedings in an Australian court or tribunal (i.e. no frequency test).

265. However, where it is claimed that the person is ‘acting in concert’ with another person, the Court will have to be satisfied that the second person was subject to a vexatious proceedings order or had frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. This is designed to ensure that a person who is already subject to a vexatious proceedings order or at risk of such an order could not avoid its consequences by arranging for another person to initiate proceedings instead. This approach is consistent with the provisions enacted in vexatious litigant laws in Queensland (*Vexatious Proceedings Act 2005*) the Northern Territory (*Vexatious Proceedings Act 2007*) and New South Wales (*Vexatious Proceedings Act 2008*).

266. Subsection 37AO(1) expressly allows the Court to take into account vexatious proceedings instituted or conducted by a person in any other Australian court or tribunal, as well as in the Federal Court, so that a person need not have a history of vexatious proceedings just in the Federal Court before the Court can consider making a vexatious proceedings order against them. One of the purposes of this provision is to minimise the possibility of a person unsuccessfully pursuing vexatious proceedings in one court, and then trying again with similar vexatious proceedings in another court.

267. The threshold that will need to be met under paragraph 37AO(1)(a) is that a person has instituted or conducted vexatious proceedings in Australian courts and tribunals ‘frequently’. Clause 5 of the Standing Committee of Attorneys-General vexatious proceedings model law provides a choice between this ‘frequency’ test and a test that requires the Court to be satisfied that a person has ‘habitually and persistently’ instituted and conducted vexatious proceedings, which was the traditional test.

268. The Northern Territory, New South Wales and Queensland have adopted the frequency test. This Bill also uses this test, which furthers the objectives of promoting consistency in how courts across Australia deal with vexatious litigants and discouraging forum shopping or acting in concert by vexatious litigants.

269. Subsection 37AO(2) provides the Court with power to make any or all of the following kinds of orders (defined in section 37AM as a vexatious proceedings order):

- a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;
- b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;
- c) any other order the Court considers appropriate in relation to the person.

270. This subsection provides the Court with a broad discretion to make orders tailored to fit the circumstances of the particular person or proceedings. Orders could range from preventing any proceedings being instituted in the Court by that person at all (subject to the leave of the Court – see Division 3), to a narrower order preventing that person from bringing

certain kinds of proceedings (see definition of *proceedings of a particular type* in section 37AM), or just dismissing particular proceedings instituted by that person. Paragraph 37AO(2)(c) also makes it clear that the Court can choose not to dismiss vexatious proceedings brought by a person, but deal with that person in another way. Some examples of what this might be are set out in the note under that clause. Furthermore, the Court could choose to deal with vexatious proceedings under its other general practice and procedure and case management powers (made clear by section 37AN), such as, for example, by striking out pleadings or ordering that a document be amended by a certain time.

271. Subsection 37AO(3) provides that the Court could make a vexatious proceedings order on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Registrar of the Court
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

272. Although the Standing Committee of Attorneys-General vexatious proceedings model law requires the categories of person set out in paragraphs (c) and (d) to seek leave of the Court to make an application, this requirement has not been included in subsection 37AO(3). This is because, usually, the application for leave is heard at the same time as the substantive application and, as a result, there is little practical difference in requiring leave to be granted. Furthermore, not requiring leave should simplify the process, reducing costs and complexity.

273. Subsection 37AO(4) provides that the Court must not make a vexatious proceedings order in relation to a person without giving that person a hearing or the opportunity to be heard. This provision ensures that procedural fairness will be accorded to persons who may be subject to a vexatious proceedings order, given the potentially serious consequences of such orders.

274. Subsection 37AO(5) provides that a vexatious proceedings order made under paragraph 37AO(2)(a) or (b) is a final order (as opposed to an interlocutory or interim order). Since there is inconsistent case law on this issue, this provision is provided for clarificatory purposes.

275. Subsection 37AO(6) provides examples of the conduct that the Court could consider under subsection 37AO(1), when deciding whether to make a vexatious proceedings order under subsection 37AO(2).

Section 37AP – Notification of vexatious proceedings orders

276. Subsection 37AP(1) allows a person to request a certificate from the Registrar of the Court stating whether a person named in the request is or has been the subject of a vexatious proceedings order made by the Court. This provision enables a member of the public to obtain authoritative information about vexatious proceedings orders. It is envisaged that such certificates will mainly be sought by persons who may wish to seek a vexatious proceedings order against that person in another court.

277. Subsection 37AP(2) provides that, upon receiving a request for a certificate under subsection (1), if a person named in the request is or has been the subject of a vexatious proceedings order made by the Court, the Registrar must provide the person making the

request with a certificate specifying the date of the order and any other information prescribed by the Rules of Court. This will allow the detail of the information to be included in certificates to be prescribed by court rules.

278. Section 37AP has been included in the Bill as an alternative to the establishment of a register of vexatious proceedings orders (included in the Standing Committee of Attorneys-General vexatious proceedings model law). Anyone who wishes to find out whether a person is subject to a vexatious proceedings order will be able to seek a certificate.

279. Subsection 37AP(3) clarifies that the provision of information under this section is subject to any Commonwealth law or Court orders prohibiting or restricting the publication or disclosure of the name of a party to Court proceedings. This will include, for example, section 91X of the *Migration Act 1958*, which provides that the Court must not publish the name of parties to proceedings concerning certain protection visa related matters.

280. The note to section 37AP directs people to section 155 of the *Evidence Act 1995* and highlights that a certificate issued under this section stating that a person is subject to a vexatious proceedings order could be adduced as evidence of that fact. This section is mentioned in preference to section 157 of the *Evidence Act 1995*, since that section only facilitates proof of court judgments or other process – it will assist in determining whether a vexatious proceedings order had been made against a person, but not whether such an order was still in force.

Division 3 – Particular consequences of vexatious proceedings orders

Section 37AQ – Proceedings in contravention of vexatious proceedings order

281. Section 37AQ prevents a person who is subject to a vexatious proceedings order made by the Court from instituting proceedings prohibited under that order, as well as providing for the consequences of instituting proceedings in contravention of such an order.

282. Paragraph 37AQ(1)(a) provides that if a person is subject to a vexatious proceedings order preventing the person from instituting proceedings in the Court, then that person can only institute proceedings (or proceedings of the type the subject of the order) in the Court if the Court gives leave to do so under section 37AT. Similarly, paragraph 37AQ(1)(b) provides that if another person is acting in concert with a person the subject of a vexatious proceedings order, that first person can only institute proceedings (or proceedings of the kind the subject to the order) in the Court if the Court gives leave to do so under section 37AT.

283. Subsection 37AQ(2) provides that if proceedings are instituted in contravention of subsection 37AQ(1) (i.e. without obtaining the leave of the Court), those proceedings are automatically stayed.

284. Subsection 37AQ(3) provides the Court with further powers to deal with proceedings brought in defiance of a vexatious proceedings order. The Court could declare that certain proceedings are proceedings to which subsection 37AQ(2) applies (thereby clarifying that those proceedings are stayed). Additionally the Court could make any other relevant orders in respect of those stayed proceedings it considered appropriate, including an order for costs.

285. Subsection 37AQ(4) provides that the Court may make an order under subsection 37AQ(3) either on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Registrar of the Court

- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

286. This list mirrors the list of those people who have standing to apply for a vexatious proceedings order under subsection 37AO(3). As such, those persons who have standing to make an application for a vexatious proceedings order will also have standing to make an application if such an order were breached.

