

1993-94-95

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

Presented and read a first time

(Attorney-General)

FAMILY LAW REFORM BILL (NO. 2) 1995

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TRANSITIONAL PROVISIONS RELATING TO THE REPEAL AND RE-MAKING OF
PART VIII OF THE FAMILY LAW ACT 1975

1993-94-95

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Presented and read a first time

(Attorney-General)

A BILL

FOR

An Act to amend the *Family Law Act 1975*, the *Family Law Reform Act 1995*, and for related purposes

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the *Family Law Reform Act (No. 2) 1995*.

5 Commencement

2.(1) Part 1 and sections 3, 20 and 26 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the provisions of Part 2, other than sections 3, 20, 26 and 27, commence on a day or days to be fixed by Proclamation.

(3) If a provision of Part 2 covered by subsection (2) does not commence under that subsection within the period of 6 months beginning on the day on which this Act receives the Royal Assent, the provision commences on the first day after the end of that period.

(4) Section 27 commences on the first day after all the provisions of Part 2 of this Act (other than that section), and all the provisions of the *Family Law Reform Act 1995*, have commenced.

(5) Part 3 commences, or is taken to have commenced, immediately after the commencement of subsection 59(2) of the *Family Law Reform Act 1995*.

PART 2—AMENDMENTS OF THE FAMILY LAW ACT 1975

Principal Act

3. In this Part, *Principal Act* means the *Family Law Act 1975*¹.

Interpretation

4. Section 4 of the Principal Act is amended:

(a) by inserting after paragraph (ca) of the definition of “*matrimonial cause*” in subsection (1):

“(cb) proceedings between one or both of the parties to a marriage and a child of the marriage with respect to the property of the parties to the marriage or of either of them, being proceedings arising out of the marital relationship of the parties to the marriage;”;

(b) by omitting paragraph (d) of the definition of “*matrimonial cause*” in subsection (1);

(c) by omitting paragraph (ea) of the definition of “*matrimonial cause*” in subsection (1) and substituting:

“(ea) proceedings by a party to a marriage for a declaration under subsection 76(5), 76C(3), 77(5) or 77B(2);

(eaa) proceedings between the parties to a marriage with respect to the registration of a financial agreement;

(eab) proceedings between:

(i) the parties to a marriage; or

(ii) if one of the parties to a marriage has died—the other party to the marriage and the legal personal representative of the deceased party;

with respect to a financial agreement registered under section 76D or an overseas financial agreement registered pursuant to regulations referred to in section 76H;

(eac) proceedings between the parties to a marriage, or between one or both of those parties and a child of the marriage, with respect to a pre-nuptial agreement;”;

(d) by omitting from subsection (1) the definitions of “*financial matters*”, “*maintenance agreement*” and “*overseas maintenance agreement*”;

(e) by inserting in subsection (1):

“*financial agreement* has the meaning given by subsection 76(1).

financial matters has the meaning given by subsection 76(2).

overseas financial agreement has the meaning given by subsection 76B(1).

pre-nuptial agreement has the meaning given by subsection 77(1).

property order has the meaning given by section 85.

spousal maintenance order has the meaning given by section 79.”;

(f) by inserting in subsection (1):

“*conciliation conference* means a conference using the conciliation facilities of the Family Court or a Family Court of a State.”.

Outline of Part

5. Section 14A of the Principal Act is amended by omitting the Outline of Part at the end of the section and substituting:

“

OUTLINE OF PART

Item	Divisions and coverage
1	<p><i>Division 1—Object and outline</i></p> <ul style="list-style-type: none"> • object of this Part • outline of this Part
2	<p><i>Division 2—Obligations to consider the possibility of reconciliation</i></p> <ul style="list-style-type: none"> • duty of judges and of legal practitioners to consider the possibility of a reconciliation of the parties
3	<p><i>Division 3—Obligations to consider advising people about primary dispute resolution methods</i></p> <p>duty of courts and of legal practitioners to consider advising people about primary dispute resolution methods</p>

OUTLINE OF PART—continued

4	<i>Division 4—Counselling</i> <ul style="list-style-type: none"> • parties to a marriage seeking counselling • courts advising or directing people to attend counselling • other matters related to counselling
5	<i>Division 5—Mediation and arbitration</i> <ul style="list-style-type: none"> • requests for mediation and courts advising or directing parties to attend mediation • private arbitration, courts referring proceedings to arbitration and review of awards of arbitration • provision of information about mediation and arbitration services and other matters relating to mediators and arbitrators
6	<i>Division 5A—Conciliation</i> <ul style="list-style-type: none"> • requests for conciliation facilities to be made available • courts directing people to attend conciliation conferences
7	<i>Division 6—Miscellaneous</i> <ul style="list-style-type: none"> • miscellaneous matters

.”.

Interpretation

6. Section 14E of the Principal Act is amended by adding at the end of the definition of ***primary dispute resolution methods***:

“; and (d) the conciliation facilities of the Family Court and of a Family Court of a State.”.

Insertion of new Division

7. The Principal Act is amended by inserting after section 19M:

“Division 5A—Conciliation**Court conciliation facilities to be made available**

“19MA. A person who is:

- (a) the parent or adoptive parent of a child; or
- (b) a child; or
- (c) a party to a marriage;

may seek the assistance of the conciliation facilities of the Family Court or a Family Court of a State, and the Court must, as far as practicable, make those facilities available.

Conciliation conferences between parties to proceedings

“19MB. If, in proceedings under this Act, the Family Court or a Family Court of a State considers that it may be advantageous to do so, the Court may order the parties to attend a conciliation conference.”.

5 Admissions in course of counselling, mediation, conciliation etc.

8. Section 19N of the Principal Act is amended by adding at the end of subsection (1):

“; or (f) a person conducting a conciliation conference or otherwise acting
10 in the course of the conciliation facilities of the Family Court or
of a Family Court of a State.”.

Delegation of powers to Registrars

9. Section 37A of the Principal Act is amended by omitting from subparagraph (1)(f)(i) “77” and substituting “81”.

Institution of proceedings

15 10. Section 44 of the Principal Act is amended:

(a) by omitting from subsection (2) “subsections (3) and (3A)” and substituting “subsection (3)”;

(b) by omitting from subsection (3) “or (ca)” and substituting “, (ca) or (cb)”;

20 (c) by omitting from subsection (3) “78 or 79A” and substituting “84, 87 or 87A”;

(d) by omitting subsection (3A);

(e) by omitting from subsection (4) “or (3A)”;

(f) by adding at the end of subsection (4):

25 “; or (c) that the parties to the marriage consent to the institution of the proceedings.”.

Meaning of *parenting plan* and related terms

11. Section 63C of the Principal Act is amended:

(a) by adding at the end of subsection (2):

30 “Note: If the *Child Support (Assessment) Act 1989* applies, provisions in a parenting plan dealing with the maintenance of a child (as distinct from child support under that Act) are unenforceable and of no effect (see subsection 63F(5)). A parenting plan may, however, also operate as a child support agreement (see section 63CAA)”;

(b) by adding at the end of subsection (3):

35 “Note: One of the other matters with which a parenting plan may deal is child support (see section 63CAA).”.

Insertion of new section

12. After section 63C of the Principal Act the following section is inserted:

Parenting plans may include child support provisions

“63CAA.(1) If a parenting plan includes provisions of a kind referred to in subsection 84(1) of the *Child Support (Assessment) Act 1989*, the provisions do not have effect for the purposes of this Act.

“(2) Subsection (1) does not affect the operation of the provisions for any other purpose.

“(3) Nothing in this Division is to be taken to prevent the same agreement being both a parenting plan under this Part and a child support agreement under Part 6 of the *Child Support (Assessment) Act 1989*.”.

Child maintenance provisions of registered parenting plans—where not enforceable as financial agreements

13. Section 63F of the Principal Act is amended:

(a) by omitting from paragraph (1)(b) “maintenance agreement” (wherever occurring) and substituting “financial agreement”;

(b) by adding at the end of subsection (5):

“Note: This subsection does not affect the operation of provisions of a parenting plan referred to in section 63CAA (child support matters).”.

Certain instruments not liable to duty

14. Section 70R of the Principal Act is amended by omitting from paragraph (2)(b) “maintenance agreement” (wherever occurring) and substituting “financial agreement”.

Repeal of Part VIII and substitution of new Part

15. Part VIII of the Principal Act is repealed and the following Part is substituted:

“PART VIII—SPOUSAL MAINTENANCE AND PROPERTY**“Division 1—Introductory****“Subdivision A—What this Division does****What this Division does**

“71. This Division contains:

(a) a statement of the object of this Part, and an outline of this Part (Subdivision B); and

(b) provisions relevant to the interpretation and application of this Part (Subdivision C).

