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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILY LAW AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

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FAMILY LAW AMENDMENT BILL 2004

GENERAL OUTLINE

In line with the Government's ongoing reform agenda in Family Law this Bill makes a range of changes to the Family Law Act. In particular the Bill deals with the interaction of bankruptcy and family law, the enforcement of court orders, introduces the term 'divorce', allows for recovery of child maintenance paid by a person found not to be a parent, strengthens the court's powers in relation to vexatious litigants and clarifies the rule-making power of the Family Court, and a range of largely technical amendments intended to improve the operation of the Act.

Family Law and Bankruptcy

Part 19 of the Bill contains amendments to implement three recommendations of the *Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax* which was provided to the former Attorney-General and the Assistant Treasurer in 2002.

The Bill includes amendments to clarify the standing of third party creditors to intervene in family law property proceedings, and to seek to have property orders set aside or overturned after they have been made. An amendment is also included which enables third parties to apply to the court for an order or injunction preventing the disposition of property pending an application to set aside or overturn a property order. These provisions build upon amendments to expand the rights of third parties in relation to binding financial agreements which were made in the *Family Law Amendment Act 2003*.

An amendment is also contained in the Bill that makes provision for notice to affected third parties in matters involving property orders. A further amendment provides for a separation declaration to be made for financial agreements under Part VIIIA of the Act to help ensure that such agreements are entered into by couples for the distribution of property as between the spouses on marriage breakdown rather than for purposes such as avoiding creditors.

Own motion orders in enforcement proceedings under Part VII

Following introduction of the three-stage parenting compliance regime in the *Family Law Amendment Act 2000*, it has become apparent that many parenting orders by consent do not work for practical reasons. Many of these orders are made by consent. Instead of bringing applications to vary the 'unworkable order', the experience of courts exercising jurisdiction under the Act is that parties tend instead to bring contravention applications.

A new subdivision is to be created in Division 13A of Part VII of the Act to provide the Court with the power to vary on its own motion orders relating to children at a hearing on a contravention application. The amendments also clarify the Court's power to send parties in contravention proceedings to counselling and post-separation parenting programs.

Divorce order – replacing the terms 'dissolution of marriage', 'decree nisi' and 'decree absolute'

These provisions are intended to replace outdated and legalistic terms in the Act relating to the termination of marriage with more modern language including the use of the term divorce.

‘Decrees nisi’ and ‘absolute’ are replaced by the term ‘divorce order’. Just as ‘decree absolute’ takes effect one month after the ‘decree nisi’, the divorce order would take effect one month after it is made. In that month, proceedings can be brought to have the divorce order rescinded.

The term ‘dissolution of marriage’ is replaced by the concept of ‘divorce’. A definition of divorce is set out in the definition section of the Act.

Proceedings for principal relief – replacing with a concept of ‘divorce or validity of marriage proceedings’

The Act refers to proceedings for principal relief in a number of places. That concept describes proceedings for a decree of dissolution or a decree of nullity or proceedings for a declaration of the validity of a marriage or the validity of a decree of dissolution.

In keeping with the intention of making the language of the Act clearer, minor amendments are inserted throughout the Act to refer, where appropriate, to either ‘divorce proceedings’ or ‘validity of marriage proceedings’.

Empower the Court to order the repayment of monies paid under a child maintenance order where the person is found not to have been the ‘parent’ of the child

A person who has been determined not to be a parent (for example through DNA testing) is unable to recover under section 66 amounts of child maintenance paid under a child maintenance order made under the Act. This is because under this section only people who could apply for a maintenance order in relation to a child can seek a modification of that order. A person who is not a parent is not able to seek such an order. Effectively this means that such a person can only recover maintenance payments made by taking debt recovery action in a State court.

Generally, only parents who separated before 1989 and whose children were born before that date could have applied for and can still apply to the court for a parenting order in relation to the maintenance of a child under the Family Law Act. All other child support applications must be made under the *Child Support (Assessment) Act 1989*.

A new section 66X provides that where a court determines that a party to a child maintenance order is found not to have been a parent or a liable step-parent of the child to whom the order relates, and that person has made payments under the purported order in respect of the child, the amount paid may be recovered in a court having jurisdiction under Part VII of the Family Law Act.

Frivolous or vexatious proceedings

The proposed amendments are intended to strengthen the Court’s power to dismiss vexatious proceedings and to make orders with respect to vexatious litigants. The amendments are intended to ensure the Court has sufficient power to deal with both proceedings and litigants as comprehensively as possible.

Rules as to costs

The proposed amendment provides for a court to make rules which impose costs on parties unless the court orders otherwise. This proposal is consistent with provisions being introduced in the Family Court’s new Rules of Court.

The rule making power would provide that:

- in the event of default or non-compliance with an order or the Rules of Court; or

- in the event of behaviour which is regarded (by the majority of Judges of the court) as an abuse of process or otherwise unreasonable

the defaulting party must pay the non-defaulting party's costs unless otherwise ordered by the Court.

Civil penalties for contravention of Rules of Court

Currently, the penalty provisions for the rule-making power of the Court in section 123 only provides for criminal penalties. The amendment is intended to make clear the Court's power to make rules prescribing civil penalties.

FINANCIAL IMPACT STATEMENT

These measures will have little or no financial impact.

CONSULTATION STATEMENT

The Bill has been subject to consultation with both the Family Court and the Federal Magistrates Court over a period of about three months.

NOTES ON ITEMS

Clause 1 – Short title

Item 1 provides for the Act to be cited as the *Family Law Amendment Act 2004*.

Clause 2 – Commencement

Item 2 provides for the commencement of the Act. Subclause 2(1) provides that each provision in column 1 of the table will commence on the day or at the time specified in Column 2 of the table.

Sections 1-3 and anything in the Act not covered elsewhere in the table commence when the Act receives Royal Assent.