Section 37AR– Application for leave to institute proceedings

287. Section 37AR deals with the process by which a person who is subject to a vexatious proceedings order prohibiting that person from instituting proceedings (or proceedings of a particular type) may seek leave to institute new proceedings notwithstanding the existence of that order.

288. Subsection 37AR(1) provides that the section applies to a person who is subject to a vexatious proceedings order prohibiting the person from instituting proceedings (or proceedings of a particular type) in the Court, or to a person who is acting in concert with such a person (in either case, referred to in this section as the applicant).

289. Subsection 37AR(2) allows the applicant to apply to the Court for leave to institute proceedings that are subject to the vexatious proceedings order. Accordingly, this subsection allows an applicant to seek leave to institute proceedings despite being subject to a vexatious proceedings order otherwise preventing the institution of such proceedings.

290. Subsection 37AR(3) lists the information that an applicant must include in an affidavit that must be filed with the application under subsection 37AR(2), being:

- a) all the occasions on which the applicant has applied for leave under this section; and
- b) all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
- c) all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

291. This information is designed to ensure that the applicant makes full disclosure of relevant information to assist the Court in reaching a decision as to whether to grant leave to the applicant to institute the proceedings. Pursuant to its general case management powers, the Court may also request such further evidence or making such other directions as it considered appropriate before reaching its decision (such powers being preserved under section 37AN).

292. Subsection 37AR(4) provides that the applicant must not serve the application or affidavit on anyone unless the Court makes an order to do so under paragraph 37AT(1)(a). This is designed to prevent potential respondents' time being unnecessarily taken up with possibly vexatious proceedings.

Section 37AS – Dismissing an application for leave

293. Section 37AS establishes how and in what circumstances the Court or a Judge may make an order dismissing an application made under section 37AR for leave to institute a proceeding. The use of the term 'the Court or a Judge' makes it clear that such applications

may be dismissed in Chambers. Under the definition of ‘Judge’ set out in section 4, when the term ‘Judge’ is used in the expression ‘the Court or a Judge’, this means a Judge sitting in Chambers.

294. Subsection 37AS(1) provides that the Court or a Judge may make an order dismissing an application for leave to institute a proceeding made under section 37AR if the Court or Judge considered that the affidavit filed by the applicant did not substantially comply with subsection 37AR(3). This will give the Court or a Judge the discretionary power to dismiss the application on such grounds.

295. Subsection 37AS(2) compels the Court or a Judge to dismiss an application for leave to institute a proceeding under section 37AR if the Court or Judge considered the proceeding to be vexatious. The definition of vexatious proceeding is set out in section 37AM, and includes a proceeding that is an abuse of process, proceedings instituted or conducted in a way to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and a proceeding instituted or pursued without reasonable ground. This incorporates a proceeding that has no reasonable likelihood of success.

296. Subsection 37AS(3) provides that the Court or a Judge may dismiss an application without an oral hearing (either with or without the consent of the applicant). This subsection preserves the Court’s discretion to conduct an oral hearing if it chose to do so.

297. This section is intended to provide the Court with an efficient way of dealing with further unmeritorious litigation sought to be brought by persons already subject to vexatious proceedings orders. The Court may still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the Court the flexibility to determine applications by a person subject to a vexatious proceedings order on the papers alone in Chambers, while not mandating this as a course of action.

Section 37AT – Granting an application for leave

298. Section 37AT establishes how and in what circumstances the Court may make an order granting an application under section 37AR for leave to institute proceedings.

299. Subsection 37AT(1) establishes what the Court must do prior to making an order granting an application for leave to institute proceedings. It requires that the Court must order that the applicant serve the respondent(s) and such other persons as it orders with a copy of the application and affidavit in support, and a notice that the person is entitled to be heard on the application. Such persons must be given an opportunity, if they choose to appear, to be heard at the hearing of the application.

300. Subsection 37AT(2) allows, at the hearing of the application, the Court to receive as evidence any record of evidence given or affidavit filed in any proceeding in any Australian court or tribunal in which the applicant is (or was) involved as a party or as a person acting in concert with a party. This will enable the Court to receive with minimal formality evidence regarding other proceedings in which the applicant has been involved.

301. Subsection 37AT(3) provides the Court with the power to grant the application allowing a person subject to a vexatious proceedings order to commence fresh proceedings in the Court. That order could be made subject to such conditions as the Court considers appropriate. It could, for example, grant an applicant the right to institute a proceeding only in relation to a specific matter or against a particular person.

302. Subsection 37AT(4) clarifies that the Court may only grant leave if it is satisfied that the proceeding is not vexatious. This reinforces the restriction in subsection 37AS(2), requiring the Court to dismiss an application for leave if it considers the proceeding to be vexatious.

Federal Magistrates Act 1999

Item 9 – Insertion of new Part 6B – Vexatious proceedings

303. Item 9 adds a new Part 6B to the *Federal Magistrates Act 1999*. This implements the Standing Committee of Attorneys-General vexatious proceedings model law in respect of the Federal Magistrates Court.

Division 1 – Preliminary

Section 88N - Definitions

304. Section 88N inserts the relevant definitions for this new Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Federal Magistrates Act 1999*, as their application is limited to the Part.

305. The definition of *Australian court or tribunal* means a Commonwealth, State or Territory court or tribunal.

306. The definition of *institute* in relation to proceedings is inclusive, and covers instituting civil, criminal and tribunal proceedings as well as appeals.

307. The definition of *proceeding* covers both court and tribunal proceedings. For court proceedings, the Bill adopts the definition in section 5 of the *Federal Magistrates Act 1999*. That subsection provides that ‘proceeding’ means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of or in connection with a proceeding, and also includes an appeal. In relation to a tribunal, ‘proceeding’ means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

308. The definition of *proceedings of a particular type* includes proceedings in relation to a particular matter or against a particular person. This phrase is used in subsection 88Q(2), which provides the Court with the power to make vexatious proceedings orders. This purpose of using this phrase is to make it clear that the Court could prohibit a person from instituting a narrow class of proceedings (for example, concerning a particular subject matter or against a particular person) where that is appropriate.

309. The definition of *vexatious proceeding* is an inclusive definition, which lists some examples of various kinds of proceedings which could give rise to a vexatious proceedings order, namely:

- a) a proceeding that is an abuse of the process of a court or tribunal; and
- b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

310. The definition of *vexatious proceedings order* means an order made pursuant to subsection 88Q(2).

311. Subsection 88N(2) clarifies that a person acting as a lawyer or a legally recognised representative of a person is not a ‘a person acting in concert’ with that person for the purposes of this Part. The term ‘representative’ may include, for example, the representatives of persons under a disability, deceased persons or children. This clarification is necessary, since under section 88Q, a court can order that a person acting in concert with a person subject to a vexatious proceedings order can also be prohibited from instituting proceedings. It is not intended that this power be able to be used against lawyers or other legally recognised representatives of a litigant if their only role is acting as the litigant’s representative.

Section 88P – Powers of the Federal Magistrates Court not affected

312. Section 88P clarifies that Part 6B does not limit or otherwise affect any other powers (including implied powers) that the Court has apart from that Part to deal with vexatious proceedings. For example, Part 6B will not affect the Court’s existing powers to dismiss or otherwise deal with an individual vexatious proceeding brought by a person who did not have a history of bringing vexatious proceedings.