“Subdivision B—Object and outline**Object of Part**

- 5 “72. The object of this Part is to provide a just and equitable system by which the parties to a marriage may resolve issues related to their finances and property by agreement, or in the absence of agreement, by seeking an order from a court.

Outline of Part

- 10 “72A. An outline of this Part is set out below.

OUTLINE OF PART

Item	Divisions and coverage
1	<i>Division 1—Introductory</i> <ul style="list-style-type: none"> • object of Part and outline of Part • interpretation and application of Part
2	<i>Division 2—Agreements about maintenance and property</i> <ul style="list-style-type: none"> • the difference between financial agreements and pre-nuptial agreements • what financial agreements are and their effect • what pre-nuptial agreements are and their effect
3	<i>Division 3—Spousal maintenance orders</i> <ul style="list-style-type: none"> • what spousal maintenance orders are and the right of a spouse to maintenance • applying for and making spousal maintenance orders • other aspects of courts’ powers relating to spousal maintenance orders • when spousal maintenance orders stop being in force
4	<i>Division 4—Declarations and orders about property</i> <ul style="list-style-type: none"> • declarations about existing interests in property • what property orders are • applying for and making property orders • variation and discharge of property orders • courts’ powers in relation to property under ante-nuptial and post-nuptial settlements
5	<i>Division 5—Other aspects of courts’ powers</i> <ul style="list-style-type: none"> • other aspects of courts’ powers under Part
6	<i>Division 6—Miscellaneous</i> miscellaneous matters relating to spousal maintenance and property

“Subdivision C—Interpretation and application of Part

Defined expressions

“73. In this Part:

after the marriage means any time after the dissolution of the marriage.

before the marriage means any time before the solemnisation of the marriage. 5

disputed property, in relation to an application for a property order, has the meaning given by subsection 86A(1).

dissolution of the marriage means:

- (a) a decree *nisi* made under this Act in relation to the marriage has become absolute; or 10
- (b) a decree of nullity has been made under this Act in relation to the marriage; or
- (c) the dissolution or annulment of the marriage, or the legal separation of the parties to the marriage, has been effected in accordance with the law of an overseas jurisdiction and is recognised as valid in Australia under section 104. 15

during the marriage means any time after the solemnisation of the marriage and before the dissolution of the marriage.

financial agreement has the meaning given by subsection 76(1). 20

financial matters has the meaning given by subsection 76(2).

overseas financial agreement has the meaning given by subsection 76B(1).

pre-nuptial agreement has the meaning given by subsection 77(1).

property order has the meaning given by section 85.

property quarantined by the agreement, in relation to a pre-nuptial agreement, has the meaning given by subsection 77(2). 25

spousal maintenance order has the meaning given by section 79.

Application of Part to void marriages

“73A. This Part applies in relation to a purported marriage that is void as if: 30

- (a) the purported marriage were a marriage; and
- (b) the parties to the purported marriage were husband and wife.

“Division 2—Agreements about maintenance and property

“Subdivision A—What this Division does

What this Division does

“74. This Division:

- (a) explains the difference between financial agreements and pre-nuptial agreements (Subdivision B); and 5

- (b) sets out what financial agreements are and how they have effect (Subdivision C); and
- (c) sets out what pre-nuptial agreements are and how they have effect (Subdivision D).

“Subdivision B—Introductory provisions about agreements

Financial agreements and pre-nuptial agreements

“75. This Division provides for 2 different kinds of agreement, namely:

- (a) financial agreements; and
- (b) pre-nuptial agreements.

The difference between the 2 kinds of agreement

“75A.(1) A financial agreement:

- (a) enables the parties to a marriage to agree, during or after the marriage, about financial matters as defined in subsection 76(2) (that definition covers spousal maintenance, child maintenance and property matters); and
- (b) may be registered in a court and, once registered, has effect as if it were an order of the court as provided in section 76E.

“(2) A pre-nuptial agreement:

- (a) enables the parties to a proposed marriage to agree, before the marriage, that a court is not to be able to make an order under this Part over specified property; and
- (b) has the effect (without any need to register it) of preventing a court from making:
 - (i) a property order in relation to the property; or
 - (ii) a spousal maintenance order transferring or settling the property.

Note: The parties to a pre-nuptial agreement may vary or revoke the agreement under section 77B. A court may set aside or vary a pre-nuptial agreement under section 77C.

“Subdivision C—Financial agreements—what they are and their effect

Meaning of financial agreement and related terms

“76.(1) A **financial agreement** is an agreement between the parties to a marriage that:

- (a) deals with a matter or matters mentioned in subsection (2); and
- (b) satisfies the requirements of subsection (4).

“(2) The agreement may deal with one or more of the following matters (*financial matters*):

- (a) the maintenance of a party to the marriage;
- (b) specified property of the parties to the marriage or of either of them;
- (c) the maintenance of a child of the marriage.

Note: If the *Child Support (Assessment) Act 1989* applies, provisions in a financial agreement dealing with the maintenance of the child (as distinct from child support under that Act) are unenforceable and of no effect (see subsection 76E(4)). A financial agreement may, however, also operate as a child support agreement (see section 76A).

“(3) Paragraph (2)(b) permits the agreement to deal with specified property of the parties or of either of them. For this purpose:

- (a) *specified* means specified by any means sufficient to enable the property to be identified; and
- (b) the property may be property of either or both of the parties when the agreement is entered into, or it may be property that will or may be acquired by either or both of the parties after the agreement is entered into.

Note: A financial agreement may specify property in precise terms (for example, ‘Richard’s car, registration number RM000.’). A financial agreement may also specify property in general terms (for example, ‘Any property, real or personal, that is left to Peta by her parents.’).

“(4) The agreement:

- (a) must have been made during the marriage or after the marriage; and
- (b) must:
 - (i) be in writing; and
 - (ii) be signed by the parties; and
 - (iii) subject to subsection (5), be signed by another person as a witness to the signatures of the parties; and
- (c) must have been made after the commencement of this section.

“(5) A court may, if the court considers it is appropriate to do so, declare that the agreement is taken to satisfy the requirements of paragraph (4)(b) even if subparagraph (4)(b)(iii) is not satisfied.

“(6) The agreement may be a financial agreement:

- (a) whether made inside or outside Australia; and
- (b) whether other persons as well as the parties to the marriage are parties to the agreement; and
- (c) whether the agreement deals with other matters as well as matters mentioned in subsection (2).

Note: One of the other matters with which a financial agreement may deal is child support (see section 76A).

Financial agreement may include child support provisions

“76A.(1) If a financial agreement includes provisions of a kind referred to in subsection 84(1) of the *Child Support (Assessment) Act 1989*, the provisions do not have effect for the purposes of this Act.

“(2) Subsection (1) does not affect the operation of the provisions for any other purpose.

“(3) Nothing in this Subdivision is to be taken to prevent the same agreement being both a financial agreement under this Part and a child support agreement under Part 6 of the *Child Support (Assessment) Act 1989*.

Meaning of overseas financial agreement and how certain sections apply to overseas financial agreements

“76B.(1) An *overseas financial agreement* is:

(a) a financial agreement; or

(b) an agreement that would be a financial agreement if the matters covered by subsection 76(2) included maintenance of ex-nuptial children;

that has force and effect in a prescribed overseas jurisdiction because of the registration of the agreement, or the taking of any other action, under the law of that jurisdiction.

“(2) Sections 76C to 76G (inclusive) do not apply to an overseas financial agreement except as provided by regulations referred to in section 76H.

Financial agreement may not be varied, but may be revoked, by further agreement

“76C.(1) An agreement, in whatever form and however expressed, is not effective to vary a financial agreement for the purposes of this Act. An agreement purporting to vary a financial agreement cannot be registered under section 76D.

“(2) Subject to subsection (4), the parties to a financial agreement may revoke the agreement by a further agreement that:

(a) is in writing; and

(b) is signed by the parties to the financial agreement; and

(c) subject to subsection (3), is signed by another person as a witness to the signatures of the parties.

“(3) A court may, if the court considers it is appropriate to do so, declare that an agreement is taken to satisfy the requirements of subsection (2) even if paragraph (2)(c) is not satisfied.

“(4) An agreement revoking a financial agreement registered under section 76D:

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- (a) may, subject to the Rules of Court, be registered under section 76D as if it were a financial agreement; and
- (b) does not have effect to revoke the financial agreement until it is so registered.

Registration in a court

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“76D.(1) A financial agreement may be registered in a court having jurisdiction under this Part if:

- (a) an application for registration of the agreement is lodged in accordance with the Rules of Court; and
- (b) the application is accompanied by:
 - (i) a copy of the agreement; and
 - (ii) the information required by the Rules of Court; and
 - (iii) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the agreement and that is signed by the legal practitioner who provided that advice.