The items in Schedule 1 of the Bill commence 28 days after the Bill receives Royal Assent.

SCHEDULE 1 – AMENDMENTS

Item 1: At the end of section 65F

1. A new subsection is inserted to define ‘proceedings for a parenting order’ to make it clear that the court has power to order a party to attend counselling in proceedings for enforcement of a parenting order under Division 13A of Part VII of the Act, or where contravention of such an order is alleged.

Item 2: Subsection 65LA(3)

2. A new subsection is inserted to define ‘proceedings for a parenting order’ to make it clear that the court has power to order a party to attend post-separation parenting programs in proceedings for enforcement of a parenting order under Division 13A of Part VII of the Act, or where contravention of such an order is alleged.

Item 3: After Subdivision A of Division 13A of Part VII

Subdivision AA: Court’s powers where contravention without reasonable excuse not established:

Section 70NEB Court’s power to vary parenting order

3. A new subdivision AA is inserted after subdivision A of Part VII. Subdivision AA is to include a new section 70NEB which provides that a court may vary a parenting order if there is an alleged contravention of a parenting order and either, the court is not satisfied that there was a contravention, or the court is satisfied there was a contravention but that there was a reasonable excuse.

Item 4: Application

4. The new provision set out in Item 3 is to apply whether the parenting order is made before or after the commencement of the subdivision.

5. The reason for the provision applying to parenting orders made before the provision commences is that without this provision a court dealing with a contravention of a parenting order application is left with little it can do when it does not find the contravention proven except to dismiss the proceedings. This will be the case even though it is clear that what is really required is a variation of the original parenting so that it operates more effectively.

Part 2 – Costs and offers of settlement

Family Law Act 1975

Item 5: Paragraph 117(2A)(f)

6. This item amends paragraph 117(2A)(f) so that when a judge is determining whether to make a cost order (under subsection 117(2)), there is no longer a requirement for them to consider whether the parties have made an offer of settlement in accordance with section 117C.

Item 6: Section 117C

7. This item repeals the current provision and inserts a substitute which encompasses a number of the previous provisions regarding how offers of settlement operate under the Act. The effect of this change has been to remove the provision relating to parties filing notices of offers to settle and withdrawal of such offers in the Court.
8. Provisions dealing with filing of offers are now comprehensively dealt with under the new Family Law Rules which come into effect 29 March 2004.

Item 7: Application

9. This item deals with the way the amendments under this Part will be applied. It specifies that the changes made regarding offers of settlement will apply on or after the commencement of the changes.

Part 3 – Suspension of sentences of imprisonment

Family Law Act 1975

Item 8: After subsection 70NO(4)

10. This item inserts a new provision which gives the court an express power to suspend or terminate a suspension of an imprisonment order, where a sentence of imprisonment has been made under paragraph 70NJ(3)(e).

Item 9: After subsection 112AE(4)

11. This item replicates the provision inserted in Item 7 (above) relating to the court's power to suspend or terminate a suspension of an imprisonment order under subsection 112AD(1). Importantly, the power in subsection 112AE(4) relates to the court's broader power to imprison, rather than being restricted to the parenting order compliance regime relating to children, as subsection 70NO(4) does.

Part 4 – Enforcement (removing of information procedure)

Family Law Act 1975

Item 10: Subsections 70NN(2) to (7)

12. This item repeals subsections (2) to (7), and substitutes a new subsection (2). The repealed subsections deal with what happens after information is laid before a magistrate in the context of proceedings that relate wholly or partly to a parenting order. Currently a magistrate can proceed to issue a summons or warrant for the arrest of a person.
13. The amendment provides that where a court, that has made a community service order or required a bond to be entered into, is satisfied that a person failed to comply with the order or bond without reasonable excuse, then it can exercise its powers under subsection (8) without having to go through the information procedure.

Item 11: Subsection 70NN(10)

14. This item repeals subsection (10) which has no operation following the repeal of the laying of information procedures.

Item 12: Subsections 112AH(2) to (7)

15. This item repeals subsections (2) to (7) and replaces them with a new subsection (2). The amendments are in the same terms as Item 10 above. Section 112AH applies more broadly to orders made under the Act other than proceedings that relate to parenting orders as section 70NN does in Item 10.

Item 13: Subsection 112AH(10)

16. This item repeals subsection (10) which has no operation following the repeal of the laying of information procedures.

Item 14: Application

17. This item provides that the amendments contained in this Part come into operation on or after the commencement of this Part.

Part 5 – Private Arbitration

Family Law Act 1975

Item 15: Subsection 4(1)

18. This item inserts a definition of Part VIIIIB proceedings. This definition supports the amendment in Item 16 relating to private arbitration. For the purposes of this definition, Part VIIIIB proceedings relate to proceedings within the meaning of that Part, including superannuation agreements and proceedings relating to a payment spilt or flag.

Item 16: Subsection 4(1)

19. This Part provides for the expansion of the matters that can be dealt with by private arbitration under the Act.
20. This item inserts a definition of Part VIIIA proceedings. This definition supports the amendment in Item 18 relating to the expansion of matters that can be dealt with by private arbitration. For the purposes of this definition, Part VIIIA proceedings relate to financial agreements.

Item 17: Subsection 4(1)

21. This item inserts a definition of section 106A proceedings. This definition supports the amendment in Item 18 relating to private arbitration. For the purposes of this definition, section 106A proceedings relate to the execution of instruments by order of the court to assist in the enforcement of orders made by the court.

Item 18: Subsection 19E(3) (paragraph (a) of the definition of *dispute*)

22. This item repeals the current provision and inserts a substitute which retains reference to Part VIII proceedings and specifically includes three new types of proceedings which may be subject to a private arbitration under the Act. Under this change, Part VIIIA proceedings relating to financial agreements, Part VIIIB proceedings relating to superannuation and section 106A proceedings relating to execution of instruments by order of the court, are now included in the definition of 'dispute' for the purposes of subsection 19E(3), relating to private arbitration under section 19E.