Division 2 – Vexatious proceedings orders

Section 88Q – Making vexatious proceedings orders

313. Section 88Q provide the power for the Court to make a vexatious proceedings order.

314. Subsection 88Q(1) establishes the threshold which needs to be met before such an order can be made. It will require the Court to be satisfied either that:

- a) the person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- b) the person acting in concert with a second person has instituted or conducted vexatious proceedings in an Australian court or tribunal (i.e. no frequency test).

315. However, where it is claimed that a person has been ‘acting in concert’ with another, the Court will also have to be satisfied that the second person was subject to a vexatious proceedings order or had frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. This is designed to ensure that a person who is already subject to a vexatious proceedings order or at risk of such an order could not avoid its consequences by arranging for another person to initiate proceedings instead. This approach is consistent with the provisions enacted in vexatious litigant laws in Queensland (*Vexatious Proceedings Act 2005*) the Northern Territory (*Vexatious Proceedings Act 2007*) and New South Wales (*Vexatious Proceedings Act 2008*).

316. This subsection expressly allows the Court to take into account vexatious proceedings instituted or conducted by a person in any other Australian court or tribunal, as well as in the Federal Magistrates Court, so that a person need not have a history of vexatious proceedings just in the Federal Magistrates Court before the Court can consider making a vexatious proceedings order against them. One of the purposes of this provision is to minimise the possibility of a person unsuccessfully pursuing vexatious proceedings in one court, and then trying again with similar vexatious proceedings in another court.

317. The basic threshold that needs to be met under paragraph 88Q(1)(a) is that a person has instituted or conducted vexatious proceedings in Australian courts and tribunals ‘frequently’. Clause 5 of the Standing Committee of Attorneys-General vexatious proceedings model law allows for a choice between this ‘frequency’ test and a test that requires the Court to be satisfied that a person has ‘habitually and persistently’ instituted and conducted vexatious proceedings, which was the traditional test.

318. The Northern Territory, New South Wales and Queensland have adopted the frequency test. This Bill also uses this test, which furthers the objectives of promoting consistency in how courts across Australia deal with vexatious litigants and discouraging forum shopping or acting in concert by vexatious litigants.

319. Subsection 88Q(2) provides the Court with power to make any or all of the following kinds of orders (defined in section 88N as a vexatious proceedings order):

- a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;
- b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;
- c) any other order the Court considers appropriate in relation to the person.

320. This subsection provides the Court with a broad discretion to make orders tailored to fit the circumstances of the particular person or proceedings. Orders can range from preventing any proceedings being instituted in the Court by that person at all (subject to the leave of the Court – see Division 3), to a narrower order preventing that person from bringing certain kinds of proceedings (see definition of *proceedings of a particular type* in section 88N), or just dismissing particular proceedings instituted by that person. Paragraph 88Q(2)(c) also makes it clear that the Court can choose not to dismiss vexatious proceedings brought by a person, but deal with that person in another way. Some examples of what this might be are set out in the note under that clause. Furthermore, the Court can choose to deal with vexatious proceedings under its other general practice and procedure and case management powers (made clear by section 88P), such as, for example, by striking out pleadings or ordering that a document be amended by a certain time.

321. Subsection 88Q(3) provides that section 88Q(2) applies to all proceedings in the Court other than those under the *Family Law Act 1975*. (Vexatious proceedings in the Court under the *Family Law Act 1975* will be dealt with under the new Part XIB of that Act, to be inserted by item 2 of this Schedule. The note under this subsection makes this clear.)

322. Subsection 88Q(4) provides that the Court could make a vexatious proceedings order on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Chief Executive Officer of the Court
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

323. Although the Standing Committee of Attorneys-General vexatious proceedings model law requires the categories of person set out in paragraphs (c) and (d) to seek leave of the Court to make an application, this requirement has not been included in

subsection 88Q(4). This is because, usually, the application for leave is heard at the same time as the substantive application and, as a result, there is little practical difference in requiring leave to be granted. Furthermore, not requiring leave should simplify the process, reducing costs and complexity.

324. Subsection 88Q(5) provides that the Court must not make a vexatious proceedings order in relation to a person without giving that person a hearing or the opportunity to be heard. This provision ensures that procedural fairness will be accorded to persons who may be subject to a vexatious proceedings order, given the potentially serious consequences of such orders.

325. Subsection 88Q(6) provides that a vexatious proceedings order made under paragraph 88Q(2)(a) or (b) is a final order (as opposed to an interlocutory or interim order). Since there is inconsistent case law on this issue, this provision is provided for clarificatory purposes.

326. Subsection 88Q(7) provides examples of the conduct that the Court could consider under subsection 88Q(1), when deciding whether to make a vexatious proceedings order under subsection 88Q(2).

Section 88R – Notification of vexatious proceedings orders

327. Subsection 88R(1) allows a person to request a certificate from the Chief Executive Officer of the Court stating whether a person named in the request is or has been the subject of a vexatious proceedings order made by the Court. This provision enables members of the public to obtain authoritative information about vexatious proceedings orders. It is envisaged that such certificates will mainly be sought by persons who may wish to seek a vexatious proceedings order against that person in another court.

328. Subsection 88R(2) provides that, upon receiving a request for a certificate under subsection (1), if a person named in the request is or has been the subject of a vexatious proceedings order made by the Court, the Chief Executive Officer must provide the person making the request with a certificate specifying the date of the order and any other information prescribed by the Rules of Court. This allows the detail of what information is to be included in the certificate to be prescribed by court rules.

329. Section 88R has been included in the Bill as an alternative to the establishment of a register of vexatious proceedings orders (included in the Standing Committee of Attorneys-General vexatious proceedings model law). Anyone who wishes to find out whether a person is subject to a vexatious proceedings order will be able to seek a certificate.

330. Subsection 88R(3) clarifies that the provision of information under this section is subject to any Commonwealth law or Court orders prohibiting or restricting the publication or disclosure of the name of a party to Court proceedings. This will include, for example, section 91X of the *Migration Act 1958*, which provides that the Court must not publish the name of parties to proceedings concerning certain protection visa related matters.

331. The note to section 88R directs people to section 155 of the *Evidence Act 1995* and highlights that a certificate issued under this section stating that a person is subject to a vexatious proceedings order could be adduced as evidence of that fact. This section is mentioned in preference to section 157 of the *Evidence Act 1995*, since that section only facilitates proof of court judgments or other process – it will assist in determining whether a vexatious proceedings order had been made against a person, but not whether such an order was still in force.

Division 3 – Particular consequences of vexatious proceedings orders

Section 88S – Proceedings in contravention of vexatious proceedings order

332. Section 88S prevents a person who is subject to a vexatious proceedings order made by the Court from instituting proceedings prohibited under that order, as well as providing for the consequences of instituting proceedings in contravention of such an order.

333. Paragraph 88S(1)(a) provides that if a person is subject to a vexatious proceedings order preventing the person from instituting proceedings in the Court, then that person can only institute proceedings (or proceedings of the type the subject of the order) in the Court if the Court gives leave to do so under section 88V. Similarly, paragraph 88S(1)(b) provides that if another person is acting in concert with a person the subject of a vexatious proceedings order, that first person can only institute proceedings (or proceedings of the kind the subject to the order) in the Court if the Court gives leave to do so under section 88V.

