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Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008

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Law and Bills Digest Section

Contents

Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 and Schedules 1, 2, 3 and 4 on Royal Assent. Schedule 5, items 2 to 8 on the day after Royal Assent and Schedule 5, item1 and Schedule 5, Part 2 on whichever is the later date, the start of the day after Royal Assent and immediately after item 1 of Schedule 1 of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To amend:

- the *Federal Court of Australia Act 1976* (the Federal Court Act) to enable a single judge to make interlocutory orders in proceedings that would otherwise be heard by a Full Court and to enable the appointment of court appointed referees to inquire into and report on a proceeding or questions arising from a proceeding;
- the *International Arbitration Act 1974* (the International Arbitration Act) to clarify the Federal Court of Australia's existing jurisdiction under Part II of the Act in enforcing awards and to give the Federal Court concurrent jurisdiction with state and territory courts for matters arising under Parts III and IV of the Act;
- the respective Acts of the Administrative Appeals Tribunal, the Family Court, the Federal Court of Australia and the National Native Title Tribunal to permit the acquisition of interests in land for the purposes of the *Lands Acquisition Act 1989* (Cth) (the Lands Acquisition Act);
- the *Public Order (Protection of Persons and Property) Act 1971* to allow the making of court premises orders for security purposes and to clearly delineate '*court premises*', and

- the *Family Law Act 1975* (the Family Law Act) to clarify and simplify the procedures for making binding financial agreements, including financial agreements made by *de facto* couples.

Background

Commencement provisions

The commencement of Schedule 5 item 1 and Part 2 of the current Bill relating to binding financial agreements are dependent on the commencement of Schedule 1, item 1 of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008.* This Act was assented to on 21 November 2008 but as yet item 1 of Schedule 1 has not commenced.[1]

Amendments to the *Federal Court Act 1976*

The amendments to the Federal Court Act are designed to expedite the proceedings of the Court and to assist in avoiding undue delays experienced in procedural matters. A single judge is given the power to make interlocutory orders either before or after the determination of a matter by the Full Court either in the exercise of original or appellate jurisdiction. This will avoid having to convene the Full Court for this purpose.

An 'interlocutory order' is defined as an

> immediate direction of a court made before the court makes a final determination of the proceedings. Appeal courts will not overturn interlocutory orders unless a clear case has been made out that the judge who made the interlocutory order has acted on some wrong principle or has made an order that works a substantial injustice to one of the parties.[2]

The Bill also makes provision for the Federal Court to appoint referees and to refer a proceeding or questions arising in a proceeding to the referee to inquire into and report on to the Court. Referees will have the same protection and immunity as a judge when inquiring or reporting on a proceeding or a question referred by the Court. This means that referees will have complete protection from civil liability when discharging their functions

1. Item 1 of Schedule 1 is due to commence on a single day to be fixed by Proclamation, or on 22 May 2009, whichever occurs first.

2. LexisNexusAU, *Interlocutory order: practice and procedure*, Encyclopaedic Australian Law Dictionary.

under **proposed section 54A** of the Federal Court Act and providing that they act in good faith.[3]

Amendments proposed by **Schedule 1** provide that the Rules of Court will make provision for:

- the types of cases to be referred
- the procedural matters involved in the referral of a proceeding or a question to a referee
- the appointment of referees
- fees payable, and
- time limits on parties and so on
- referees to have the power to require that evidence be taken under oath or affirmation, and
- referees to have the power to administer an oath or affirmation.

The Explanatory Memorandum states that the ability to refer a 'matter out to a referee will provide the Court with greater flexibility, ensure efficient use of judicial resources and assist in the timely and efficient resolution of disputes for litigants'.[4] The Bill provides that the Court can appoint a referee who can be a judge, the Registrar or another officer of the Court or any other person to inquire into and report on a referred proceeding or questions in relation to a proceeding.