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“(2) The Rules of Court:

- (a) must prescribe what information is to accompany an application for registration of a financial agreement; and
- (b) may prescribe other matters relating to the procedures for registration.

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Effect of registered financial agreement

“76E.(1) This section applies if a financial agreement is registered in a court under section 76D.

“(2) The agreement has effect as follows:

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- (a) subject to subsection (3), the provisions (if any) dealing with the maintenance of a party to the marriage have effect as if they were a spousal maintenance order made by the court; and
- (b) the provisions (if any) dealing with specified property of the parties to the marriage or of either of them have effect as if they were a property order made by the court; and

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- (c) subject to subsection (4), the provisions (if any) dealing with the maintenance of a child of the marriage have effect as if they were a child maintenance order made by the court.

Note 1: Provisions of this Act relevant to provisions of the financial agreement having effect as if they were a spousal maintenance order include:

- (a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (b) section 81B (providing for discharge, variation, suspension or revival of spousal maintenance orders); and
- (c) other provisions of this Act that refer to spousal maintenance orders.

Note 2: Provisions of this Act relevant to provisions of the financial agreement having effect as if they were a property order include:

- (a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (b) sections 87 and 87A (providing for the discharge and variation of property orders); and
- (c) other provisions of this Act that refer to property orders.

Note 3: Provisions of this Act relevant to provisions of the financial agreement having effect as if they were a child maintenance order include:

- (a) Parts XIII and XIII A (dealing generally with enforcement of orders and sanctions for contravening orders); and
- (b) section 66S (providing for discharge, variation, suspension and revival of child maintenance orders); and
- (c) other provisions of this Act that refer to parenting orders, or to child maintenance orders.

“(3) Section 82 does not apply to provisions of the agreement that have effect as if they were a spousal maintenance order.

“(4) If the agreement includes provisions about the maintenance of a child of the marriage, those provisions have no effect, and are not enforceable in any way, at any time when an application could properly be made under the *Child Support (Assessment) Act 1989* by one of the parties to the agreement, for administrative assessment of child support (within the meaning of that Act) for the child concerned, seeking payment of child support by the other party to the agreement.

Note: This subsection does not affect the operation of provisions of a financial agreement referred to in section 76A (child support matters).

“(5) Subsection (4) has effect whether or not an application for administrative assessment of child support for the child has in fact been made by a party to the agreement.

Effect of death on registered financial agreement

“76F.(1) This section applies if a financial agreement is registered in a court under section 76D.

“(2) Unless the agreement provides otherwise, the agreement (other than provisions for the periodic payment of maintenance) continues to operate in spite of the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

“(3) If the agreement includes provisions (the *periodic provisions*) for the periodic payment of maintenance:

- (a) the periodic provisions continue to operate, if the agreement so provides, in spite of the death of a party to the agreement who is liable to make the periodic payments, and are binding on the legal personal representative of that party; but 5
- (b) the periodic provisions do not continue to operate, in spite of anything in the agreement, after the death of the person entitled to receive the periodic payments.

Setting aside or variation of registered financial agreements by courts 10

“76G.(1) The court in which a financial agreement is registered under section 76D may set aside the agreement, and its registration, if the court is satisfied that:

- (a) a party’s concurrence to the agreement was obtained by fraud, duress or undue influence; or 15
- (b) failure to set aside the agreement would result in serious injustice; or
- (c) circumstances have arisen since the agreement was entered into that make it impracticable for some or all of the provisions of the agreement to be carried out; or
- (d) the parties to the agreement want the agreement set aside. 20

“(2) The matters a court may consider in deciding, for the purposes of paragraph (1)(b), whether failure to set aside the agreement would result in serious injustice include, but are not limited to, any significant change in the circumstances of the parties to the agreement, or of either of them, which could not reasonably have been foreseen when the agreement was entered into. 25

“(3) The court in which the agreement is registered may vary the agreement if circumstances have arisen since the agreement was entered into that make it impracticable for some or all of the provisions of the agreement to be carried out. 30

“(4) Other provisions of this Act under which provisions of the agreement may be set aside, varied or otherwise affected are:

- (a) section 66S—under this section a court may discharge, vary, suspend or revive provisions of the agreement that have effect as if they were a child maintenance order; and 35
- (b) section 81B—under this section a court may discharge, vary, suspend or revive provisions of the agreement that have effect as if they were a spousal maintenance order; and
- (c) sections 87 and 87A—under these sections a court may discharge or vary provisions of the agreement that have effect as if they were a property order. 40

“(5) Except as permitted by subsection (1) or (3), or by a provision mentioned in subsection (4), a court must not set aside, discharge, vary, suspend or revive the whole or a part of the financial agreement.

Registration of overseas financial agreements

5 “76H. The regulations may make provision for and in relation to the application of sections 76C to 76G (inclusive) with such additions, exceptions and modifications (if any) as are prescribed, to overseas financial agreements.

10 **Regulations may deal with sending financial agreements etc. to overseas jurisdictions**

“76J. The regulations may make provision for and in relation to the sending to prescribed overseas jurisdictions of, or of copies of, financial agreements and agreements for the maintenance of ex-nuptial children, for the purpose of securing the enforcement of those agreements in those
15 jurisdictions.

Specification in financial agreements of payments etc. for maintenance purposes

“76K.(1) If:

(a) a financial agreement has the effect of requiring:

20 (i) payment of a lump sum, whether in one amount or by instalments; or

(ii) the transfer or settlement of property; and

(b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a marriage or a child or children of a marriage;
25

the agreement must:

(c) state that the agreement is an agreement to which this section applies; and

(d) specify:

30 (i) the person or persons for whose maintenance provision is made by the payment, transfer or settlement; and

(ii) the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for that person or each of those persons.

35 “(2) If a financial agreement referred to in paragraph (1)(a):

(a) does not state that the agreement is an agreement to which this section applies; or

(b) states that the agreement is an agreement to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a) that the agreement has the effect of requiring is to be taken not to make provision for the maintenance of a party to the relevant marriage or of a child of the relevant marriage.

**“Subdivision D—Pre-nuptial agreements—what they are
and their effect**

5

Meaning of pre-nuptial agreement

“77.(1) A **pre-nuptial agreement** is an agreement between the parties to a proposed marriage that:

- (a) deals with property in the way described in subsection (2); and 10
- (b) satisfies the requirements of subsection (4).

“(2) The agreement must, in relation to specified property of the parties or of either of them, include provisions that make it clear that the parties intend that a court is not to be able to make an order under this Part over the property. This property is referred to in this Part as **property quarantined by the agreement**. 15

“(3) Subsection (2) requires the agreement to specify property of the parties or of either of them. For this purpose:

- (a) **specified** means specified by any means sufficient to enable the property to be identified; and 20
- (b) the property may be property of either or both of the parties when the agreement is entered into, or it may be property that will or may be acquired by either or both of the parties after the agreement is entered into.

Note: A pre-nuptial agreement may specify property in precise terms (for example, ‘Richard’s car, registration number RM000.’). A pre-nuptial agreement may also specify property in general terms (for example, ‘Any property, real or personal, that is left to Peta by her parents.’). 25

“(4) The agreement:

- (a) must have been made before the marriage and in contemplation of that marriage; and 30
- (b) must:
 - (i) be in writing; and
 - (ii) be signed by the parties; and
 - (iii) subject to subsection (5), be signed by another person as a witness to the signatures of the parties; and 35
- (c) must have been made after the commencement of this section.

“(5) A court may, if the court considers it is appropriate to do so, declare that the agreement is taken to satisfy the requirements of paragraph (4)(b) even if subparagraph (4)(b)(iii) is not satisfied.

“(6) The agreement may be a pre-nuptial agreement:

- (a) whether made inside or outside Australia; and
- (b) whether other persons as well as the parties to the marriage are parties to the agreement; and
- 5 (c) whether the agreement deals with other matters as well as the matter mentioned in subsection (2).

Regulations may set out a sample pre-nuptial agreement

“77A.(1) The regulations may set out a sample pre-nuptial agreement.

- 10 “(2) A sample agreement so set out is intended only to provide guidance to persons proposing to enter into a pre-nuptial agreement. It is not to be taken to impose requirements for a pre-nuptial agreement beyond those set out in section 77.

Variation or revocation of pre-nuptial agreement by parties

- 15 “77B.(1) The parties to a pre-nuptial agreement may vary or revoke the agreement by a further agreement that:

- (a) is in writing; and
- (b) is signed by the parties to the pre-nuptial agreement; and
- (c) subject to subsection (2), is signed by another person as a witness to the signatures of the parties.

- 20 “(2) A court may, if the court considers it is appropriate to do so, declare that the agreement is taken to satisfy the requirements of subsection (1) even if paragraph (1)(c) is not satisfied.