Part 6 – Change of Venue

Family Law Act 1975

Item 19: After section 27

23. This item inserts a new provision which gives an express power to the Court to make an order for a change of venue. This is a discretionary power as it can be used at any point during a proceeding being heard, and any such order can be made subject to *any* term or condition as determined by the Court or Judge. The Court also has the capacity to direct that only part of the proceedings be subject to a change of venue.

Part 7 – Definition of disposition

Family Law Act 1975

Item 20: Subsection 106B(5) (definition of *disposition*)

24. This item repeals the definition of disposition and substitutes an expanded definition which includes the issue, grant, creation, transfer or cancellation or variation of rights in an interest in a company or a trust.

Item 21: Subsection 106B(5)

25. This item inserts definitions of what is an interest in a company, and what is an interest in a trust. An interest in a company is broadly defined and includes a share in or debenture of the company and an option over a share in or debenture of the company.
26. An interest in a trust is broadly defined and includes: a beneficial interest; the interest of a settlor in property subject to the trust; a power of appointment under the trust; a power to rescind or vary a provision or the exercise of a power under the trust; and an interest that is conditional, contingent or deferred.

Item 22: Application

27. This item provides that the amendments in this Part come into operation on or after the commencement of this Part.

Part 8 – Appeals

Family Law Act 1975

Item 23: Subsection 94(2D)

28. The amendment in this item indicates that the range of matters for which an application can be made under subsection 94(2D) are of a procedural nature.

Item 24: After paragraph 94(2D)(d)

29. This item brings under paragraph 94(2D) six additional types of procedural application which concern the conduct of an appeal to the Family Court from courts other than the Federal Magistrates Court. These are procedural applications: for an extension of time within which to file an application for leave to appeal; for security for costs in relation to an appeal; to reinstate an appeal dismissed under a provision of the Rules of Court; to adjourn the hearing of an appeal; to vacate the hearing date of an appeal; or to expedite the hearing of an appeal.

Item 25: Subsection 94AAA(10)

30. This amendment in this item indicates that the range of matters for which an application can be made under subsection 94AAA(10) are of a procedural nature.

Item 26: After paragraph 94AAA(10)(d)

31. This item brings under paragraph 94AAA(10) six additional types of procedural application which concern the conduct of appeals to the Family Court from the Federal Magistrates Court. These are procedural applications: for an extension of time within which to file an application for leave to appeal; for security for costs in relation to an appeal; to reinstate an appeal dismissed under a provision of the Rules of Court; to adjourn the hearing of an appeal; to vacate the hearing date of an appeal; or to expedite the hearing of an appeal.

Item 27: After section 94AAA

32. This item inserts a new section 94AAB which provides that parties to an appeal or to an application for leave to appeal to the Family Court from either the Federal Magistrates Court or a court other than the Federal Magistrates Court can elect for the appeal, or leave to appeal, to proceed without an oral hearing. The court has discretion not to provide for an oral hearing.

Subsection (3) provides that once the parties consent to the appeal or application being dealt with by oral hearing, that consent can only be withdrawn with the leave of the court.

Part 9 – Transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court

Family Law Act 1975

Item 28: Paragraphs 46(1)(a) and (b)

33. This item repeals paragraphs (a) and (b) and substitutes them with re-formatted paragraphs which expressly provide that the Federal Magistrates Court may be one of the courts to which, in certain cases, a court of summary jurisdiction is required to transfer proceedings.

Item 29: Subsection 46(1B)

34. This item repeals subsection (1B) and substitutes new subsections (1B) and (1C). Subsection (1B) provides that if proceedings are instituted in a court of summary jurisdiction and the parties consent to the proceedings being heard and determined in that court, a party is not entitled subsequently to object to the proceedings so heard and determined.

35. Subsection (1C) provides that if the court of summary jurisdiction subsequently gives leave to a party to object to the proceedings being heard and determined, the Federal Magistrates Court is one of the courts to which the court shall transfer proceedings.

Item 30: Subsection 46(2A)

36. This item repeals subsection (2A) and substitutes a new subsection which provides that where a court of summary jurisdiction hears defended proceedings for a divorce order the Federal Magistrates Court is one of the courts to which the court must transfer proceedings.

Item 31: Subsection 46(3A)

37. This item repeals subsection (3A) and substitutes a new subsection which provides that the Federal Magistrates Court is one of the courts which may, on the application of a party or on its own motion, order that proceedings pending under the Act or continued under section 9 be transferred from a court of summary jurisdiction.

Item 32: Subsections 69N(2) and (3)

38. Section 69 generally requires that where contested proceedings for a parenting order are instituted in a court of summary jurisdiction, that court is required to transfer the proceedings to the Family Court, the Family Court of a State, or the Supreme Court of the Northern Territory unless the parties consent to the proceeding being heard in that court. The requirement that proceedings be transferred where there is not consent is provided in subsections (2) and (3).

39. This item repeals subsections (2) and (3) and substitutes new subsections which provide for the addition of the Federal Magistrates Court as being one of the courts to which a court of summary jurisdiction must transfer a proceeding for a parenting order in contested proceedings.

Item 33: Paragraph 69N(5)(b)

40. This item repeals paragraph (b) and substitutes a new paragraph which provides that, even if parties consent to a court of summary jurisdiction hearing the matter, the court may still transfer the proceeding to another court (one of which is the Federal Magistrates Court) on its own motion.

Item 34: Subsection 69N(6)

41. This item repeals subsection (6) and substitutes a new subsection. The provision currently provides that if the parties consent to a court of summary jurisdiction hearing an application for parenting orders, the court can subsequently give leave for a party to object to the proceeding being heard in that court. If an objection is made, the court can, under the new provision, transfer the proceeding to the Federal Magistrates Court or any of the other courts referred to in item 41.