The Federal Court deals with a myriad of different types of cases from very complex commercial and corporate law cases to social security matters and migration cases. It also has the problem of dealing with self-represented litigants. If a referee has questions arising from a complex proceeding to inquire into and report on, the actual inquiry itself by the referee could become very complex and time consuming and would no doubt involve substantial cost. See the commentary below by former Federal Court judges on

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3. '*Judicial immunity*' is defined as follows: Complete protection from civil liability afforded to the judiciary when discharging their judicial function. Under this doctrine, the judiciary are not liable for any act provided they are acting in good faith: *Rajski v Powell* (1987) 11 NSWLR 522. Immunity does not extend where, although purporting to act in a judicial capacity, the judge knowingly acts unlawfully and beyond jurisdiction: *Moll v Butler* (1985) 4 NSWLR 231; 10 Fam LR 544; *Rajski v Powell*. Even if this were established the executive government cannot be held vicariously liable: *Rajski v Powell*, Encyclopaedic Australian Law Dictionary.

4. Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008, p. 1.

this point. The question then arises as to who pays for the provision of this service. Although the Explanatory Memorandum states that there is no significant financial impact, it would appear a difficult matter to determine what exactly the cost will be. While the Court Rules may make provision for 'the fees payable to a referee' (**proposed paragraph 59(2C)(h)**), the Bill, second reading speech and Explanatory Memorandum are silent as to how they are to be paid and by whom. This silence (and/or lack of appropriation) suggests the fees will be borne by litigants not the Court, but further clarification from the Government would avoid any doubt.

The Court is already trialling innovative approaches to try and deal with some of the problems associated with maintaining an efficient case management system. The extract below from the Court's latest Annual Report outlines these strategies:

> During the year, the Court continued to actively pursue greater efficiency in its case management. The emphasis in this work has been to improve the overall management of litigation in the Court in order to resolve disputes as quickly, inexpensively and efficiently as possible.
>
> As reported in 2006–07, the Victorian Registry of the Court launched a 'Fast Track List' in May 2007. The principal objective of the Fast Track List is to streamline court procedures in order to significantly reduce both the time and costs of litigation. The key elements of the List are the replacement of pleadings with a case summary, compulsory attendance at a scheduling conference held approximately six weeks after filing to identify the issues in dispute, dealing with most interlocutory applications on the papers, reducing the volume of discovery, closely monitoring trial times and, where possible, delivering judgment within six weeks. An extensive consultation program was undertaken with the legal profession, with Fast Track List presentations given to over 50 law firms.
>
> The List continues to operate effectively. The average time to finalisation is four months and litigants costs have been substantially reduced. After a trial period of 12–18 months, and further consultation with judges and the profession, an assessment will be made about whether the List should be introduced nationally.
>
> …
>
> The Court is also developing other procedures and protocols that will help strengthen the active case management of proceedings. These include the introduction of guidelines for the conduct of matters in particular areas of the Court's jurisdiction, such as taxation and intellectual property matters, and for the more effective use of technology in relation to pre-trial procedures (such as discovery) and hearings. Work will continue in relation to such matters as the early identification and refining of the real issues in dispute, the use of specialist panels and lists and the conduct of mega-litigation.
>
> The Court has undertaken an extensive review of its Practice Note which deals with the use of technology in litigation. The new Practice Note will more clearly inform

> the parties and their representatives about the Court's expectations on how technology should be used in proceedings and recommends a framework or procedures and protocols for managing electronic documents in both the discovery process and in the conduct of electronic trials. The procedures and protocols are designed to help ensure that the use of technology contributes to the quick, inexpensive and efficient resolution of proceedings.[5]

The problems that federal courts have been grappling with are not new, as evidenced by the following reviews:

- Federal Civil Justice Strategy Paper December 2003[6]
- Managing Justice: a review of the Federal Civil Justice System, Report No. 89, ALRC, 1999.[7]

The Bill is silent on the matter of what type of qualifications and/or experience a referee is required to have, assuming the referee is not a Judge, Registrar or other court officer. The measure is aimed at resolving commercial disputes 'as expeditiously and economically as possible' and is thought to be useful in cases involving 'complex technical issues or where detailed examination of financial records is necessary to assess damages.'[8] However, no mention is made in the Bill of the need for a referee to possess financial and /or accounting qualifications, or perhaps some other relevant qualification and/or experience in other areas such as building construction. However, it would be expected that the Court Rules would set up the framework in relation to these matters.

International Commercial Arbitration

The International Arbitration Act implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (into Australian domestic law.