Setting aside or variation of pre-nuptial agreements by courts

- 25 “77C.(1) Subject to subsection (3), a court may set aside or vary a pre-nuptial agreement if, and only if:

- (a) the court is satisfied that a party’s concurrence to the agreement was obtained by fraud, duress or undue influence; or

- (b) these conditions are satisfied:

- 30 (i) there is an application before the court for a property order or a spousal maintenance order; and

- (ii) the court considers that it cannot make a property order that is just and equitable, or a spousal maintenance order that is proper, unless the agreement is set aside or varied; and

- 35 (iii) the court is satisfied that failure to set aside or vary the agreement would result in serious injustice; or

- (c) the court is satisfied that the parties to the agreement want the agreement set aside or varied.

- 40 “(2) The matters the court may consider in deciding, for the purposes of subparagraph (1)(b)(iii), whether failure to set aside or vary the agreement would result in serious injustice include, but are not limited to, the following:

- (a) whether the parties to the agreement received independent legal advice before the agreement was entered into;
- (b) whether any person explained the provisions of the agreement and their legal and practical effect to the parties to the agreement before the agreement was entered into; 5
- (c) the age, and the physical and mental capacity, at the time the agreement was entered into, of the parties to the agreement;
- (d) the educational background and literacy, at the time the agreement was entered into, of the parties to the agreement;
- (e) how easy the agreement is to understand; 10
- (f) any significant change in the circumstances of the parties to the agreement, or of either of them, which could not reasonably have been foreseen when the agreement was entered into.

“(3) The court must not set aside or vary a pre-nuptial agreement if the parties to the agreement have not married. 15

Effect of pre-nuptial agreement

“77D.(1) A court must not:

- (a) make a property order in relation to property quarantined by a pre-nuptial agreement; or
- (b) make a spousal maintenance order transferring or settling property quarantined by a pre-nuptial agreement. 20

Note 1: This subsection does not prevent a court from taking into account property quarantined by a pre-nuptial agreement as provided in paragraphs 80B(1)(b) and 86D(1)(b).

Note 2: The parties to a pre-nuptial agreement may vary or revoke the agreement under section 77B. A court may set aside or vary a pre-nuptial agreement under section 77C. 25

“(2) For the purposes of proceedings under this Part, a statement in a pre-nuptial agreement that specifies assets or liabilities of the parties to the marriage, or either of them, is *prima facie* evidence of the matters contained in that statement, even if the agreement has been set aside.

“Division 3—Spousal maintenance orders 30

“Subdivision A—What this Division does

What this Division does

“78. This Division:

- (a) explains what spousal maintenance orders are and establishes the right of a spouse to maintenance (Subdivision B); and 35
- (b) deals with applying for and making spousal maintenance orders (Subdivision C); and
- (c) deals with other aspects of courts’ powers in relation to spousal maintenance orders (Subdivision D); and

- (d) deals with when spousal maintenance orders stop being in force (Subdivision E).

“Subdivision B—What spousal maintenance orders are and the right of a spouse to maintenance

5 Meaning of spousal maintenance order

“79. A *spousal maintenance order* is an order under this Division that deals with maintenance of a party to a marriage.

Right of spouse to maintenance

10 “79A. A party to a marriage is liable to maintain the other party to the extent that the first-mentioned party is reasonably able to do so if, and only if, the other party cannot support himself or herself adequately:

- 15 (a) because he or she is responsible for the day-to-day care, welfare and development of a child under 18; or
 (b) because his or her age or physical or mental incapacity reduce his or her capacity to earn or derive income; or
 (c) for any other adequate reason;

taking into consideration any relevant matters mentioned in subsection 80B(1).

“Subdivision C—Applying for and making spousal maintenance orders

20 Who may apply for a spousal maintenance order

“80.(1) Either or both of the parties to a marriage may apply for a spousal maintenance order.

“ (2) The regulations may make provision with respect to authorising:

- 25 (a) a specified authority of the Commonwealth or of a State or Territory;
 or
 (b) the person from time to time holding or acting in a specified office established under a law of the Commonwealth or of a State or Territory;

30 to institute and conduct, in the authority’s or person’s discretion, proceedings with respect to the maintenance of a party to a marriage on behalf of that party.

“ (3) Proceedings instituted on behalf of a person under regulations covered by subsection (2) are taken, for the purposes of subsection (1), to have been instituted by that person.

35 Power of court in spousal maintenance proceedings

“80A(1). In proceedings for a spousal maintenance order, the court may, subject to this Division, make such spousal maintenance order as it considers proper.

“(2) If the court is considering whether to make a spousal maintenance order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters mentioned in section 80B.

“(3) The court’s power to make a spousal maintenance order (including an order made with the consent of all the parties to the proceedings) is also subject to section 77D, which prevents the making of a spousal maintenance order that transfers or settles property quarantined by a pre-nuptial agreement.

Note 1: In making a spousal maintenance order, a court may take into account property quarantined by a pre-nuptial agreement (see paragraph 80B(1)(b)).

Note 2: The parties to a pre-nuptial agreement may vary or revoke the agreement under section 77B. A court may set aside or vary a pre-nuptial agreement under section 77C.

Matters to be taken into account in making spousal maintenance order

“80B.(1) In considering whether to make a particular spousal maintenance order, the court must take into account only the following matters:

- (a) the age and health of each of the parties;
- (b) the income, property and financial resources of each of the parties (including property quarantined by a pre-nuptial agreement);
- (c) the physical and mental capacity of each of the parties to earn or derive income by appropriate means;
- (d) whether either of the parties is responsible for the day-to-day care, welfare and development of a child of the marriage who is under 18;
- (e) commitments of each party that are necessary to enable the party to support:
 - (i) himself or herself; and
 - (ii) a child or another person that the party has a duty to maintain;
- (f) the responsibilities of either of the parties to support any other person;
- (g) subject to subsection (2), the eligibility of either party for a pension, allowance or benefit under:
 - (i) any law of the Commonwealth, of a State or Territory or of another country; or
 - (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party;

- (h) if the parties have separated or the marriage has been dissolved—a standard of living that in all the circumstances is reasonable;
- (i) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the capacity of that party to earn or derive income by enabling him or her to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (j) the extent to which the party whose maintenance is under consideration has contributed to the income, capacity to earn or derive income, property and financial resources of the other party;
- (k) the duration of the marriage and the extent to which it has affected the capacity of the party whose maintenance is under consideration to earn or derive income;
- (l) the need to protect a party who wishes to continue his or her role as a parent;
- (m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation;
- (n) the terms of any property order made or proposed to be made in relation to the property of the parties;
- (o) the terms of any child maintenance order made or proposed to be made in relation to a child of the marriage;
- (p) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, or is to provide, for a child of the marriage;
- (q) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be considered.

“(2) In considering whether to make a particular spousal maintenance order, the court must disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

“Subdivision D—Other aspects of courts’ powers

Urgent spousal maintenance cases

- “81. If, in proceedings for a spousal maintenance order:
- (a) the court considers that the applicant is in immediate need of financial assistance; but
 - (b) it is not practicable in the circumstances to determine immediately what order (if any) should be made;

the court may order the payment, pending the disposal of the proceedings, of such periodic or other amount as the court considers appropriate.

Specification in orders of payments etc. for spousal maintenance purposes

“81A.(1) If:

- (a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to the marriage, is made by consent or varies an earlier order) that has the effect of requiring: 5

- (i) payment of a lump sum, whether in one amount or by instalments; or

- (ii) the transfer or settlement of property; and 10

- (b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to the marriage;

the court must:

- (c) express the order to be an order to which this section applies; and 15

- (d) specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.

“(2) If:

- (a) a court makes an order of a kind referred to in paragraph (1)(a); and

- (b) the order: 20

- (i) is not expressed to be an order to which this section applies; or

- (ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a) 25
that the order has the effect of requiring, is to be taken not to make provision for the maintenance of a party to the relevant marriage.

Modification of spousal maintenance orders

“81B.(1) This section applies if:

- (a) there is in force an order (the **first order**) for the maintenance of a party to a marriage (whether or not made under this Act and whether made before or after the commencement of this section): 30

- (i) made by a court; or

- (ii) registered in a court under the Rules of Court; and

- (b) a party to the marriage, or an authority or person authorised as mentioned in subsection 80(2), applies to the court for an order under this section in relation to the first order. 35

“(2) The court may, by order:

- (a) discharge the first order if there is just cause for so doing; or

(b) suspend the operation of the first order wholly or in part, either until further order or until a fixed time or the happening of a future event; or

5 (c) if the operation of the first order has been suspended under paragraph (b), revive its operation wholly or in part; or

(d) vary the first order:

(i) subject to subsection (3), so as to increase or decrease any amount required to be paid by the order; or

(ii) in any other way.