334. Subsection 88S(2) provides that if proceedings are instituted in contravention of subsection 88S(1) (i.e. without obtaining the leave of the Court), those proceedings are automatically stayed.

335. Subsection 88S(3) provides the Court with further powers to deal with proceedings brought in defiance of a vexatious proceedings order. The Court could declare that certain proceedings are proceedings to which subsection 88S(2) applies (thereby clarifying that those proceedings are stayed). Additionally the Court could make any other relevant orders in respect of those stayed proceedings it considered appropriate, including an order for costs.

336. Subsection 88S(4) provides that the Court may make an order under subsection 88S(3) either on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Chief Executive Officer of the Court
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

337. This list mirrors the list of those people who have standing to apply for a vexatious proceedings order under subsection 88Q(4). As such, those persons who have standing to make an application for a vexatious proceedings order will also have standing to make an application if such an order were breached.

Section 88T– Application for leave to institute proceedings

338. Section 88T deals with the process by which a person who is subject to a vexatious proceedings order prohibiting that person from instituting proceedings (or proceedings of a particular type) may seek leave to institute new proceedings notwithstanding the existence of that order.

339. Subsection 88T(1) provides that the section applies to a person who is subject to a vexatious proceedings order prohibiting the person from instituting proceedings (or proceedings of a particular type) in the Court, or to a person who is acting in concert with such a person (in either case, referred to in this section as the applicant).

340. Subsection 88T(2) allows the applicant to apply to the Court for leave to institute proceedings that are subject to the vexatious proceedings order. Accordingly, this

subsection allows an applicant to seek leave to institute proceedings despite being subject to a vexatious proceedings order otherwise preventing the institution of such proceedings.

341. Subsection 88T(3) lists the information that an applicant must include in an affidavit that must be filed with the application under subsection 88T(2), being:

- a) all the occasions on which the applicant has applied for leave under this section; and
- b) all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
- c) all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

342. This information is designed to ensure that the applicant makes full disclosure of relevant information to assist the Court in reaching a decision as to whether to grant leave to the applicant to institute the proceedings. Pursuant to its general case management powers, the Court could also request such further evidence or making such other directions as it considered appropriate before reaching its decision (such powers being preserved under section 88P).

343. Subsection 88T(4) provides that the applicant must not serve the application or affidavit on anyone unless the Court makes an order to do so under paragraph 88V(1)(a). This is designed to prevent potential respondents' time being unnecessarily taken up with possibly vexatious proceedings.

Section 88U – Dismissing an application for leave

344. Section 88U establishes how and in what circumstances the Federal Magistrates Court or a Federal Magistrate can make an order dismissing an application under section 88T for leave to institute a proceeding.

345. Subsection 88U(1) provides that the Federal Magistrates Court or a Federal Magistrate may make an order dismissing an application for leave to institute a proceeding made under section 88T if the Federal Magistrates Court or Federal Magistrate considered that the affidavit filed by the applicant did not substantially comply with subsection 88T(3). This will give the Federal Magistrates Court or a Federal Magistrate the discretionary power to dismiss the application on such grounds.

346. Subsection 88U(2) compels the Federal Magistrates Court or a Federal Magistrate to dismiss an application for leave to institute a proceeding made under section 88T if the Federal Magistrates Court or Federal Magistrate considers the proceeding to be vexatious. The definition of *vexatious proceeding* is set out in section 88N, and includes a proceeding that is an abuse of process, proceedings instituted or conducted in a way to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and a proceeding instituted or pursued without reasonable ground. This incorporates a proceeding that has no reasonable likelihood of success.

347. Subsection 88U(3) provides that the Federal Magistrates Court or a Federal Magistrate may dismiss an application without an oral hearing (either with or without the consent of the applicant). This subsection preserves the Court's discretion to conduct an oral hearing if it chose to do so. While section 54 also allows the Rules of Court to authorise

certain applications to be heard without an oral hearing, section 54 does not affect this section.

348. The use of the term ‘the Federal Magistrates Court or a Federal Magistrate’ makes it clear that such applications may be dismissed in Chambers. Under the definition of ‘Federal Magistrate’ set out in section 4, when the term ‘Federal Magistrate’ is used in the expression ‘the Federal Magistrates Court or a Federal Magistrate’, this means a Federal Magistrate sitting in Chambers. Subsection 13(2) of the Act makes it clear that provisions of the Act can allow the jurisdiction of the Court to be exercised by a Federal Magistrate sitting in Chambers rather than in open court.

349. This section is intended to provide the Court with an efficient way of dealing with further unmeritorious litigation sought to be brought by persons already subject to vexatious proceedings orders. The Court can still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the Court the flexibility to determine applications by a person subject to a vexatious proceedings order on the papers alone in Chambers, while not mandating this as a course of action.

Section 88V – Granting an application for leave

350. Section 88V establishes how and in what circumstances the Court may make an order granting an application made under section 88T for leave to institute proceedings.

351. Subsection 88V(1) establishes what the Court must do prior to making an order granting an application for leave to institute proceedings. It requires that the Court must order that the applicant serve the respondent(s) and such other persons as it orders with a copy of the application and affidavit in support, and a notice that the person is entitled to be heard on the application. Such persons must be given an opportunity, if they choose to appear, to be heard at the hearing of the application.

352. Subsection 88V(2) allows, at the hearing of the application, the Court to receive as evidence any record of evidence given or affidavit filed in any proceeding in any Australian court or tribunal in which the applicant is (or was) involved as a party or as a person acting in concert with a party. This will enable the Court to receive with minimal formality evidence regarding other proceedings in which the applicant has been involved.

353. Subsection 88V(3) provides the Court with the power to grant the application allowing a person subject to a vexatious proceedings order to commence fresh proceedings in the Court. That order could be made subject to such conditions as the Court considers appropriate. It could, for example, grant an applicant the right to institute a proceeding only in relation to a specific matter or against a particular person.

354. Subsection 88V(4) clarifies that the Court can only grant leave if it is satisfied that the proceedings are not vexatious. This reinforces the restriction in subsection 88U(2), requiring the Court to dismiss an application for leave if it considers the proceeding to be vexatious.

Judiciary Act 1903

Item 10 – Insertion of new Part XAB – Vexatious proceedings

355. Item 10 adds a new Part XAB to the *Judiciary Act 1903*. This implements the Standing Committee of Attorneys-General vexatious proceedings model law in respect of the High Court.

Division 1 – Preliminary

Section 77RL - Definitions

356. Section 77RL inserts the relevant definitions for this new Part. The definitions are included for the purposes of this Part only, rather than being included in the general definition section of the *Judiciary Act 1903*, as their application is limited to the Part.

357. The definition of *Australian court or tribunal* means a Commonwealth, State or Territory court or tribunal.

358. The definition of *Chief Executive and Principal Registrar* means the Chief Executive and Principal Registrar of the High Court appointed under section 18 of the *High Court of Australia Act 1979*.

359. The definition of *institute* in relation to proceedings is inclusive, and covers instituting civil, criminal and tribunal proceedings as well as appeals.