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5. Federal Court of Australia, Annual Report 2007–2008, 'Case management strategies', p. 13, http://www.fedcourt.gov.au/pdfsrtfs_a/annual_report_2007/annualreport2007.pdf, accessed on 2 February 2009.
6. Attorney-General's Department, *Federal Civil Justice System Strategy Paper*, December 2003, http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_FederalCivilJusticeSystemStrategyPaper-December2003, accessed on 2 February 2009.
7. Australian Law Reform Commission, *MANAGING JUSTICE: A review of the federal civil justice system*, Report No 89, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/, accessed on 2 February 2009.
8. The Hon. Robert McClelland MP, Attorney-General, 'Second reading speech: Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008', House of Representatives, *Debates*, 3 December 2008, p. 12296, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2008-12-03%2F0025%22, accessed on 3 February 2009.

In acceding to the Convention, Australia was obliged to recognise and enforce foreign arbitration agreements and foreign arbitral awards.[9] Matters involving disputes usually involve commercial contracts.

The amendments in the current Bill clarify the Federal Court's existing jurisdiction under Part II of the Act which involves the enforcement of foreign awards. The Federal Court is also given concurrent jurisdiction under Parts III and IV of the Act with state and territory courts.[10] The amendment to section 18 designates the Federal Court as a competent court to perform the functions under Article 6 of the 'Model Law'. The 'Model Law' refers to the UNCITRAL Model Law on International Commercial Arbitration:

> The Model Law is designed to assist States (countries) in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[11]

The text of the Model Law can be found at Schedule 2 of the International Arbitration Act together with the other international instruments which the Act implements.

The second reading speech refers to the need to ensure that the Federal Court is well equipped to operate as a regional hub for commercial arbitration.[12] The Office of International Law in the Attorney-General's Department is currently undertaking a review of the International Arbitration Act to ensure that the legislation 'best supports international arbitration in Australia'.[13] The objects of the review are to:

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9. The Hon. K. Enderby MP, then Minister for Manufacturing Industry, 'Second reading speech: Arbitration (Foreign Awards and Agreements) Bill 1974', House of Representatives, *Debates*, 2 December 1974, p. 4390.

10. The Hon. Robert McClelland MP, Attorney-General, 'Second reading speech: Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008', House of Representatives, *Debates*, 3 December 2008, p. 12296, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2008-12-03%2F0025%22, accessed on 2 February 2009.

11. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration, 1985, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

12. The Hon. Robert McClelland, op. cit.

13. Office of International Law, Attorney-General's Department, *Review of the International Arbitration Act 1974: discussion paper*, November 2008.

> a) ensure it provides a comprehensive and clear framework governing international arbitration in Australia
>
> b) improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration, and
>
> c) consider whether to adopt 'best-practice' developments in national arbitral law from overseas.[14]

Committee consideration

Inquiry into the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008

Provisions of this Bill have been referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 17 February 2009.[15] Details of the inquiry can be found at http://www.aph.gov.au/Senate/committee/legcon_ctte/efficiency_measures/index.htm.

Position of significant interest groups/press commentary

Federal Court powers

The *Australian Financial Review* has reported on comments made by several Federal Court judges, both serving and retired members of the Court. The Hon. Rodney Madgwick, who retired from the Court in April 2008, suggested that an investigatory system for small disputes should be used rather than the adversarial system.[16] He said:

> So bad is the position in relation to small-scale litigation that serious thought should be given to a completely fresh look at it and we may have to consider means of by-passing the adversary system altogether.[17]

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14. ibid.
15. Selection of Bills Committee, Report No. 17 of 2008, 4 December 2008, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2008/rep1708.pdf, accessed on 2 February 2009.
16. Bill Pincus, 'Practical Approach could slash litigation costs', *Australian Financial Review*, 7 November 2008, p. 52.
17. James Eyers, 'Relief for small litigators urged', *Australian Financial Review*, 23 April 2008, p. 5, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FXN8Q6%22, accessed on 2 February 2009.

Pincus also suggested it is more urgent to employ the investigatory system in relation to massive litigation.[18] In the United States, he stated that special masters are sometimes appointed to report on complex matters involved in the litigation.