10 “(3) The court must not vary the first order so as to increase or decrease any amount required to be paid by the order unless it is satisfied:

(a) that, since the order was made or last varied:

(i) the circumstances of the person for whose benefit the order was made have changed so as to justify the variation; or

15 (ii) the circumstances of the person liable to make payments under the order have changed so as to justify the variation; or

(iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative—the circumstances of the estate are such as to justify the variation; or

20 (b) that, since the order was made or last varied, the cost of living has changed to such an extent as to justify its so doing (this is expanded on in subsections (5) and (6)); or

(c) if the order was made by consent—that the amount ordered to be paid is not proper or adequate (this is expanded on in subsection (7)); or

25 (d) that material facts were withheld from the court that made the order or from a court that varied the order, or material evidence previously given before such a court was false.

30 “(4) Subsection (3) does not prevent the court from making an order varying the first order if the first order was made before the commencement of this Act and the variation is made for the purposes of giving effect to this Part.

“(5) In satisfying itself for the purposes of paragraph (3)(b), the court must have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician.

35 “(6) The court must not, in considering the variation of the first order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made, or was last varied having regard to a change in the cost of living.

40 “(7) In satisfying itself for the purposes of paragraph (3)(c), the court must have regard to any payments, and any transfer or settlement of property, previously made by a party to the marriage to:

- (a) the other party; or
- (b) any other person for the benefit of the other party.

“(8) For the purposes of this section, the court must have regard to the provisions of sections 79A and 80B (to the extent applicable).

Retrospective orders under section 81B

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“81C.(1) An order under section 81B decreasing a periodic amount payable under another order, or discharging another order, may be expressed to be retrospective to such day as the court considers appropriate.

“(2) If an order under section 81B decreasing a periodic amount payable under another order is expressed to be retrospective, amounts paid under the other order that are not payable under that order (as varied to decrease the periodic amount) may be recovered in a court having jurisdiction under this Act.

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“(3) If an order under section 81B discharging another order is expressed to be retrospective to a specified day, amounts paid under the other order since the specified day may be recovered in a court having jurisdiction under this Act.

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“Subdivision E—When spousal maintenance orders stop being in force

Effect of death of person liable to pay or person entitled to receive

“82.(1) A spousal maintenance order stops being in force on the death of the person entitled to payments under the order.

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“(2) A spousal maintenance order stops being in force on the death of the person liable to make payments under the order.

“(3) Subsection (2) does not apply to an order made before 25 November 1983 (the commencement of section 38 of the *Family Law Amendment Act 1983*) if the order was expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the death of the person liable to make payments under the order and, in that case, the order is binding on the legal personal representative of the deceased person.

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30

Effect of marriage

“82A.(1) A spousal maintenance order stops being in force if the person entitled to payments under the order (the *beneficiary*) re-marries unless, in special circumstances, a court having jurisdiction under this Act orders otherwise.

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“(2) If the beneficiary re-marries, he or she must, without delay, inform the person liable to make payments under the order of the date of the re-marriage.

“(3) Any money paid to the beneficiary under the order after the date of the re-marriage may be recovered in a court having jurisdiction under this Act.

Subdivision does not affect recovery of arrears

5 “82B. Nothing in this Subdivision affects the recovery of arrears due under an order when the order ceased to be in force.

“Division 4—Declarations and orders about property

“Subdivision A—What this Division does

What this Division does

10 “83. This Division:

- (a) deals with declarations about existing interests in property (Subdivision B); and
- (b) explains what property orders are (Subdivision C); and
- (c) deals with applying for and making property orders (Subdivision D);
- 15 and
- (d) deals with variation and discharge of property orders (Subdivision E); and
- (e) deals with a court’s powers in relation to property under ante-nuptial and post-nuptial settlements (Subdivision F).

20 ***“Subdivision B—Declarations about existing property title and rights***

Court may declare existing title and rights to property

“84.(1) A court may, on application by a party to a marriage, declare what existing title or rights either or both of the parties has or have in respect of property.

25 “(2) If a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders about sale or partition and interim or permanent orders about possession.

“Subdivision C—Property orders—what they are

Meaning of property order

30 “85.(1) A ***property order*** is an order under this Division that alters the interests that a party to a marriage has in some or all of the property of the parties to the marriage or of either of them.

“(2) Without limiting the generality of subsection (1), a property order may:

35 (a) require a settlement of property in substitution for an interest in property; or

(b) require either or both of the parties to the marriage to make a specified settlement or transfer of property for the benefit of:

- (i) either or both of the parties; or
- (ii) a child of the marriage.

“Subdivision D—Applying for and making property orders

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Who may apply for a property order

“86.(1) Either or both of the parties to a marriage may apply for a property order in relation to property of the parties to the marriage or of either of them.

“(2) A child of a marriage may apply for a property order in relation to property of the parties to the marriage or of either of them if the child’s application is based on circumstances arising out of the marital relationship of the parties to the marriage.

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Court’s power to make property orders

“86A.(1) In proceedings for a property order, the court may, subject to this Division, make such property order as it considers appropriate in relation to the property (the *disputed property*) to which the application for the order relates.

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“(2) The main requirements of this Division relevant to a court making a property order are (subject to subsection (3)):

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(a) the order must deal with the disputed property in a just and equitable way (see subsection 86B(1)); and

(b) the court is to determine what is just and equitable as between the parties to the marriage as follows:

(i) the court is to assume that justice and equity require the disputed property to be divided between the parties in proportion to their respective contributions to the marriage, unless that would not produce a just and equitable result having regard to other matters (see subsection 86B(2) and section 86D);

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(ii) in determining the contributions made by the parties, the court is to assume, as a starting point, that they have made equal contributions, but this assumption will be displaced if the contributions were not in fact equal (see section 86C); and

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(c) the court is to determine whether it is just and equitable to make a property order in favour of a child in accordance with subsection 86B(3); and

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(d) the court may have to consider a request that the order be made in a way that has the effect of retaining a business asset as a functional unit (see section 86E); and

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- (e) the parties may have to attend a conciliation conference before the order can be made (see section 86F).

“(3) If the court is considering whether to make a property order with the consent of all the parties to the proceedings:

- 5 (a) the court is not required to comply with sections 86B to 86F in making the order; and
- (b) the court may, but is not required to, have regard to all or any of the matters mentioned in sections 86B, 86C and 86D; and
- 10 (c) if the court is the Family Court, or the Family Court of a State—the court may refuse to make the order unless the parties have attended a conciliation conference as mentioned in paragraph 86F(1)(a).

“(4) The court’s power to make a property order (including an order made with the consent of all the parties) is also subject to section 77D, which prevents a property order from being made in relation to property

15 quarantined by a pre-nuptial agreement.

Note 1: In making a property order, a court may take into account property quarantined by a pre-nuptial agreement (see paragraph 86D(1)(b)).

Note 2: The parties to a pre-nuptial agreement may vary or revoke the agreement under section 77B. A court may set aside or vary a pre-nuptial agreement under section 77C.

20 **Disputed property to be dealt with in just and equitable way**

“86B.(1) A property order must deal with the disputed property in a way that the court determines is just and equitable.

“(2) The court’s determination of what is just and equitable as between the parties to the marriage must be made as follows:

- 25 (a) the court is to start from an assumption that justice and equity require the disputed property to be divided between the parties in proportion to their respective contributions to the marriage as a whole (this is expanded on in section 86C);
- 30 (b) the court must make its determination in accordance with that assumption unless it considers that doing so would not produce a just and equitable result, having regard to the other matters specified in section 86D.

“(3) The court’s determination of whether it is just and equitable to make a property order in favour of a child of the marriage is to be made

35 having regard to such matters as the court considers appropriate including (but not limited to) the financial or non-financial contribution made, directly or indirectly, by or on behalf of the child to the acquisition, conservation or improvement of any of the property of the parties to the marriage or of either of them.