360. The definition of *proceeding* covers both court and tribunal proceedings. In relation to a court, proceeding means a proceeding in the court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding and also includes an appeal. In relation to a tribunal, proceeding means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

361. The definition of *proceedings of a particular type* includes a proceeding in relation to a particular matter or against a particular person. This phrase is used in subsection 77RN(2), which provides the Court with the power to make vexatious proceedings orders. This purpose of using this phrase is to make it clear that the Court can prohibit a person from instituting a narrow class of proceedings (for example, concerning a particular subject matter or against a particular person) where that is appropriate.

362. The definition of *vexatious proceeding* is an inclusive definition, which lists some examples of various kinds of proceedings which could give rise to a vexatious proceedings order, namely:

- a) a proceeding that are an abuse of the process of a court or tribunal; and
- b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

363. The definition of *vexatious proceedings order* means an order made subsection 77RN(2).

364. Subsection 77RL(2) clarifies that a person acting as a lawyer or a legally recognised representative of a person is not a ‘a person acting in concert’ with that person for the purposes of this Part. The term ‘representative’ can include, for example, the representatives of persons under a disability, deceased persons or children. This clarification is necessary, since under section 77RN, the Court can order that a person acting in concert with a person subject to a vexatious proceedings order can also be prohibited from instituting proceedings. It is not intended that this power be able to be used against lawyers or other legally

recognised representatives of a litigant if their only role is acting as the litigant's representative.

Section 77RM – Powers of the High Court not affected

365. Section 77RM clarifies that Part XAB does not limit or otherwise affect any other powers (including implied powers) that the High Court has apart from that Part to deal with vexatious proceedings. For example, Part XAB will not affect the Court's existing powers to dismiss or otherwise deal with an individual vexatious proceeding brought by a person who did not have a history of bringing vexatious proceedings.

Division 2 – Vexatious proceedings orders

Section 77RN – Making vexatious proceedings orders

366. Section 77RN provides the power for the High Court to make a vexatious proceedings order.

367. Subsection 77RN(1) establishes the threshold which needs to be met before such an order could be made. It requires the Court to be satisfied either that:

- a) the person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- b) the person acting in concert with a second person has instituted or conducted vexatious proceedings in an Australian court or tribunal (i.e. no frequency test).

368. However, where it is claimed that a person has been 'acting in concert' with another, the Court will also have to be satisfied that the second person was subject to a vexatious proceedings order or had frequently instituted or conducted vexatious proceedings in Australian courts or tribunals. This is designed to ensure that a person who is already subject to a vexatious proceedings order or at risk of such an order could not avoid its consequences by arranging for another person to initiate proceedings instead. This approach is consistent with the provisions enacted in vexatious litigant laws in Queensland (*Vexatious Proceedings Act 2005*) the Northern Territory (*Vexatious Proceedings Act 2007*) and New South Wales (*Vexatious Proceedings Act 2008*).

369. This subsection expressly allows the Court to take into account vexatious proceedings instituted or conducted by a person in any other Australian court or tribunal, as well as in the High Court, so that a person need not have a history of vexatious proceedings just in the High Court before the Court could consider making a vexatious proceedings order against them. One of the purposes of this provision is to minimise the possibility of a person unsuccessfully pursuing vexatious proceedings in one court, and then trying again with similar vexatious proceedings in another court.

370. The threshold that needs to be met under paragraph 77RN(1)(a) is that a person has instituted or conducted vexatious proceedings in Australian courts and tribunals 'frequently'. Clause 5 of the Standing Committee of Attorneys-General vexatious proceedings model law allows for a choice between this 'frequency' test and a test that requires the Court to be satisfied that a person has 'habitually and persistently' instituted and conducted vexatious proceedings, which was the traditional test.

371. The Northern Territory, New South Wales and Queensland have adopted the frequency test. This Bill also uses this test, which furthers the objectives of promoting

consistency in how courts across Australia deal with vexatious litigants and discouraging forum shopping or acting in concert by vexatious litigants.

372. Subsection 77RN(2) provides the Court with power to make any or all of the following kinds of orders (defined in section 77RL as a vexatious proceedings order):

- a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;
- b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;
- c) any other order the Court considers appropriate in relation to the person.

373. This subsection provides the Court with a broad discretion to make orders tailored to fit the circumstances of the particular person or proceedings. Orders could range from preventing any proceedings being instituted in the Court by that person at all (subject to the leave of the Court – see Division 3), to a narrower order preventing that person from bringing certain kinds of proceedings (see definition of *proceedings of a particular type* in section 77RL), or just dismissing particular proceedings instituted by that person. Subclause 77RN(2)(c) also makes it clear that the Court can choose not to dismiss vexatious proceedings brought by a person, but deal with that person in another way. Some examples of what this might be are set out in the note under that clause. Furthermore, the Court can choose to deal with vexatious proceedings under its other general practice and procedure and case management powers (made clear by section 77RM), such as, for example, by striking out pleadings or ordering that a document be amended by a certain time.

374. Subsection 77RN(3) provides that the Court could make a vexatious proceedings order on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Chief Executive and Principal Registrar of the Court
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

375. Although the Standing Committee of Attorneys-General vexatious proceedings model law requires the categories of person set out in paragraphs (c) and (d) to seek leave of the Court to make an application, this requirement has not been included in subsection 77RN(3). This is because, the application for leave may be heard at the same time as the substantive application and, as a result, there may be little practical difference in requiring leave to be granted. Furthermore, not requiring leave should simplify the process, reducing costs and complexity.

376. Subsection 77RN(4) provides that the Court must not make a vexatious proceedings order in relation to a person without giving that person a hearing or the opportunity to be heard. This provision ensures that procedural fairness is accorded to persons who may be subject to a vexatious proceedings order, given the potentially serious consequences of such orders.

377. Subsection 77RN(5) provides that a vexatious proceedings order made under paragraph 77RN(2)(a) or (b) is a final order (as opposed to an interlocutory or interim order).

Since there is inconsistent case law on this issue, this provision is provided for clarificatory purposes.

378. Subsection 77RN(6) provides examples of the conduct that the Court can consider under subsection 77RN(1), when deciding whether to make a vexatious proceedings order under subsection 77RN(2).

Section 77RO – Notification of vexatious proceedings orders

379. Subsection 77RO(1) allows a person to request a certificate from the Chief Executive and Principal Registrar of the Court stating whether a person named in the request is or has been the subject of a vexatious proceedings order made by the Court. This provision enables a member of the public to obtain authoritative information about vexatious proceedings orders. It is envisaged that such certificates will mainly be sought by persons who may wish to seek a vexatious proceedings order against that person in another court.

380. Subsection 77RO(2) provides that, upon receiving a request for a certificate under subsection (1), if a person named in the request is or has been the subject of a vexatious proceedings order made by the Court, the Chief Executive and Principal Registrar must provide the person making the request with a certificate specifying the date of the order and any other information prescribed by the Rules of Court. This allows the detail of what information is to be included in the certificate to be prescribed by court rules.

381. Section 77RO has been included in the Bill as an alternative to the establishment of a register of vexatious proceedings orders (included in the Standing Committee of Attorneys-General vexatious proceedings model law). Anyone who wishes to find out whether a person is subject to a vexatious proceedings order will be able to seek a certificate.

382. Subsection 77RO(3) clarifies that the provision of information under this section is subject to any Commonwealth law or Court orders prohibiting or restricting the publication or disclosure of the name of a party to Court proceedings. This includes, for example, section 91X of the *Migration Act 1958*, which provides that the Court must not publish the name of parties to proceedings concerning certain protection visa related matters.