> The European inquisitorial system, as exemplified by the performance of the German civil courts, seems to work pretty well. As a first step, our courts might, whether the parties want it, appoint a person in complex cases to report on the issues, after gathering information by any method thought convenient by the reporter. The report might take weeks to complete and could be quite expensive. But the Bell decision, for example, was not completed until 13 years after it was initiated.[19]

This suggestion is very similar to the reform being proposed by this Bill.

International Arbitration

The Australian reports that the Attorney-General, the Hon. Robert McClelland, has singled out the Federal Court to be the primary focus for Australia's attempt to counter Singapore's growing status as a regional commercial hub. He said Australia needed to counter Singapore as a commercial centre but those efforts were being hampered by the conflicting ambitions of different courts.[20] The *Australian Financial Review* reports that the Attorney-General has called on NSW and Victoria to recognise the importance of a harmonised approach to international commercial arbitration:

> … we have some stiff competition from Singapore and Hong Kong who are putting a lot of resources into this, and it is my strong conviction we are not going to be able to [become a regional arbitration hub] if Victoria is putting up its hand and saying 'We are the centre for international arbitration' and NSW is jumping up and down saying 'We are the centre'. What we have to say is Australia is the centre for commercial arbitration.[21]

Financial implications

The Explanatory Memorandum states that the Bill will have no significant financial impact. However, in relation to the appointment of referees to assist the Federal Court before and during proceedings and after, the cost of investigations and reporting processes may result in substantial cost, if not to the Government and/or the Federal Court, then to litigants. It is difficult to determine the extent of the impact as it will depend on the

18. Pincus, op. cit.

19. ibid.

20. Chris Merritt, 'Business litigants back Spigelman Court', *The Australian*, 25 July 2008, p. 29.

21. James Eyers, 'McClelland wants states to find solutions', *Australian Financial Review*, 5 December 2008, p. 46.

management of individual cases, and the issues raised in each case. Former Federal Court judges have commented on the possible cost impact but have put it in the context of overall costs of complex litigation. The use of referees by the court will contribute to saving the time of judges in inquiring into matters in which they may not have particular expertise and it will ultimately save the Court time as well.

Main provisions

Schedule 1—Federal Court powers

Item 2 inserts **proposed paragraph 20(5)(aa)** to enable a single judge or a Full Court of the Federal Court in the exercise of original jurisdiction to make an interlocutory order pending or after the determination of a matter by the Full Court. As the Explanatory Memorandum indicates, this amendment will reduce the potential for undue delays in having to convene a Full Court for this purpose.[22] Similarly **item 4** inserts **proposed paragraph 25(2B)(ab)** to enable a single judge or a Full Court to make an interlocutory order pending or after the determination of an appeal to the court.

Item 6 inserts **new section 54A** which enables the Court, subject to the Rules of Court, to refer a proceeding or a question or questions in relation to a proceeding to a referee to inquire into and report to the Court (**proposed subsection 54A(1)**). Such a referral can be made at any stage of the proceeding (**proposed subsection 54A(2)**) and when the report is made to the Court, the Court can deal with it as it thinks fit. The Court may either adopt the report, vary it in some way, reject it completely, and make such orders as it thinks appropriate on the matters referred to the referee (**proposed subsection 54A(3)**).

Item 6 also inserts p**roposed section 54B**, which confers on the referee the same immunity and protection as a judge has in performing the functions of a judge.

Item 7 inserts **proposed subsection 59(2C)** to provide that the Rules of Court may make provision for the following matters in relation to a referral of proceedings or questions to a referee by the Court:

- the cases that may referred by the Court
- the appointment of a referee
- the procedures to be followed by a referee when inquiring into and reporting on a proceeding or a question arising from a proceeding
- the participation of persons in an inquiry by a referee
- the procedures to be followed after an inquiry has ended
- the manner in which a report may be called into question

22. Explanatory Memorandum, p. 4.

- provision of services and facilities to a referee for an inquiry
- fees payable to a referee
- time limits to be observed by parties, and
- other matters relating to an inquiry or a report.

Proposed subsection 59(2D) provides that the Rules of Court may empower the Court or a referee to require evidence be given on oath or affirmation, or that the referee may administer an oath or affirmation.