Item 35: Application

42. This item provides that the amendments apply to proceedings initiated before or after commencement. The reason for the provisions applying to proceedings initiated prior to the commencement of these provisions is that under the current provisions many matters are now referred from courts of summary jurisdiction to the Family Court which then transfers them to the Federal Magistrates Court. This simply delays the proceedings unnecessarily.

Part 10 – Terminology relating to divorce and principal relief

Item 36: Subsection 4(1)

43. This item repeals the current definition of *decree* and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. The change is from ‘decree *nisi*’ to the more generic term ‘order’. This is consonant with other changes to the Act to replace legalistic terminology with language that gives a more accessible meaning to concepts, effects and procedures relating to divorce under the Act.

Item 37: Subsection 4(1)

44. This item inserts a definition of divorce, which has not been previously included in the Act. The effect is to make a distinction between divorce and annulment to emphasis that divorce refers to a *termination* of a marriage rather than declaring a purported marriage void. Having a definition of *divorce* provides clarity for greater understanding of the effect of the Act and the concept itself. This is an expansive definition of divorce, and is intended to cover divorces obtained overseas in circumstances where the marital status of the parties is relevant to proceedings under this Act.

Item 38: Subsection 4(1)

45. This item inserts a definition of *divorce or validity of marriage proceedings*. This definition supports other changes to the Act, relating to terminology, to replace the phrase ‘principal relief’ with divorce or validity of marriage proceedings. The concept of divorce or validity of marriage proceedings describes the various matrimonial causes available for parties to end their marriage. Parties can seek a divorce order, a decree of nullity and declarations as to the validity of a marriage.

Item 39: Subsection 4(1) (paragraphs (d) and (e) of the definition of marriage counselling)

46. This item repeals current paragraphs (d) and (e) of the definition of *marriage counselling* and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology. The phrase ‘dissolution of marriage’ has been replaced with the more accessible term ‘divorce’. This is consonant with other changes to the Act regarding terminology.

Item 40: Subsection 4(1) (paragraphs (a) and (b) of the definition of matrimonial cause)

47. This item repeals current paragraphs (a) and (b) of the definition of *matrimonial cause* and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. In the new paragraph (a) the phrase ‘decree of dissolution of marriage’ has been replaced with ‘divorce order’. For paragraph (b) ‘dissolution of marriage’ has been replaced with ‘divorce’ and the format has been changed to more clearly set out the matters on which a declaration as to validity can be made. These changes are consonant with other changes to the Act regarding terminology.

Item 41: Subsection 4(1) (subparagraph (ca)(ii) of the definition of matrimonial cause)

48. This item amends the current provision to replace the phrase ‘proceedings between those parties for principal relief’ with ‘divorce or validity of marriage proceedings between those parties’. These changes are consonant with other changes to the Act regarding terminology.

Item 42: Subsection 4(1) (subparagraph (ca)(iii) of the definition of matrimonial cause)

49. This item repeals the current subparagraph (ca)(iii) of the definition of *matrimonial cause* and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. These changes substitute the word ‘divorce’ in all instances where ‘dissolution’ and ‘dissolution of marriage’ are used, consonant with other changes to the Act. No change has been made to the effect of subparagraph (ca)(iii) in the definition of *matrimonial cause*.

Item 43: Subsection 4(1) (definition of prescribed proceedings)

50. This item repeals the current definition of prescribed proceedings and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept and the previous definition has been substantially retained. These changes substitute the phrase ‘principal relief’ with ‘divorce or validity of marriage proceedings’ (wherever occurring), consonant with other changes to the Act.

Item 44: Subsection 4(2)

51. This item repeals the current definition of a party to a marriage and inserts a substitute. The purpose of replacing this definition is to change the terminology of the concept. The phrase ‘marriage that has been dissolved’ has been replaced with the phrase, ‘terminated by divorce’ consonant with other changes to the Act relating to terminology. The format of the new definition has been changed to make the definition clearer.

Item 45: Section 14B (paragraph (a) of the definition of Division 2 proceedings)

52. This item repeals the current paragraph and its use of the term ‘dissolution of marriage’. The purpose of replacing this term is not to change the operation but rather the terminology of the provision. This change is aimed to ensure the accessible term ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 46: Paragraph 33A(2)(a)

53. This item repeals the current paragraph and its use of the term ‘decree of dissolution of marriage’ to ensure the more accessible ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 47: Paragraph 37A(2)(a)

54. This items repeals the current paragraph and its use of the term ‘decree of dissolution of marriage’ to ensure the more accessible term ‘divorce order’ operates, consonant with other changes to the Act relating to terminology.

Item 48: Paragraph 37A(2)(c)

55. This item amends the current provision to replace the term ‘dissolution of marriage’ with ‘divorce order’. The purpose of replacing this term is to make the terminology of the provision more accessible. The paragraph has also been reformatted to make clearer the matters about which a declaration of validity can be made.

Item 49: Subsection 39(3)

56. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted, consonant with other changes to the Act relating to terminology.

Item 50: Subsection 39(3)

57. This item amends the current provision to replace ‘the decree’ with ‘the order’ which provides a more accessible meaning of what the effect of proceedings will be, consonant with other changes made to the Act relating to terminology.

Item 51: Subsection 39(4)

58. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what the proceeding is intended for, consonant with other changes to the Act relating to terminology.

Item 52: Subsection 44(1A)

59. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the purpose of the proceeding, consonant with other changes to the Act. The format of the section has also been changed to make clearer what alternative proceedings may be instituted.

Item 53: Subsection 44(1B)

60. This item amends the current provision to replace the term ‘dissolution of marriage’ with the phrase ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the objective of proceedings under this provision, consonant with other changes to the Act relating to terminology.