383. The note to section 77RO directs people to section 155 of the *Evidence Act 1995* and highlights that a certificate issued under this section stating that a person is subject to a vexatious proceedings order could be adduced as evidence of that fact. This section is mentioned in preference to section 157 of the *Evidence Act 1995*, since that section only facilitates proof of court judgments or other process – it will assist in determining whether a vexatious proceedings order had been made against a person, but not whether such an order was still in force.

Division 3 – Particular consequences of vexatious proceedings orders

Section 77RP – Proceedings in contravention of vexatious proceedings order

384. Section 77RP prevents a person who is subject to a vexatious proceedings order made by the Court from instituting proceedings prohibited under that order, as well as providing for the consequences of instituting proceedings in contravention of such an order.

385. Paragraph 77RP(1)(a) provides that if a person is subject to a vexatious proceedings order preventing the person from instituting proceedings in the Court, then that person can only institute proceedings (or proceedings of the type the subject of the order) in the Court if the Court gives leave to do so under section 77RS. Similarly, paragraph 77RP(1)(b) provides that if another person is acting in concert with a person the subject of a vexatious proceedings

order, that first person can only institute proceedings (or proceedings of the kind the subject to the order) in the Court if the Court gives leave to do so under section 77RS.

386. Subsection 77RP(2) provides that if proceedings are instituted in contravention of subsection 77RP(1) (i.e. without obtaining the leave of the Court), those proceedings are automatically stayed.

387. Subsection 77RP(3) provides the Court with further powers to deal with proceedings brought in defiance of a vexatious proceedings order. The Court can declare that certain proceedings are proceedings to which subsection 77RP(2) applies (thereby clarifying that those proceedings are stayed). Additionally the Court can make any other relevant orders in respect of those stayed proceedings it considered appropriate, including an order for costs.

388. Subsection 77RP(4) provides that the Court may make an order under subsection 37AQ(3) either on its own initiative or on the application of either:

- a) the Attorney-General of the Commonwealth or of a State or Territory
- b) the Chief Executive and Principal Registrar of the Court
- c) a person against whom another person has instituted or conducted vexatious proceedings, or
- d) a person who has sufficient interest in the matter.

389. This list mirrors the list of those people who have standing to apply for a vexatious proceedings order under subsection 77RN(3). As such, those persons who have standing to make an application for a vexatious proceedings order will also have standing to make an application if such an order were breached.

Section 77RQ– Application for leave to institute proceedings

390. Section 77RQ deals with the process by which a person who is subject to a vexatious proceedings order prohibiting that person from instituting proceedings (or proceedings of a particular type) could seek leave to institute new proceedings notwithstanding the existence of that order.

391. Subsection 77RQ(1) provides that the section applies to a person who is subject to a vexatious proceedings order prohibiting the person from instituting proceedings (or proceedings of a particular type) in the Court, or to a person who is acting in concert with such a person (in either case, referred to in this section as the applicant).

392. Subsection 77RQ(2) allows the applicant to apply to the Court for leave to institute proceedings that are subject to the vexatious proceedings order. Accordingly, this subsection allows an applicant to seek leave to institute proceedings despite being subject to a vexatious proceedings order otherwise preventing the institution of such proceedings.

393. Subsection 77RQ(3) lists the information that an applicant must include in an affidavit that must be filed with the application under subsection 77RQ(2), being:

- a) all the occasions on which the applicant has applied for leave under this section; and
- b) all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and

- c) all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

394. This information is designed to ensure that the applicant makes full disclosure of relevant information to assist the Court in reaching a decision as to whether to grant leave to the applicant to institute the proceedings. Pursuant to its general case management powers, the Court could also request such further evidence or making such other directions as it considered appropriate before reaching its decision (such powers being preserved under section 77RM).

395. Subsection 77RQ(4) provides that the applicant must not serve the application or affidavit on anyone unless the Court makes an order to do so under paragraph 77RS(1)(a). This is designed to prevent potential respondents' time being unnecessarily taken up with possibly vexatious proceedings.

Section 77RR – Dismissing an application for leave

396. Section 77RR establishes how and in what circumstances the Court or a Justice sitting in Chambers can make an order dismissing an application made under section 77RQ for leave to institute a proceeding.

397. Subsection 77RR(1) provides that the Court or a Justice sitting in Chambers may make an order dismissing an application for leave to institute a proceeding made under section 77RQ if the Court or Justice considered that the affidavit filed by the applicant did not substantially comply with subsection 77RQ(3). This gives the Court or a Justice the discretionary power to dismiss the application on such grounds.

398. Subsection 77RR(2) compels the Court or a Justice sitting in Chambers to dismiss an application for leave to institute a proceeding under section 77RQ if the Court or Justice considered the proceeding to be vexatious. The definition of vexatious proceeding is set out in section 77RL, and includes a proceeding that is an abuse of process, proceedings instituted or conducted in a way to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and a proceeding instituted or pursued without reasonable ground. This incorporates a proceeding that has no reasonable likelihood of success.

399. Subsection 77RR(3) provides that the Court or a Justice sitting in Chambers may dismiss an application without an oral hearing (either with or without the consent of the applicant). This subsection preserves the Court's discretion to conduct an oral hearing if it chose to do so.

400. Section 15 of the *Judiciary Act 1903* provides that the jurisdiction of the High Court may, subject to the provisions of the Act, be exercised by one or more Justices sitting in open Court. Section 16 of the *Judiciary Act 1903* provides that the jurisdiction of the High Court can be exercised by a Justice sitting in Chambers in certain specified circumstances, which include under paragraph 16(d) any applications authorised by the Act. Hence, paragraph 16(d) of the Act allows other provisions of the Act to specify when a Justice can exercise the jurisdiction of the High Court sitting in Chambers. Section 77RR is one such provision.

401. This section is intended to provide the Court with an efficient way of dealing with further unmeritorious litigation sought to be brought by persons already subject to vexatious proceedings orders. The Court could still afford procedural fairness to such persons by providing them with the opportunity to make written submissions. These provisions will give the Court the flexibility to determine applications by a person subject to a vexatious

proceedings order on the papers alone in Chambers, while not mandating this as a course of action.

Section 77RS – Granting an application for leave

402. Section 77RS establishes how and in what circumstances the Court can make an order granting an application made under section 37RQ for leave to institute proceedings.

403. Subsection 77RS(1) establishes what the Court must do prior to making an order granting an application for leave to institute proceedings. It requires that the Court must order that the applicant serve the respondent(s) and such other persons as it orders with a copy of the application and affidavit in support, and a notice that the person is entitled to be heard on the application. Such persons must be given an opportunity, if they choose to appear, to be heard at the hearing of the application.

404. Subsection 77RS(2) allows, at the hearing of the application, the Court to receive as evidence any record of evidence given or affidavit filed in any proceeding in any Australian court or tribunal in which the applicant is (or was) involved as a party or as a person acting in concert with a party. This will enable the Court to receive with minimal formality evidence regarding other proceedings in which the applicant has been involved.

405. Subsection 77RS(3) provides the Court with the power to grant the application allowing a person subject to a vexatious proceedings order to commence fresh proceedings in the Court. That order could be made subject to such conditions as the Court considers appropriate. It could, for example, grant an applicant the right to institute a proceeding only in relation to a specific matter or against a particular person.