Item 8 deals with the application of amendments. The amendments made by the schedule will apply to matters which commenced in the Court either before, on or after the commencement of this Schedule. In other words, the amendments apply to all matters which have been filed in the Court but are yet to be finally determined. While the amendments have retrospective application, it is difficult to see how a litigant may be disadvantaged by the fact a single judge may make an interlocutory order in matters that would otherwise be heard by a Full Court, and/or the fact that a proceeding (or one or more questions arising in the proceeding) may be referred to a referee to inquiry or report—although it may depend on the type of case, the issues arising in the case, and the stage at which the case is at

Schedule 2—International arbitration

International Arbitration Act 1974

Item 1: proposed subsection 3(1) of the International Arbitration Act amends the definition of '*court*' in the Act to specifically mention the Federal Court of Australia, which has concurrent jurisdiction with other state and territory courts to enforce foreign arbitral awards.

Item 2: proposed subsection 8(3) provides that with leave from the Federal Court of Australia, a foreign award can be enforced in the Federal Court as if it were an award of the Federal Court.

Item 3: proposed subparagraph 18(c) specifies the Federal Court of Australia as a competent court for the purposes of Article 6 of the UNCITRAL Model Law on International Commercial Arbitration (as set out in Schedule 2 of the Act). As a specified court, it can perform the functions of appointing arbitrators, challenging an arbitrator, terminating the mandate of an arbitrator, ruling on an arbitral tribunal's jurisdiction, and the setting aside of an arbitral award.

Item 4: proposed subsections 35(3) and (4) designate the Federal Court of Australia for the purposes of Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. The text of this Convention can be found in Schedule 3 of the International Arbitration Act. Section 35 of the Act deals with the

recognition of awards. Under the amendments, the Federal Court may enforce the award as if it were an award of the Federal Court—although the award may only be enforced with the leave of the Court, not as of right (**proposed subsection 35(4)**).

Schedule 3—Land Acquisition

Schedule 3 amends the following provisions of the following Acts:

References to the *Lands Acquisition Act 1989* in this Schedule relate to the administrative matters of the courts and tribunals acquiring and disposing of land for their own purposes.

- *Administrative Appeals Tribunal Act 1975* (AAT Act), subsection 24A(4)
- Family Law Act, subsection 38A(4)
- Federal Court Act, subsection 18A(4), and
- *Native Title Act 1993* (Native Title Act), subsection 128(4)

Item 1: proposed subsection 24A(4) repeals and substitutes the existing provision in the AAT Act which will enable the President of the AAT to acquire an interest in land under the *Lands Acquisition Act 1989.* Currently the President of the AAT is not authorised to do so. The President of the AAT will be able to negotiate and execute leases without the Minister's approval, providing that it does not exceed the prescribed limit of $1 million. This limit also applies to major purchases.

Item 1 repeals existing subsection 24A(4) and substitutes a **new subsection 24A(4**) in its place. Currently, subsection 24A(4) refers specifically to the fact that the President of the AAT is **not** authorised to:

> (a) acquire any interest or right that would constitute an interest in land for the purposes of the *Lands Acquisition Act 1989* ; or
>
> (b) enter into a contract under which the Commonwealth is to pay or receive an amount exceeding $250,000 or, if a higher amount is prescribed, that higher amount, except with the approval of the Minister.

Currently, the higher amount of $1 million is prescribed for the purposes of paragraph 24A(4)(b).[23] The revised provision removes all reference to the acquisition of any interest or right 'that would constitute an interest in land for the purposes of the *Lands Acquisition Act 1989*'. Instead, **proposed subsection 24A(4)** consists of only the fact that the President is not authorised to enter into a contract under which the Commonwealth is to pay or receive an amount exceeding $250,000 (or such higher amount as is prescribed)

23. Regulation 21, Administrative Appeals Tribunal Regulations 1976.

without the Minister's approval. Presumably, such a contract can now include the sale or purchase of land.[24]

By virtue of the operation of **item 5** of **Schedule 3** to the Bill, any regulation that was made for the purposes for paragraph 24A(4)(b) (which is to be repealed by **item 1**) is taken to have been made for the purposes of **proposed subsection 24A(4)** of the AAT Act. Thus, the President of the AAT may enter into a contract (including a contract for the acquisition of land) under which the Commonwealth must pay or receive an amount not exceeding $1 million without the Minister's approval.