Item 54: Subsection 44(1C)

61. This item amends the current provision to replace the term ‘dissolution of marriage’ with the phrase ‘a divorce order in relation to a marriage’, which provides a more accessible meaning of the objective of proceedings under this provision, consonant with other changes to the Act relating to terminology.

Item 55: Paragraph 44(3)(a)

62. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect; or’ which provides a clearer explanation of the same process, consonant with other changes to the Act relating to terminology.

Item 56: Paragraph 44(3)(c)

63. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘date of the making of a decree *nisi* became absolute’ with ‘date on which the divorce order took effect; or’.

Item 57: Paragraph 44(3A)(a)

64. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect’. Consonant with other changes to the Act regarding terminology, this provides a more accessible meaning of the concepts, without altering the operation of the provision.

Item 58: Subparagraph 44(3A)(c)(i)

65. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This

change replaces the phrase ‘the decree *nisi* became absolute’ with ‘the divorce order took effect’.

Item 59: Paragraph 44(3B)(a)

66. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘a decree *nisi* of dissolution of marriage has become absolute’ with ‘a divorce order has taken effect’.

Item 60: Subparagraph 44(3B)(c)(i)

67. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the decree *nisi* became absolute’ with ‘the divorce order took effect’.

Item 61: Section 44A

68. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted, consonant with other changes to the Act regarding clarity of language.

Item 62: Paragraph 46(2A)(a)

69. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’ which provides a more accessible meaning of what proceedings are being instituted. This is consonant with other changes to the Act relating to terminology.

Item 63: Part VI (heading)

70. This item repeals the current heading and inserts a substitute. The purpose of replacing this heading is not to change the operation of the Part but rather to complement the terminology used in it. This change replaces the word ‘Dissolution’ with ‘Divorce’, consonant with other changes to the Act relating to terminology, which provides greater clarity of language and meaning.

Item 64: Subsection 48(1)

71. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’ which provides a more precise meaning of what the application is intended to achieve, consonant with other changes to the Act relating to terminology.

Item 65: Subsection 48(2)

72. This item amends the current provision to replace the phrase ‘a decree of dissolution of the marriage’ with ‘the divorce order’. Consonant with other changes to the Act regarding terminology, this change provides clarity of language relating to divorce.

Item 66: Subsection 48(2)

73. This item amends the current provision to replace the phrase ‘dissolution of marriage’ with ‘the divorce order’, consonant with other changes to the Act regarding terminology..

Item 67: Subsection 48(3)

74. This item amends the current provision to replace the phrase ‘decree of dissolution of marriage’ with ‘divorce order’. This change is consonant with other changes to the Act regarding to the terminology.

Item 68: Subsection 50(1)

75. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order’. Consonant with other changes to the Act regarding the terminology of divorce, this provides a more precise meaning than previously used.

Item 69: Section 52

76. This item amends the current provision to replace the phrase ‘a decree of dissolution of that marriage’ with ‘a divorce order in relation to the marriage’. This change is consonant with other changes to the Act relating to terminology.

Item 70: Section 52

77. This item amends the current provision to replace the phrase ‘a decree of dissolution of the marriage’ with ‘a divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 71: Section 54

78. This item repeals section 54. This removal is aimed at getting away from the legalistic terminology of ‘dissolution of marriage’ and ‘decree *nisi*’. To the extent that the repealed provision sets out the interaction between these two concepts, its repeal has no effect on the substantive operation of the Act.

Item 72: Subsections 55(1) to (5)

79. This item repeals the current subsections and inserts substitutes. The purpose of replacing these provisions is not to change their operation but rather the terminology of those provisions. These changes replace the old legalistic terminology such as ‘dissolution of marriage’ and ‘decree *nisi*’ with ‘divorce’ and ‘divorce order’. This is consonant with other changes to the Act in regards to using more straightforward terminology regarding concepts and procedures relating to divorce under the Act.

Item 73: Subsection 55A(1)

80. This item amends the current provision to replace the phrase ‘a decree *nisi* of dissolution of marriage does not become absolute’ with ‘a divorce order in relation to a marriage does not take effect’. This change is consonant with other changes to the Act regarding terminology..

Item 74: Subparagraph 55A(1)(b)(ii)

81. This item amends the current provision to replace the phrase ‘the decree *nisi* should become absolute’ with ‘the divorce order should take effect’. This change is consonant with other changes to the Act regarding terminology..

Item 75: Subsection 55A(2)

82. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 76: Subsection 55A(4)

83. This item amends the current provision to replace the phrase ‘the decree *nisi* of dissolution of marriage’ with ‘the divorce order’. This change is consonant with other changes to the Act regarding terminology..

Item 77: Subsections 56(1) and (2)

84. This item amends the current subsections to replace ‘where a decree *nisi* becomes absolute’ with ‘if a divorce order takes effect’, and ‘decree’ with ‘order’ (where occurring).

Item 78: Sections 57 to 59

85. This item repeals the current sections and inserts substitutes. The purpose of replacing these provisions is not to change their operation but rather the terminology of those provisions. These changes replace the legalistic terminology such as ‘decree *nisi*’, ‘decree of dissolution of marriage’ and ‘decree absolute’, with ‘divorce order in relation to a marriage’ and ‘effect as a final order’.

86. In relation to section 57, the effect of the provision, which allows for the application by the parties for the divorce to be rescinded on the basis of reconciliation, before the orders become final, remains the same.

87. In relation to section 58, the effect of the provision, which allows for the application by the parties (or Attorney-General), for the divorce to be rescinded on the basis of miscarriage of justice, before the orders become final, remains the same.

88. In relation to section 59, the effect of the provision is that if a divorce order under the Act in relation to a marriage has taken effect, a party to the marriage may marry again, which is the same effect as the current provision.

Item 79: Paragraph 60F(2)(a)

89. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the word ‘dissolved’ with the phrase ‘terminated by divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 80: Paragraph 69P(3)(d)

90. This item amends the current provision to replace the term ‘the dissolution of the marriage’ with ‘the divorce of the parties’ which is consonant with other changes to the Act regarding terminology.