Contributions to marriage

“86C.(1) In proceedings for a property order, a court is to assume, as a starting point, that the parties to the marriage have made equal contributions to the marriage as a whole. The assumption will be displaced if the court is satisfied, having regard to the matters mentioned in subsection (2), that the contributions were not in fact equal. 5

“(2) These are the matters to which the court may have regard in considering the contribution made by each party to the marriage as a whole:

- (a) the duration of the marriage and any period of cohabitation before or after the marriage; and 10
- (b) the financial or non-financial contribution made, directly or indirectly, by or on behalf of the parties to the marriage, to the acquisition, conservation or improvement of any of the property of the parties to the marriage or of either of them; and
- (c) the financial or non-financial contribution made, directly or indirectly, by or on behalf of the parties to the marriage to any of the financial resources of the parties to the marriage or of either of them; and 15
- (d) the financial or non-financial contribution made, directly or indirectly, by the parties to the marriage, to the welfare of the family made up of the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and 20
- (e) any other factor the court considers relevant. 25

“(3) In proceedings for a property order, a court must regard financial contributions and non-financial contributions as being, intrinsically, equally significant. 25

Consideration of other matters

“86D.(1) The other matters the court may take into account in determining what is just and equitable as between the parties to a marriage are: 30

- (a) the age and health of each of the parties;
- (b) the income, property and financial resources of each of the parties (including property quarantined by a pre-nuptial agreement);
- (c) the physical and mental capacity of each of the parties to earn or derive income by appropriate means; 35
- (d) whether either of the parties is responsible for the day-to-day care, welfare and development of a child of the marriage who is under 18;
- (e) commitments of each party that are necessary to enable the party to support: 40
 - (i) himself or herself; and

- (ii) a child or another person that the party has a duty to maintain;
- (f) the responsibilities of either of the parties to support any other person;

(g) subject to subsection (2), the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party;

(h) if the parties have separated or the marriage has been dissolved—a standard of living that in all the circumstances is reasonable;

(i) the extent to which the role of either of the parties as a parent has affected the capacity of that party to earn or derive income;

(j) the need to protect a party who wishes to continue his or her role as a parent;

(k) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation;

(l) the terms of any spousal maintenance order made or proposed to be made in relation to either of the parties;

(m) the terms of any child maintenance order made or proposed to be made in relation to a child of the marriage;

(n) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, or is to provide, for a child of the marriage;

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be considered.

“(2) In considering whether to make a property order in favour of a party to a marriage, the court must disregard any entitlement of the party to an income tested pension, allowance or benefit.

Request to retain business asset as a functional unit

“86E.(1) A party to proceedings for a property order may request the court to make the order in a way that has the effect of retaining a business asset as a functional unit.

“(2) If:

(a) a party makes a request under subsection (1); and

(b) the court considers it is possible to comply with the request consistently with its obligations under section 86B;

the court must comply with the request in making the property order unless it considers that it is not appropriate to do so.

“(3) In this section:

business asset means:

- (a) property that produces income; or 5
- (b) property used in connection with a business carried on for the purpose of producing income (whether the business is generating a net profit or a net loss).

Requirement for conciliation conference before property order made

“86F.(1) Subject to subsection (2), the Family Court, or a Family Court of a State, must not make a property order unless: 10

- (a) the parties to the proceedings for the order have attended a conciliation conference using the Court’s conciliation facilities to discuss the matter to which the proceedings relate; or
- (b) the Court is satisfied that there is an urgent need for a property order, or there is some other special circumstance, that makes it appropriate to make the order even though the parties to the proceedings have not attended a conciliation conference as mentioned in paragraph (a); or 15
- (c) the Court is satisfied that it is not practicable to require the parties to the proceedings to attend a conciliation conference as mentioned in paragraph (a). 20

“(2) Subsection (1) does not apply to the making of a property order if:

- (a) it is made with the consent of all the parties to the proceedings; or
- (b) it is an order until further order.

Adjournment to consider likely effect of property order on marriage or children 25

“86G.(1) Subject to subsection (3), a court hearing proceedings for a property order may adjourn the proceedings to enable the parties to consider the likely effects of a property order on the marriage concerned or on any children of the marriage. 30

“(2) An adjournment is to be:

- (a) on such terms and conditions (if any) as the court considers appropriate; and
- (b) for such period as the court considers appropriate.

“(3) The court must not adjourn the proceedings if: 35

- (a) the parties to the proceedings are parties to concurrent, pending or completed proceedings for principal relief; or

(b) these conditions are satisfied:

(i) the parties to the proceedings are parties to a marriage that has been dissolved or annulled under the law of an overseas country; and

5 (ii) that dissolution or annulment is recognised as valid in Australia under section 104; or

(c) these conditions are satisfied:

10 (i) the parties to the proceedings are parties to a marriage who have been granted a legal separation under the law of an overseas country; and

(ii) that legal separation is recognised as valid in Australia under section 104.

“(4) If:

(a) the court adjourns the proceedings; and

15 (b) during the adjournment, paragraph (3)(a), (b) or (c) becomes satisfied in relation to the parties to the proceedings;

either of the parties may apply to the court for the hearing of the proceedings to be continued.

20 **Adjournment because of likely significant change in financial circumstances**

“86H.(1) A court hearing proceedings for a property order may adjourn the proceedings if the court considers that:

25 (a) there is likely to be a significant change in the financial circumstances of the parties to the marriage concerned, or of either of them; and

(b) having regard to when the change is likely to occur, it is reasonable to adjourn the proceedings; and

30 (c) a property order that the court could make if the change occurs is more likely to do justice between the parties to the marriage than a property order that the court could make immediately.

“(2) If the court is proposing to adjourn the proceedings, the court may, before doing so, make an interim order, or some other order or orders that it considers appropriate, in relation to the property of the parties to the marriage or of either of them.

35 “(3) The kinds of changes to which the court may have regard in considering whether there is likely to be a significant change in the financial circumstances of the parties to the marriage, or of either of them, include, but are not limited to:

- (a) a change in financial circumstances that may occur because a party to the marriage is a contributor to a superannuation fund or scheme, or participates in a scheme or arrangement that is like a superannuation scheme; or
 - (b) a change in financial circumstances that may occur because a party to the marriage may become entitled to property as a result of the exercise of a power to distribute trust property. 5
- “(4) An adjournment is to be:
- (a) on such terms and conditions (if any) as the court considers appropriate; and 10
 - (b) for such period as the court considers appropriate.

Sections 86G and 86H do not limit court’s powers to adjourn proceedings

“86J. The power of a court to adjourn proceedings for a property order is not limited to the circumstances covered by sections 86G and 86H. 15

Property orders—effect of death of party

“86K.(1) If a party to proceedings for a property order dies before the proceedings are completed:

- (a) the proceedings may be continued by, or against, the legal personal representative of the deceased party; and 20
- (b) the court may make a property order in the continued proceedings if it considers that:
 - (i) it would have made a property order if the deceased party had not died; and
 - (ii) it is still appropriate to make a property order; and 25
- (c) a property order the court makes in the proceedings may be enforced on behalf of, or against, the estate of the deceased party.

“(2) The Rules of Court may provide for the legal personal representative of the deceased party to become a party to the proceedings in substitution for the deceased party. 30

“(3) If a party to proceedings for a property order dies after the proceedings are completed, a property order made in the proceedings may be enforced on behalf of, or against, the estate of the deceased party.

Party must disclose information relating to financial circumstances in accordance with Rules of Court 35

“86L.(1) A party to proceedings for a property order must, as and when required to do so by the Rules of Court, disclose information the party has:

- (a) relating to his or her financial circumstances; or
- (b) relating to the financial circumstances of another person.

“(2) A person must not intentionally or recklessly contravene subsection (1).

5 Penalty: Imprisonment for 2 years.

“(3) A party to proceedings mentioned in subsection (1) is not excused from disclosing information as required by that subsection on the ground that the information may tend to incriminate the party.

“(4) Information:

- 10 (a) disclosed by a party to proceedings as required by subsection (1); or
 - (b) obtained as a direct or indirect consequence of the disclosure of information by a party to proceedings as required by subsection (1);
- is admissible in those proceedings or in proceedings in respect of the falsity of the information given by the party, or the failure of the party to disclose
- 15 information, but is not otherwise admissible in evidence against the party in any civil or criminal proceedings.

“*Subdivision E—Variation and discharge of property orders*”

Variation and discharge of property orders if court satisfied of certain matters

20 “87.(1) If a court is satisfied, on application by a person affected by a property order, of a matter mentioned in subsection (2), the court may:

- (a) vary the order; or
- (b) discharge the order and, if the court considers it appropriate to do so, make another property order in substitution for the discharged order.

25 “(2) These are the matters because of which a court may decide to vary or discharge the property order:

- (a) there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance; or
- 30 (b) circumstances have arisen since the order was made that make it impracticable for some or all of the order to be carried out; or
- (c) a person has failed to comply with an obligation imposed by the order and circumstances have arisen as a result of that failure that make it just and equitable to vary the order or to discharge the order and make
- 35 another property order in substitution; or

- (d) circumstances have arisen since the order was made, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, that mean the child, or if the applicant has caring responsibility for the child (as defined in subsection (3)), the applicant, will suffer hardship if the court does not vary the order or discharge the order and make another property order in substitution. 5

“(3) For the purposes of paragraph (2)(d), a person has *caring responsibility* for a child if:

- (a) the person is a parent of the child and the child lives with the person; 10
or
(b) the person has a residence order in relation to the child; or
(c) the person has a specific issues order in relation to the child under which the person is responsible for the child’s long-term or day-to-day care, welfare and development. 15

Variation and discharge of property orders by consent

“87A. A court may, on application by a person affected by a property order and with the consent of all the parties to the proceedings in which the order was made:

- (a) vary the order; or 20
(b) discharge the order and, if the court considers it appropriate to do so and all those parties consent, make another property order in substitution for the discharged order.