Items 2–4 make similar amendments to the Family Law Act, the Federal Court Act and the Native Title Act in so far as they remove reference to the acquisition of 'any interest or right that would constitute an interest in land for the purposes of the *Lands Acquisition Act 1989*', but retain the power of the Chief Judge of the Family Court, the Chief Justice of the Federal Court, and the President of the Native Title Tribunal (as the case may be) to enter into a contract under which the Commonwealth is to pay or receive an amount exceeding $250,000 (or such higher amount as may be prescribed) without the Minister's approval. Currently, the amount of $1 million has been prescribed in relation to contracts entered into by these courts and the tribunal—by virtue of **item 5** of **Schedule 3**, that amount will remain the same for the purposes of the revised provisions,[25]

Schedule 4—Court premises

Public Order (Protection of Persons and Property) Act 1971

Item 1 of **Schedule 4** repeals the definition of '*court premises'* in **section 13A** and replaces it with a new definition that makes specific reference to the Federal Court and to premises for which a '*court premises order*' exists. **Item 2** inserts **proposed section 13AA**, which provides for the making of a '*court premises order*' by an authorised Court official **(proposed subsection 13AA(1)).** Such an order can be made if premises are to be likely to be occupied or used on a permanent or temporary basis, or under a lease or otherwise, in connection with operations of the Federal Court **(proposed subsection 13AA(2)).** An '*authorised court official*' may give notice of a court premises order by

24. Note that unlike the other courts and tribunals affected by the Bill, the High Court of Australia retains a specific power to 'acquire, hold and dispose of real and personal property' (paragraph 17(2)(b) of the *High Court of Australia Act 1979*), in addition to its general power to enter into contracts (paragraph 17(2)(a) of that Act). Except with the Minister's approval, the Court may enter into contracts under which 'the Court is to pay or to receive an amount exceeding $250,000' (unless a higher limit is prescribed): section 40. Currently, the higher amount of $1 million is prescribed by regulation 4 of the High Court of Australia Regulations 2000.

25. See regulation 3A of the Family Law Regulations 1984, regulation 17 of the Federal Court of Australia Regulations 2004, and regulation 18 of the Native Title (Tribunal) Regulations 1993.

posting a copy of the order in a prominent place near the court premises **(proposed subparagraph 13AA(5)(a)(i))** and ensuring that, if the premises are occupied or used for the purposes of a sitting or proceeding, an announcement concerning the details of the order and its effect is made at the beginning of or during the sitting or proceeding **(proposed subparagraph 13AA(5)(a)(ii))**.[26] One of the effects will be that persons on court premises can be searched if an authorised officer in relation to a court believes on reasonable grounds that the removal or search is necessary 'in the interests of security', and removed if they refuse or fail to comply with requirement, or do not satisfy the officer that they have a proper reason for being on the court premises[27] If regulations exist under **proposed subsection 13AA(6)** (prescribing the form of the notice, the manner of giving the notice, and the content of the notice) then the requirements prescribed by those regulations are to be complied with: **proposed paragraph 13AA(5)(b)**).

Schedule 5—Binding Financial Agreements

Part 1–Financial agreements

Item 2 repeals existing paragraphs 90G(1)(b) and (c) of the Family Law Act and inserts **proposed paragraph 90(G)(1)(b)** to clarify and simplify what each spouse party is provided with before signing a financial agreement. Each spouse party will be required to have independent legal advice about the effect of the agreement on their rights, and the advantages and disadvantages of entering the agreement at the time the advice was given; and a signed statement by the legal practitioner providing the advice to that spouse party stating that this advice was given to the party.[28]

Item 5 repeals existing paragraphs 90J(2)(b) and (c) and inserts **proposed paragraph 90J(2)(b)**. This amendment is similar to item 2. It clarifies and simplifies what each spouse party is required to have prior to signing a termination agreement, being (as is the case in relation to financial agreements under **proposed paragraph 90G(1)(b)**) independent legal advice from a legal practitioner about the effect of the agreement on the party's rights, the advantages and disadvantages of entering the agreement at the time the advice was provided, and a signed statement from the legal practitioner stating that the advice was given to the party.