Item 81: Subparagraph 69ZH(3)(b)(ii)

91. This item amends the current provision to replace the phrase ‘proceedings between those parties for principal relief’ with ‘divorce or validity of marriage proceedings between those parties’, which is consonant with other changes to the Act regarding terminology.

Item 82: Subparagraph 69ZH(3)(b)(iii)

92. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the term ‘a dissolution of that marriage’ with ‘the divorce of the parties’. Consonant with other changes to the Act regarding terminology, this change provides clarity of language relating to divorce.

Item 83: Paragraph 75(2)(g)

93. This item amends the current provision to replace the phrase ‘the marriage has been dissolved’ with ‘or divorced’, consonant with other changes to the Act regarding terminology.

Item 84: Paragraphs 79(1B)(a) and (b)

94. This item amends the current subparagraph (a) to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, consonant with other changes to the terminology in the Act.

95. This item repeals the current subparagraph (b) and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrases ‘that has been dissolved’ and ‘dissolution’ with ‘who have divorced’ and ‘divorce’.

Item 85: Paragraphs 79(1C)(a) and (b)

96. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, consonant with other changes to the terminology in the Act.

97. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This

change replaces the phrases ‘that has been dissolved’ and ‘dissolution’ with ‘who have divorced’ and ‘divorce’.

Item 86: Paragraph 90(2)(a)

98. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 87: Paragraph 90(2)(b)

99. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 88: Paragraph 90(2)(d)

100. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 89: Paragraph 90(2)(e)

101. This item amends the current provision to replace ‘the dissolution or’ with ‘the termination of the marriage to which the maintenance agreement relates by divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 90: Paragraph 90B(2)(a)

102. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’.

Item 91: Subparagraph 90B(2)(b)(ii)

103. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 92: Subparagraph 90B(2)(b)(iii)

104. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the dissolution of the’ with ‘divorce’.

Item 93: Subparagraph 90C(2)(b)(ii)

105. This item amends the current provision to replace the phrase ‘the dissolution of the marriage’ with ‘divorce’.

Item 94: Subparagraph 90C(2)(b)(iii)

106. This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase ‘the dissolution of the’ with ‘divorce’.

Item 95: Paragraph 90D(1)(a)

107. This item amends the current provision to replace ‘a decree *nisi* dissolving a marriage is made’ with ‘a divorce order is made in relation to a marriage (whether it has taken effect or not)’.

Item 96: Subparagraph 90MI(a)(i)

108. This item amends the current provision to replace the phrase ‘the decree absolute dissolving the marriage’ with ‘the divorce order that has terminated the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 97: Subsection 90MK(2) (subparagraph (a)(i) of the definition of *service time*)

109. This item amends the current provision to replace the phrase ‘the decree absolute dissolving the marriage’ with ‘the divorce order that has terminated the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 98: Subsection 91(1A)

110. This item amends the current provision to replace ‘a decree *nisi* has been made in any proceedings and before it has become absolute’ with ‘a divorce order had been made in any proceedings and before it has taken effect’. This change is consonant with other changes to the terminology in the Act.

Item 99: Subsection 92(1)

111. This item amends the current provision to replace the phrase ‘other than proceedings for principal relief’ with ‘(other than divorce or validity of marriage proceedings)’, which is consonant with other changes to the Act regarding terminology.

Item 100: Subsection 92(1A)

112. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’, which is consonant with other changes to the Act regarding terminology.

Item 101: Section 93

113. This item amends the current provision to replace the phrase ‘a decree of dissolution of marriage after the decree has become absolute’ with ‘a divorce order after the order has taken effect’. This change is consonant with other changes to the Act regarding terminology.

Item 102: Paragraph 98(1)(a)

114. This item amends the current provision to replace the phrase ‘proceedings for principal relief’ with ‘divorce or validity of marriage proceedings’. This change is consonant with other changes to the Act regarding terminology.

Item 103: Paragraph 98(1)(b)

115. This item amends the current provision to replace the phrase ‘other than proceedings for principal relief’ with ‘(other than divorce or validity of marriage proceedings)’. This change is consonant with other changes to the Act regarding terminology.

Item 104: Subsection 98A(1)

116. This item amends the current provision to replace the phrase ‘dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 105: Subsection 98A(2)

117. This item amends the current provision to replace the phrase ‘the dissolution of marriage’ with ‘a divorce order in relation to a marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 106: Subsection 98A(2A)

118. This item amends the current provision to replace the phrase ‘the dissolution of marriage’ with ‘the divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 107: Subsection 98A(4)

119. This item amends the current provision to replace the phrase ‘dissolution of the marriage’ with ‘the divorce order in relation to the marriage’. This change is consonant with other changes to the Act regarding terminology.

Item 108: Subsection 104(1) (definition of *applicant*)

120. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act relating to terminology.

Item 109: Subsection 104(1) (paragraph (a) of the definition of *applicant*)

121. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 110: Subsection 104(1) (paragraph (b) of the definition of *applicant*)

122. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 111: Subsection 104(1) (definition of *relevant date*)

123. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This is consonant with other changes to the Act relating to terminology.

Item 112: Subsection 104(1) (definition of *relevant date*)

124. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 113: Subsection 104(1) (definition of *respondent*)

125. This item amends the current provision to replace the phrase ‘the dissolution or’ with ‘a divorce or the’. This is consonant with other changes to the Act relating to terminology.

Item 114: Subsection 104(1) (definition of *respondent*)

126. This item amends the current provision to replace the term ‘dissolution’ with ‘divorce’. This is consonant with other changes to the Act relating to terminology.