406. Subsection 77RS(4) clarifies that the Court can only grant leave if it is satisfied that the proceeding is not vexatious. This reinforces the restriction in subsection 77RR(2), requiring the Court to dismiss an application for leave if it considers the proceeding to be vexatious.

PART 2 – APPLICATION AND SAVINGS PROVISIONS

Item 11– Application of amendments

407. Item 11 provides that the power of a court to make a vexatious proceedings order under the new Parts of the *Family Law Act 1975*, *Federal Court of Australia Act 1976*, *Federal Magistrates Act 1999* or *Judiciary Act 1903* (to be inserted by Schedule 3 of the Bill) only apply in relation to proceedings instituted in, or transferred to, that court on or after the commencement of that item. This means that the new provisions only apply prospectively, not to proceedings already on foot in the particular court before their commencement.

Item 12 – Saving – pending proceedings etc.

408. The purpose of item 12 is to preserve the law relating to vexatious proceedings in force immediately before the commencement of the new Parts of the *Family Law Act 1975*, *Federal Court of Australia Act 1976*, *Federal Magistrates Act 1999* and *Judiciary Act 1903*, for the purposes of pending proceedings. This will ensure that pending proceedings will be dealt with under the old law, to avoid confusion part way through proceedings. The item also ensures the validity of any orders made under the old law.

409. Sub-item 12(1) provides that the form of section 118 of the *Family Law Act 1975* in force immediately before the commencement of item 3 (which will repeal and replace

section 118) will continue to apply to proceedings pending before the commencement of that item.

410. Sub-item 12(2) provides that the form of section 118 of the *Family Law Act 1975* in force immediately before the commencement of item 3 (which will repeal and replace section 118) will continue to apply to orders made under that section before the commencement of that item.

411. Sub-item 12(3) provides that rules of court that were in force under the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* or the *Judiciary Act 1903* (to the extent these relate to vexatious proceedings) immediately before the commencement of Schedule 3 will continue to apply to proceedings pending before the commencement of that Schedule.

412. This ensures that the rules of court in force immediately before the commencement of Schedule 3 of the Bill will continue to apply to pending proceedings dealing with vexatious proceedings. (Currently, the rules of court generally set the legal framework for dealing with vexatious proceedings, rather than legislation.)

413. Sub-item 12(4) provides that the amendments made by Schedule 3 will not affect the validity of any orders made before the commencement of item 12 under rules of court made under the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* or the *Judiciary Act 1903* (to the extent those rules relate to vexatious proceedings). This will ensure that any previous orders made concerning vexatious proceedings under court rules will continue to be valid.

SCHEDULE 4 – TRANSFER OF PROCEEDINGS FROM COURTS OF SUMMARY JURISDICTION

Family Law Act 1975

Item 1 — Subsection 46(1)

Item 6 — Paragraph 46(1B)(a)

Item 11 — Paragraph 69N(1)(a)

414. In the Perth metropolitan area, proceedings under the *Family Law Act 1975* are often instituted in the Family Court of Western Australia and then transferred to the Magistrates Court of Western Australia under section 45(4) of the *Family Law Act 1975*, on the initiative of the Family Court of Western Australia. Sections 46 and 69N of the *Family Law Act 1975* currently only refer to proceedings instituted in a court of summary jurisdiction. Items 1, 6 and 11 clarify that sections 46 and 69N also apply to proceedings transferred to those courts.

415. Item 1 inserts the phrase ‘or transferred to’, after the words ‘instituted in’ in subsection 46(1) of the *Family Law Act 1975*. Subsection 46(1) currently requires contested family law property proceedings over a certain amount that are instituted in a court of summary jurisdiction to be transferred to certain specified superior courts (unless the parties consent to the court determining proceedings). Item 1 amends subsection 46(1) of the *Family Law Act 1975* to make it clear that the requirements relating to the transfer of contested proceedings apply regardless of whether the proceedings are transferred to, or instituted in, a court of summary jurisdiction.

416. Item 6 inserts the phrase ‘or transferred to’, after the words ‘instituted in’, in paragraph 46(1B)(a) of the *Family Law Act 1975*. Paragraph 46(1B)(a) currently states that a party is not entitled subsequently to object to proceedings instituted under subsection 46(1) being heard and determined by a court of summary jurisdiction where parties have consented to the proceeding being heard and determined by that court. Item 6 amends paragraph 46(1B)(a) to make it clear that the restrictions imposed in subsection 46(1B) apply regardless of whether the proceedings are transferred to, or instituted in, a court of summary jurisdiction.

417. Item 11 inserts the phrase ‘or transferred to’, after the words ‘instituted in’ in paragraph 69N(1)(a) of the *Family Law Act 1975*. Section 69N currently requires contested proceedings for a parenting order (other than a child maintenance order) that are instituted in a court of summary jurisdiction (other than the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia) to be transferred to certain specified superior courts (unless the parties consent to the court determining proceedings). Item 11 amends paragraph 69N(1)(a) to ensure that the jurisdictional limits set out in section 69N of the *Family Law Act 1975* apply whether the proceedings are transferred to, or instituted in, a court of summary jurisdiction.

Item 2 — Subsection 46(1)

Item 5 — Subsection 46(1AA)

418. Items 2 and 5 remove the \$5 million monetary limit on family property jurisdiction exercisable by Family Law Magistrates in the Magistrates Court of Western Australia under section 46 of the *Family Law Act 1975*. Under section 4 of the *Family Law Act 1975*, a Family Law Magistrate of Western Australia is defined as a person who holds office

concurrently as a magistrate under the *Magistrates Court Act 2004 (WA)*, and as the Principal Registrar, or as a Registrar, of the Family Court of Western Australia.

419. Subsection 46(1) of the *Family Law Act 1975* currently provides that, where proceedings are instituted in a court of summary jurisdiction in relation to property of a total value exceeding the ceiling amount, the court must transfer the proceedings (unless the parties consent to the court determining proceedings). Subsection 46(1AA) currently defines ceiling amount as follows:

- a) if the court of summary jurisdiction is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia — the amount specified in the regulations, or
- b) otherwise — \$20,000.

420. Regulation 12AC of the *Family Law Regulations 1984* specifies that the ceiling amount where the court of summary jurisdiction is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia is \$5 million. (It is intended that this Regulation will be repealed to coincide with the commencement of this Schedule.)

421. Item 2 omits the phrase ‘the ceiling amount’ in subsection 46(1) of the *Family Law Act 1975* and substitutes it with ‘\$20,000’. This reflects the removal of the limitation where the court of summary jurisdiction is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia. The limitation of \$20,000 will continue to apply to family law property proceedings in other courts of summary jurisdiction.

422. Item 5 repeals the existing text of subsection 46(1AA) of the *Family Law Act 1975* and replaces it with ‘Subsection (1) does not apply if the court of summary jurisdiction is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia’. Subsection 46(1AA) is no longer necessary due to the removal of the reference to the ceiling amount in subsection 46(1) by Item 2. Item 5 will also make it clear that subsection 46(1) does not apply if the court of summary jurisdiction is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

Item 3 — Subsection 46(1)

423. Item 3 omits the phrase ‘by which the proceedings are instituted’ and replaces it with ‘by which the proceedings were instituted’ in subsection 46(1) of the *Family Law Act 1975*. This amendment is consequential to amendments that made by Items 1, 6 and 11. The new wording will more adequately encompass the situation where proceedings have been instituted elsewhere and subsequently transferred to the court of summary jurisdiction.