Variation and discharge of property orders—effect of death of party

“87B.(1) If a party to proceedings for the variation or discharge of a property order dies before the proceedings are completed: 25

- (a) the proceedings may be continued by, or against, the legal personal representative of the deceased party; and
(b) the court may, in the continued proceedings, vary the order, discharge the order, or discharge the order and make another property order in substitution for the discharged order, if the court considers that: 30
(i) it would have exercised its powers under section 87 or 87A in relation to the order if the deceased party had not died; and
(ii) it is still appropriate to exercise its powers under section 87 or 87A in relation to the order; and 35
(c) a property order varied or made by the court in the proceedings may be enforced on behalf of, or against, the estate of the deceased party.

“(2) The Rules of Court may provide for the legal personal representative of the deceased party to become a party to the proceedings in substitution for the deceased party. 40

“(3) If a party to proceedings for the variation or discharge of a property order dies after the proceedings are completed, a property order varied or made by the court in the proceedings may be enforced on behalf of, or against, the estate of the deceased party.

5 **“Subdivision F—Orders about property dealt with by ante-nuptial and post-nuptial settlements**

Property dealt with by ante-nuptial and post-nuptial settlements

10 “88.(1) In proceedings under this Act, the court may make such order as it considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage concerned, of the whole or part of property dealt with by an ante-nuptial or post-nuptial settlement made in relation to the marriage.

15 “(2) In considering what order (if any) should be made under subsection (1), the court must take into account, so far as they are relevant, the following matters:

- (a) the matters referred to in subsection 86C(2);
- (b) the matters referred to in section 86D;
- (c) the matter referred to in subsection 86B(3).

20 “(3) In this section:
settlement does not include a financial agreement or a pre-nuptial agreement.

“Division 5—Other aspects of courts’ powers

What this Division does

25 “89. This Division deals with other aspects of courts’ powers under this Part.

General powers of courts

“89A.(1) In proceedings for an order under this Part, a court may do all or any of the following:

- 30 (a) order payment of a lump sum, whether in one amount or by instalments;
- (b) order payment of a weekly, monthly, yearly or other periodic sum;
- (c) order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage;
- 35 (d) order that payment of any sum ordered to be paid be wholly or partly secured as the court specifies;
- (e) order that any necessary instrument be executed, and that such documents of title be produced and such other things be done, as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

- (f) appoint or remove trustees;
- (g) order that payment be made to a specified person or public authority or into court;
- (h) make a permanent order, an order pending the disposal of proceedings, an order for a fixed term or during a life or joint lives or an order until further order; 5
- (i) make an order imposing terms and conditions;
- (j) make an order by consent;
- (k) make any other order (whether or not of the same nature as those referred to in paragraphs (a) to (j)) that it considers appropriate; 10
- (l) make an order under this Part at any time.

“(2) The making of an order of a kind referred to in paragraph (1)(c), or of any other order under this Part, in relation to the maintenance of a party to a marriage does not prevent a court from making a subsequent order in relation to the maintenance of the party. 15

“(3) The Rules of Court may make provision with respect to the making of orders under this Part in relation to the maintenance of parties to marriages (whether as to their form or otherwise) for the purpose of facilitating their enforcement and the collection of maintenance payable under them.

Duty of courts to finalise financial relations 20

“89B. A court must, when making orders under this Part (except under section 84 or with respect to maintenance payable during a marriage), make orders that will, as far as possible:

- (a) finally determine the financial relationship between the parties to the marriage; and 25
- (b) avoid the need for further proceedings between them.

“Division 6—Miscellaneous

What this Division does

“90. This Division deals with miscellaneous matters relating to spousal maintenance and property. 30

Certain agreements and instruments not liable to duty

“90A.(1) The following agreements and instruments are not subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:

- (a) an instrument executed under, or for the purposes of, an order made under this Part; 35
- (b) an eligible financial agreement that confers a benefit upon a party to, or a child of, the marriage to which the agreement relates, to the extent that the agreement confers that benefit;

- (c) an instrument executed under, or for the purposes of, an eligible financial agreement and that confers a benefit upon a party to, or a child of, the marriage to which the agreement relates, to the extent that the instrument confers that benefit.

5 “(2) The following agreements are *eligible financial agreements* for the purposes of this section:

- (a) a registered financial agreement made in connection with the dissolution or annulment of the marriage to which the agreement relates;
- 10 (b) a registered financial agreement (other than a financial agreement referred to in paragraph (a)) made in contemplation of the dissolution or annulment of the marriage to which the agreement relates;
- (c) a registered financial agreement (other than a financial agreement referred to in paragraph (a) or (b)) made in connection with the
- 15 breakdown of the marriage to which the agreement relates.

“(3) In this section, a reference to an agreement or instrument that confers a benefit upon a person includes a reference to an agreement or instrument that confers an entitlement to property upon the person even though the agreement or instrument also deprives the person of an

20 entitlement to other property.

“(4) In this section:

registered financial agreement means a financial agreement registered under section 76D or an overseas financial agreement registered pursuant to regulations referred to in section 76H.

25 **Matters related to agreements under repealed provisions**

“90B.(1) If the approval, under section 87 of this Act as in force immediately before the commencement of this section, of a maintenance agreement (within the meaning of this Act as then in force):

- (a) has been revoked before the commencement of this section; or
- 30 (b) is revoked after the commencement of this section under the provisions of clause 5 of Schedule 2 to the *Family Law Reform Act (No. 2) 1995*;

a court must, in considering whether, and if so how, to exercise any powers under this Part, have regard to:

- 35 (c) anything done or not done by a party to the agreement under the agreement; and
- (d) a change in the circumstances of a party to the agreement arising out of an action of a person, or the failure of a person to act, under the agreement; and

- (e) any order made by that court or another court exercising jurisdiction under this Act in connection with the agreement while the agreement was in force; and
- (f) any order made in connection with the revocation of the approval of the agreement.

5

“(2) Nothing in this Act affects the operation of an agreement sanctioned under paragraph 87(1)(k) of the repealed Act or the rights and obligations of a person under such an agreement.

Note: Clause 5 of Schedule 2 to the *Family Law Reform Act (No.2) 1995* notionally adds Division 7 (sections 90C to 90N) to the end of this Part for transitional purposes.”.

10

Appeals to Family Court

16. Section 94 of the Principal Act is amended by inserting after subsection (2):

“(2A) A single Judge of the Appeal Division of the Family Court may, in relation to an appeal under subsection (1) or (1AA), do any of the following:

15

- (a) make an order with the consent of all the parties to the appeal (including an order deciding the appeal and also including an order as to costs);
- (b) make an order giving directions about the conduct of the appeal;
- (c) make an order joining or removing a party;
- (d) make an order granting leave to amend the grounds of appeal;
- (e) make an order staying another order (including an order of the Full Court) until the appeal is decided.”.

20

Leave to appeal needed in some cases

25

17. Section 94AA of the Principal Act is amended by omitting from subsection (4) the definition of *prescribed decree* and substituting:

“*prescribed decree* means a decree of the kind prescribed by the regulations.”.

Insertion of new section

30

18. Before section 103 of the Principal Act the following section is inserted in Part XI:

Parties may settle proceedings

“102C.(1) This section applies to proceedings under this Act, other than:

35

- (a) proceedings under Part VI or Division 6, 9 or 13 of Part VII; or
- (b) proceedings to enforce a decree or injunction made under Division 6, 9 or 13 of Part VII.

“(2) A party to the proceedings may, in accordance with the Rules of Court:

- (a) make an offer to the other party to the proceedings to settle the proceedings on terms specified in the offer; and
- 5 (b) file a copy of the offer in the court in which the proceedings are being heard.

“(3) The party to whom the offer is made may, unless the offer lapses (see subsection (5)), accept the offer by filing a notice of acceptance of the offer in the court in accordance with the Rules of Court.

10 “(4) If, in accordance with subsection (3), a notice of acceptance of the offer is filed:

- (a) the proceedings are terminated; and
- (b) the offer and acceptance may be enforced as a contract between the parties.

15 “(5) The offer lapses if:

- (a) the party who made it files a notice of withdrawal of the offer in the court in accordance with the Rules of Court before the other party files a notice of acceptance of the offer in accordance with subsection (3); or
- 20 (b) the proceedings are brought to an end (otherwise than under this section); or
- (c) the offer specifies that it is only open for acceptance up to a specified time and, by that time, no notice of acceptance has been filed in accordance with subsection (3).