Item 115: Subsection 104(3)

127. This item amends the current provision to replace the phrase ‘A dissolution or’ with ‘A divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 116: Paragraph 104(3)(f)

128. This item amends the current provision to replace the phrase ‘Any dissolution or’ with ‘divorce, the’. This change is consonant with other changes to the Act regarding terminology.

Item 117: Subsection 104(4)

129. This item amends the current provision to replace the phrase ‘A dissolution or’ with ‘A divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 118: Subsection 104(5)

130. This item amends the current provision to replace the phrase ‘Any dissolution or’ with ‘Any divorce or any’. This change is consonant with other changes to the Act regarding terminology.

Item 119: Subsection 104(7)

131. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 120: Paragraph 104(7)(a)

132. This item amends the current provision to replace the phrase ‘the dissolution’ (wherever occurring) with ‘the divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 121: Paragraph 104(7)(b)

133. This item amends the current provision to replace the term ‘the dissolution’ with ‘the divorce’. This change is consonant with other changes to the Act regarding terminology.

Item 122: Subsection 104(8)

134. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 123: Subsection 104(9)

135. This item amends the current provision to replace the phrase ‘a dissolution or’ with ‘a divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 124: Subsection 104(9)

136. This item amends the current provision to replace the term ‘the dissolution’ with ‘the divorce’.

Item 125: Subsection 104(10)

137. This item amends the provision to replace the term ‘dissolutions’ with ‘divorces’. This change is consonant with other changes to the Act regarding terminology.

Item 126: Subsection 104A(2)

138. This item amends the current provision to replace the word ‘dissolution’ with the phrase ‘divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 127: Subsection 104A(3)

139. This item amends the current provision to replace the word ‘dissolution’ with the phrase ‘divorce or the’. This change is consonant with other changes to the Act regarding terminology.

Item 128: Paragraph 123(1)(n)

140. This item amends the current provision to replace the phrase ‘dissolution of’ with ‘a divorce order in relation to’. This change is consonant with other changes to the Act regarding terminology.

Item 129: Transitional arrangements in relation to decrees *nisi* made before the commencement of this Part

141. This item inserts a new provision that deals with the consequences of terminology changes to this Act relating to decrees *nisi*. The effect of this provision is to make clear that a decree *nisi* for the dissolution of marriage has effect as if it were a divorce order, on the day which the decree *nisi* was made or became absolute.

Part 11 – Leave to Appeal

Family Law Act 1975

Item 130: Subsections 94AA(1) to (2C)

142. This item repeals subsections 94AA(1) to (2C), and substitutes a table setting out the circumstances in which leave to appeal is required. The table replicates the information currently contained in the provision. The purpose of this exercise is to make clear what is currently in the Act.
143. The new subsection (2) restates the current law that an order by consent to dispose of an application for leave to appeal in any of the four circumstances set out in the table may be made by: a Full Court of the Family Court; a Judge of the Appeal Division; or another Judge if there is no Judge of the Appeal Division available.
144. The new subsection (2A) restates the law in relation to item 4 of the table (regarding appeals to the Family Court from the Federal Magistrates Court) which is that where an application for leave is dealt with by consent, it is dealt with by a single Judge. Subsection (3) provides for instances where an application for leave to appeal is made to the Family Court and it initially appears that the application will be contested. In that case, the application would be referred to a Full Court. Where the parties agree between themselves before the hearing to bring the application by consent, this subsection provides the court with a discretion to refer the application to be heard by a single Judge instead of a Full Court.

Item 131: Application

145. The effect of this item is to make clear when the amendments to this Part, relating to applications for leave to appeal, come into operation for the purposes of the Act. Specifically, on or after the commencement of this Part.

Part 12 – Power to dismiss appeal

Family Law Act 1975

Item 132: After section 96

146. This item inserts a new section 96AA after section 96 of the Act. The item provides that if it appears to a court hearing an appeal under Part X of the Act that the notice of appeal does not disclose proper grounds of appeal, the court may order that the proceedings on the appeal be stayed or dismissed. The item complements amendments sought to be made under Part 15 of this Bill in relation to the commencement and continuation of vexatious proceedings.

Item 133: Application

147. The effect of this item is to make clear that amendments to this Part also applies to appeals that are initiated before or after this Part commences.

Part 13 – Appeals to High Court

Family Law Act 1975

Item 134: Section 95

148. This item repeals the current provision and inserts a substitute which retains a restricted right of appeal to the High Court from Family Court proceedings, based on special leave being granted by the High Court. The new provision removes the current avenue of appeal based on a certificate of a Full Court of the Family Court on the basis of public interest or an important question of law.

Item 135: Application

149. The amendment made by item 134 applies to appeals in relation to proceedings whether initiated before or after commencement of that item. The certificate provisions described in para 148 above have very rarely been used.

Part 14 – Recovery of amounts paid under maintenance orders

Family Law Act 1975

Item 136: At the end of Division 7 of Part VII:

Subdivision G – Recovery of amounts paid under maintenance orders

150. This item adds a new subdivision G and a new section 66X. The new provision is intended to provide legislative support for the recovery of monies paid under child maintenance orders where the payer has later discovered that he was not the child's parent. Currently, the position is that a person who is not a parent does not have standing to bring an application to recover monies paid under a child maintenance order. Effectively this means that such a person can only recover maintenance payments made in these circumstances by taking debt recovery action in a State court.

151. The new provisions in section 66X will allow a person who has been found not to be the child's parent to recover the amount paid in a court having jurisdiction under Part VII of the Act.

Part 15– Frivolous or vexatious proceedings

Family Law Act 1975

Item 137: Section 118

152. This item repeals the section and substitutes a new section.

153. The current provision gives the Court power under paragraphs 118(1)(a) and (b) to make certain orders if it thinks that the proceedings are vexatious or frivolous. The item provides an additional ground for the Court to make orders in relation to proceedings that are an abuse of the process of the court.