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26. The term '*authorised court official*' is defined in **proposed subsection 13AA(8)** to mean the Registrar of the Federal Court or a Federal Court officer authorised in writing by the Registrar for the purposes of (proposed) section 13AA.

27. See, for example, sections 13D and 13E of the Public Order (Protection of Persons and Property) Act 1971.

28. A financial agreement may be made before, during or after the marriage. The advantages and disadvantages of entering the agreement may vary significantly during the course of the marriage, so it is important that the advice set out the effect of the agreement on the rights of the party and about the advantages and disadvantages **at the time that the advice was provided**.

Sub-item 8(1) provides that the amendments made by items 2 to 7 in this Schedule apply to financial and termination agreements made on or after 27 December 2000. **This is the date that the provisions** dealing with financial agreements (inserted by the *Family Law Amendment Act 2000* No. 143) commenced. However, **sub-item 8(2)** states that these amendments do not apply to an agreement if a court has made an order to set the agreement aside prior to the commencement of this item. While the amendments are thus of retrospective operation, they are unlikely to affect a party's substantive rights in any significant way, given that at present the law requires the agreement itself to contain a statement that each party has received independent legal advice of the sort set out in **proposed subparagraph 90G(1)(b)(i)**, and for a certificate signed by the person providing the independent legal advice to be annexed to the agreement. However a party may incur additional and unreasonable expense if the Court refuses to accept an agreement for filing because the statement is annexed to the agreement (as per the current law) instead of that statement being given to the party before he or she signed the agreement under the proposed amendment.

Part 2–Financial matters relating to de facto relationships

Item 10 repeals paragraphs 90UJ(1)(b) and (c) of the Family Law Act and inserts **proposed paragraph 90UJ(1)(b)** in their place. Paragraphs 90UJ(1)(b) and (c) were inserted by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (which is not yet in force). The amendment is similar to the amendment made by item 2 but deals instead with financial agreements between *de facto* partners. Before signing a financial agreement, each spouse party is required to be provided with independent legal advice from a legal practitioner on their rights and the advantages and disadvantages of making the agreement at the time when the advice was given. The legal practitioner giving the advice is required to give the spouse party a signed statement stating that the advice was given to that party. Similarly, i**tem 13** repeals paragraphs 90UL(2)(b) and (c) and substitutes **proposed paragraph 90UL(2)(b)** setting out what a spouse party must receive before signing a termination agreements between de facto partners.

Section 90UM of the Family Law Act (which was inserted by the *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, but is yet to commence) deals with the circumstances in which a court may set aside a financial agreement or termination agreement. **Item 16 amends subsection 90UM(5)** and states that if at least one of the spouse parties has not had independent legal advice concerning their rights and the advantages and disadvantages to that party of making the agreement before signing the agreement, or if they did not receive a signed statement from the legal practitioner to say that they had received this advice, then the court may set aside the agreement if it would be unjust and inequitable not to do so.

Sub-item 17(1) provides that the amendments made by items 10 to 15 apply to agreements made under sections 90UB, 90UC or 90UD and termination agreements under Part VIIIAB of the *Family Law Act 1975*. They apply to agreements made on or the day

after item 1 of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* commences. **Sub-item 17(2)** states that if a court has set aside an agreement prior to commencement of these provisions, the amendments do not apply in relation to that agreement.

Concluding comments

As the Attorney-General points out, the appointment of referees to the Federal Court is a means of enabling the Court 'to more effectively manage large litigation': 'Such efficiency is important if we are to ensure that the cost of justice remains proportionate to the relief being sought.'[29] Although using referees may be a costly exercise in some instances, the results of doing so may enable the Court to manage its case load more efficiently to cut down on the time taken and the resources needed to conduct complex litigation, with the possibility of freeing up court time and resources for smaller cases too. It may be a matter of observing how it operates in practice.

29. The Hon. Robert McClelland MP, Attorney-General, *Referees to provide expert assistance to Federal Court*, media release, Canberra, 3 December 2008.

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