Item 4 — After subparagraphs 46(1)(a)(i) and (b)(i)

Item 7 — After paragraph 46(1C)(a)

Item 8 — After paragraph 46(2A)(c)

Item 10 — After paragraph 46(3A)(a)

424. Section 46 of the *Family Law Act 1975* currently only allows the transfer or removal of certain family law property proceedings in a court of summary jurisdiction to the Family Court, the Supreme Court of a State or Territory, or the Federal Magistrates Court. amendments to section 46 to be made by Items 4, 7, 8 and 10 will allow these proceedings to be transferred or removed to a Family Court of a State as well.

425. Under subsection 4(1A) of the *Family Law Act 1975*, a reference to a Family Court of a State is a reference to a court to which section 41 of that Act applies. Section 41 allows the Commonwealth to make arrangements with State Governments to create State Family Courts, and for the Governor-General to make a Proclamation that section 41 applies to such a court. If such a Proclamation is made, then jurisdiction under the Act can be exercised by such a State Family Court. The Family Court of Western Australia is currently the only State regarding which a Proclamation exists under section 41 of the Act.

426. The amendments to section 46 will provide consistency with section 69N of the *Family Law Act 1975*. Section 69N allows for the transfer of certain proceedings involving parenting orders (other than child maintenance orders) from courts of summary jurisdiction to a Family Court of a State (or the Family Court, the Supreme Court of the Northern Territory, or the Federal Magistrates Court).

427. Item 4 inserts two references to a Family Court of a State at new subparagraphs 46(1)(a)(ia) and (b)(ia) of the *Family Law Act 1975*. Currently, subparagraphs 46(1)(a) and (b) only allow a court of summary jurisdiction to transfer certain family law property proceedings under subsection 46(1) of the *Family Law Act 1975* to the Family Court, the Supreme Court of a State or Territory, or the Federal Magistrates Court. Item 4 allows a court of summary jurisdiction to also transfer those proceedings to a Family Court of a State.

428. Item 7 inserts a reference to a Family Court of a State at new paragraph 46(1C)(aa) of the *Family Law Act 1975*. Subsection 46(1C) currently states that, if the court of summary jurisdiction gives leave to a party to object to the proceedings being heard and determined, the court must transfer the proceedings to the Family Court, the Supreme Court of a State or Territory, or the Federal Magistrates Court. Item 7 inserts a reference to a Family Court of a State to provide that the court could also transfer the proceedings to a Family Court of a State in these circumstances.

429. Item 8 inserts a reference to a Family Court of a State at new paragraph 46(2A)(ca) of the *Family Law Act 1975*. Subsection 46(2A) currently provides that, if proceedings for a divorce order instituted in or transferred to a court of summary jurisdiction are defended, the court must transfer the proceedings to the Family Court, the Supreme Court of a State or Territory, or the Federal Magistrates Court. Item 8 inserts a reference to a Family Court of a State to provide that the court could also transfer the proceedings to a Family Court of a State in these circumstances.

430. Item 10 inserts a reference to a Family Court of a State at new paragraph 46(3A)(aa) of the *Family Law Act 1975*. Subsection 46(3A) currently allows the Family Court, the Supreme Court of a State or Territory, or the Federal Magistrates Court to order that proceedings pending in a court of summary jurisdiction be removed to that Court, on the application of a party or of its own motion. Item 10 also allows a Family Court of a State to do so.

Item 9 — Subsection 46(2B)

431. Item 9 inserts the phrase ‘of summary jurisdiction’ after ‘the court’ in subsection 46(2B) of the *Family Law Act 1975*. Subsection 46(2B) currently states that subsection (2A) does not apply if the court is the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia. (Subsection 46(2A) allows a court of summary jurisdiction to transfer proceedings to certain other courts, where the

proceedings for a divorce order that have been instituted in or transferred to a court of summary jurisdiction are defended.)

432. Item 9 clarifies that the reference to a court in subsection 46(2B) is a reference to a court of summary jurisdiction.

Item 12 — Application of amendments

433. Item 12 provides that the amendments made by Schedule 4 apply in relation to proceedings instituted, or transferred, on or after the commencement of that Schedule. This ensures that the amendments only apply prospectively.

SCHEDULE 5 – ADMINISTRATIVE APPEALS TRIBUNAL FEES

Administrative Appeals Tribunal Act 1975

Item 1 – Section 29A

434. Item 1 repeals section 29A of the *Administrative Appeals Tribunal Act 1975*. Section 29A provides that an application to the Administrative Appeals Tribunal is not taken to be made unless the application fee is paid. In 2010, amendments were made to the *Administrative Appeals Tribunal Regulations 1976* to introduce a minimum \$100 fee for applications for review of decisions. Previously no fee was payable. This has caused difficulties for applicants unable to pay the fee at the time of lodging their application. The repeal of section 29A will enable the Tribunal to manage this issue more flexibly, allowing applications to be validly made on the condition that the application fee will be paid at a later time.

Item 2 – After 69B

435. New section 69C of the *Administrative Appeals Tribunal Act 1975* provides the Tribunal with the discretion to dismiss an application where an application fee has not been paid within the time prescribed by the Regulations. The use of the word ‘may’ in the section will allow the Tribunal to afford applicants extra time to pay an application fee in the appropriate circumstances.

Item 3 – After subsection 70(2)

436. This item inserts subsection 70(3) into the *Administrative Appeals Tribunal Act 1975* to expressly empower regulations to be made to prescribe fees payable in relation to Tribunal proceedings, as well as the waiver of such fees. This goes beyond the current regulation making power under existing subsection 70(2), which allows fees to be imposed in respect of applications, for the taxation of costs, and for the refund of fees.

437. In particular, it will enable regulations to be made to empower the Tribunal to impose fees on government agencies which unsuccessfully appeal or defend decisions in proceedings before the Tribunal. As such, this item enables implementation of the substance of Recommendation 10.5 of the *Report by the Access to Justice Taskforce*,¹ which recommended that the Government consider imposing a fee on agencies that unsuccessfully appeal or defend decisions before the Tribunal. The purpose of this fee is to provide a financial incentive to promote better primary decision making and early resolution of issues where possible. It is envisaged that, under the regulations, the Tribunal will have the discretion not to impose the fee where a government agency had compelling reasons to proceed to a hearing. Examples of such situations include where new information is provided at the hearing that was not available to the primary decision maker.

Item 4 – Application of Amendments

438. Subitem 4(1) saves the effect of section 29A for applications lodged in the Tribunal before the commencement of item 1 (which repeals section 29A). This will enable fees in relation to applications already on foot before the repeal of section 29A to continue to be dealt with under that provision.

¹ *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce, Attorney-General's Department, September 2009.*

439. Subitem 4(2) provides that the amendment made by item 2 applies to applications lodged on or after the commencement of that item, so that the amendments only apply prospectively.

440. Subitem 4(3) provides that the amendment to item 3 applies to proceedings that commence after the commencement of item 3, or have already commenced in the Tribunal but have not been completed before the commencement of item 3.