154. There is also a power under paragraph 118(1)(c) to make an order with respect to vexatious litigants such that a court can prevent the litigant from instituting proceedings under the Act without leave of the court.
155. The current section 118 deals with both 'proceedings' and 'litigants' under subsection (1).
156. These issues are dealt with separately under the new subsections (1) and (2) so that it is clear that the court has own motion power either to dismiss proceedings of the kind provided for in subsection (1), or to prevent a litigant from instituting proceedings without leave of the court.
157. Subsection (2) provides that a court may require that a person seek leave to bring proceedings where it believes that the person has instituted or conducted vexatious legal proceedings frequently and without reasonable ground.
158. Subsection (3) sets out the matters that a court must have regard to in making a decision under subsection (2). That is, the court must determine whether a person has instituted or conducted vexatious proceedings frequently and without reasonable ground. The court is required to give reasonable notice of, and a reasonable opportunity for the person to make submissions to the court before it exercises its own motion power or before it acts on the application of a person under paragraph (4)(b).
159. Subsection (4) provides that a court can exercise powers under subsection (1) or (2) on its own motion, or on the application of: a party to the relevant proceeding or certain executive officers of the Family Court.
160. Subsection (5) states that a court making an order under subsection (2) does so on the basis that the proceedings instituted or conducted by the person were frivolous, vexatious or an abuse of the process of a court. In making this determination the court could consider: earlier and current proceedings the person may have conducted under the Act; and earlier and current proceedings the person may have conducted in other Australian courts and tribunals. The Court may also consider whether another court has: dismissed the proceedings brought by the person; ordered the person to pay costs; or ordered that the person is not to bring proceedings without leave of the court.
161. Subsection (6) provides that an order made under subsection (2) may be discharged or varied.

Part 16 – Rules as to costs

Family Law Act 1975

Item 138: Subsection 117(1)

162. Current subsection 117(1) of the Act sets up the general rule applying to parties bearing their own costs for proceedings under this Act and also provides reference to the sections which this general rule is subject to. The item removes the current reference to subsection (2) and replaces it with a reference to subsections (1) and (2). Subsection (1A) is added by Item 139.

Item 139: After subsection 117(1)

163. This item inserts a new rule making power in relation to orders for costs. This provision allows for the Rules (of Court) to reverse the onus of the general rule, as provided for in

subsection 117(1), so that a party to a proceedings under this Act is to bear the costs of another party to those proceedings unless a court orders otherwise.

Part 17 – Civil penalties for contravention of Rules

Family Law Act 1975

Item 140: After paragraph 123(1)(t)

164. This item inserts a new rule making power. These changes allow the Court to make orders for civil penalties where a party to proceedings has failed to comply with the Rules of Court.

Item 141: Transitional

165. This item deals with the transitional arrangements relating to changes to the Act under this part giving the Court express power to make rules providing for civil penalties for failure to comply with the standard Rules of Court. The effect of this clause is to validate all Rules of Court relating to civil penalties that were made before the commencement of this provision, but only from the date of this commencement.

Part 18– Powers of judicial registrars

Family Law Act 1975

Item 142: Paragraph 26B(1A)(e)

166. Current section 26B deals with the powers that may be delegated to Judicial Registrars. Subsection (1) states that the Judges of the Court cannot delegate to Judicial Registrars powers to make what are called ‘excluded child orders’. This amendment makes clear that orders to vary a parenting order made under the new subsection 70NEB(1) added by Item 3 and the new subparagraph 70NG(1)(b) dealing with the making of a further parenting order that compensates for contact or residence forgone as a result of the current contravention, and (1)(ba) which deals with any other order varying the order so contravened are excluded from the definition of ‘excluded child order’. The effect of the change is to allow the Judges to delegate the power to make orders under these sections to Judicial Registrars.

Part 19 – Interaction of Family Law and Bankruptcy

Family Law Act 1975

Item 143: At the end of section 79

167. This item adds a new subsection (10) to section 79. The intention of the amendment is to preserve the existing law and to make explicit reference to creditors’ rights. Under the current law, a person whose interests are affected may apply to be a party to proceedings under this section. The amendments make clear that third party creditors may be persons whose interests are affected, and are given standing to apply to become a party to proceedings under this section.

Item 144: At the end of section 79A

168. This item inserts an additional subsection (4) in section 79A. Section 79A is the provision under which property orders made under section 79 may be set-aside. The amendment is

intended to make clear that a third party creditor can demonstrate standing as a party in proceedings under section 79 where he or she can show that his or her interests are affected by the order under section 79 because he or she may not be able to recover his or her debt if the order is made.

Item 145: After section 79E

169. This item inserts a new section 79F providing for the notification of third parties who have interests as creditors in the commencement of proceedings to alter the property interests of parties under the Act. Procedures for the notification should be dealt with in the applicable Rules of Court. It is intended that a person who applies for an order under this Part or who is a party to the property proceedings would be required to give notice of the application to a person who is not a party to the proceedings but who has an interest in their subject matter.

Item 146: After section 90D

170. This item inserts a new section 90DA in Part VIIIA of the Act. The amendment provides that a separation declaration must be made in relation to a financial agreement (in relation to particular matters). The effect of not making a declaration is that the financial agreement would have no effect.

171. The provision is not intended to apply to agreements relating to spousal maintenance during marriage because the parties will not have been separated.

172. The separation declaration must be signed by at least one of the parties. It must state that the parties have separated and are living separately and apart at the declaration time and in the opinion of the parties making the declaration there is no reasonable likelihood of cohabitation being resumed.

173. Definitions are provided for what is meant by 'declaration time' and 'separated'.

Item 147: After subsection 106B(4)

174. This item inserts a new subsection (4A) which makes clear that a party, a creditor of a party or any person whose interests would be affected by the making of an instrument or disposition of property prior to the making of an order under section 79 may apply for an order to set aside or restrain the making of such an instrument or disposition.