25 “(6) The fact that the offer has been made, or the terms of the offer, must not be disclosed to the court except for the purposes of the consideration by the court of whether it should make an order as to costs under subsection 117(2) and the terms of the order. This subsection does not prevent the court from being informed that the proceedings have been
30 terminated in accordance with subsection (4).

“(7) A judge of the court is not disqualified from sitting in the proceedings only because the fact that an offer has been made is, contrary to subsection (6), disclosed to the court.”.

Insertion of new sections

35 **19.** After section 107 of the Principal Act the following sections are inserted:

Execution of instruments by order of court

“107A.(1) If:

- (a) an order under this Act directs a person to execute an instrument; and

- (b) that person has refused or neglected to comply with the direction or, for any other reason, the court considers it necessary to exercise the powers of the court under this subsection;

the court may appoint an officer of the court or other person to execute the instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the instrument. 5

“(2) If:

- (a) a provision of a financial agreement registered under section 76D, or of an overseas financial agreement registered pursuant to regulations referred to in section 76H, requires a person to execute an instrument; and 10

- (b) that person has refused or neglected to comply with that provision of the agreement or, for any other reason, the court considers it necessary to exercise the powers of the court under this subsection; 15

the court may appoint an officer of the court or other person to execute the instrument in the name of the person required by that provision of the agreement to execute the instrument and to do all acts and things necessary to give validity and operation to the instrument.

“(3) The execution of an instrument by a person appointed under this section to execute it has the same force and validity as if the instrument had been executed by the person directed by an order referred to in paragraph (1)(a), or required by a provision of an agreement referred to in paragraph (2)(a), to execute it. 20

“(4) The court may make such order as it considers just as to the payment of the costs and expenses of and incidental to the preparation of the instrument and its execution. 25

Transactions to defeat claims

“107B.(1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order. 30

“(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale must be paid into court and held until the court makes a further order about how the proceeds should be dealt with. 35

“(3) The court must have regard to the interests of, and must make any order proper for the protection of, a *bona fide* purchaser or other person interested.

5 “(4) A party, or a person acting in collusion with a party, may be ordered to pay the costs of any other party or of a *bona fide* purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

“(5) In this section:
disposition includes a sale and a gift.”.

10 Overseas enforcement of maintenance orders etc.

20. Section 110 of the Principal Act is amended by omitting “66Z” from paragraph (e) of the definition of *maintenance order* in subsection (1) and substituting “67D”.

Interpretation

15 21. Section 112AA of the Principal Act is amended by omitting paragraphs (b) and (c) of the definition of *court enforceable agreement* and substituting:

- 20 “(b) so much of a financial agreement (other than an overseas financial agreement) registered in a court under section 76D as deals with financial matters; or
- (c) so much of an overseas financial agreement registered in a court pursuant to regulations referred to in section 76H as deals with:
- (i) financial matters; or
 - (ii) the maintenance of ex-nuptial children;”.

25 Powers of arrest

22. Section 114AA of the Principal Act is amended:

- (a) by inserting in paragraph (1)(b) “or by harassing or molesting that person” after “paragraph (a)”;
 - (b) by inserting after subsection (1):
- 30 “(2) For the purposes of subsection (1), an injunction granted under section 114 after the commencement of section 22 of the *Family Law Reform Act (No. 2) 1995* is an injunction for the personal protection of a person if, and only if, it is expressed to be for the personal protection of the person.”;
- 35 (c) by omitting from subsections (3) and (5) “expiration of the relevant period” (wherever occurring) and substituting “end of the holding period”;

(d) by omitting subsection (7) and substituting:

“(6) The **holding period**, in relation to the arrest of a person, is:

(a) if a Saturday, Sunday or public holiday starts within 24 hours after the arrest of the person—the longer of the following periods:

(i) the period starting with the arrest and ending 48 hours later;

(ii) the period starting with the arrest and ending at the end of the next day after the day of the arrest that is not a Saturday, Sunday or public holiday;

or

(b) in any other case—the period starting with the arrest and ending 24 hours later.”.

Costs

23. Section 117 of the Principal Act is amended by omitting from paragraph 117(2A)(f) “117C” and substituting “102C”.

Repeal of section 117C

24. Section 117C of the Principal Act is repealed.

Rules of Court

25. Section 123 of the Principal Act is amended:

(a) by inserting after paragraph (1)(b):

“(ba) providing for and in relation to trial management;”;

(b) by inserting after paragraph (1) (sf):

“(sg) providing for and in relation to conciliation conferences;”.

Amendments to remove sexist language

26. The Principal Act is amended as set out in Schedule 1.

Renumbering and re-lettering of *Family Law Act 1975*

27.(1) In this section:

amended Act means the *Family Law Act 1975* as in force on the commencement of this section.

provision means a Part, a Division, a Schedule, a section, a subsection, a paragraph of a section, subsection or definition, or a subparagraph or sub-subparagraph of a paragraph.

(2) The Parts of the amended Act are renumbered so that they bear consecutive arabic numerals starting with “1”.

(3) The Divisions of each Part of the amended Act are renumbered so that they bear consecutive arabic numerals starting with "1".

(4) The sections of the amended Act are renumbered in a single series so that they bear consecutive arabic numerals starting with "1".

5 (5) The subsections of each section of the amended Act are renumbered so that they bear consecutive arabic numerals enclosed in brackets starting with "(1)".

10 (6) The paragraphs of each section, subsection or definition of the amended Act are re-lettered so that they bear lower case letters, in alphabetical order, enclosed in brackets starting with "(a)".

(7) The subparagraphs of each paragraph of each section, subsection or definition of the amended Act are renumbered so that they bear consecutive lower case roman numerals enclosed in brackets starting with "(i)".

15 (8) The sub-subparagraphs of each paragraph of each section, subsection or definition of the amended Act are re-lettered so that they bear upper case letters, in alphabetical order, enclosed in brackets starting with "(A)".

20 (9) Each provision of the amended Act that refers to a provision of that Act that has been renumbered or re-lettered under this section is further amended by omitting the reference and substituting a reference to the last-mentioned provision as so renumbered or re-lettered.

(10) A reference in:

25 (a) a provision (whether or not in force) of a law of the Commonwealth, or of a Territory, enacted before the commencement of this section; or

(b) a provision (whether or not in force) of an Act of Parliament of the Commonwealth enacted after the commencement of this section, being an Act the Bill for which was introduced into the Parliament before the commencement of this section; or

30 (c) an instrument or document;

to a provision of the *Family Law Act 1975* that has been renumbered or re-lettered under this section is to be construed as a reference to that provision as so renumbered or re-lettered.

35 Note: Paragraph (b) covers references including those in Schedule 2 of this Act and in Schedules 1 and 2 of the *Family Law Reform Act 1995*.

Transitional matters

28. Transitional matters relating to the repeal and re-making of Part VIII of the Principal Act are dealt with in Schedule 2.

**PART 3—AMENDMENTS OF THE FAMILY LAW REFORM
ACT 1995**

Principal Act

29. In this Part, *Principal Act* means the *Family Law Reform Act 1995*².

Amendments of Schedule 2

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30. Schedule 2 to the Principal Act is amended:

- (a) by omitting from subclause 4(1) “immediately”;
 - (b) by omitting from subclause 7(1) “that commencement” and substituting “the Part VII commencement”.
-

SCHEDULE 1

Section 26

AMENDMENTS TO REMOVE SEXIST LANGUAGE

1. Subsection 22(2A):

After “he” (wherever occurring) insert “or she”.

2. Paragraph 30(b):

After “he” insert “or she”.

3. Subparagraph 31(1)(c)(v):

After “his” insert “or her”.

4. Subsection 94(2):

Omit “he”, substitute “it”.

5. Subsection 110(1) (paragraphs (c) and (d) of the definition of *maintenance order*):

After “his” insert “or her”.

SCHEDULE 2

Section 28

TRANSITIONAL PROVISIONS RELATING TO THE REPEAL AND RE-MAKING OF PART VIII OF THE FAMILY LAW ACT 1975

Interpretation

1. In this Schedule:

amended Act means the *Family Law Act 1975* as in force after the Part VIII commencement.

old Act means the *Family Law Act 1975* as in force immediately before the Part VIII commencement.

Part VIII commencement means the commencement of section 15 of this Act.

Treatment of spousal maintenance and property orders

2.(1) An order under section 74 of the old Act for the maintenance of a party to a marriage in force under the old Act immediately before the Part VIII commencement has effect, after that commencement, as if it were a spousal maintenance order made under section 80A of the amended Act.

(2) An order under section 79 of the old Act with respect to the property of the parties to a marriage or either of them in force under the old Act immediately before the Part VIII commencement has effect, after that commencement, as if it were a property order made under section 86A of the amended Act.

(3) In this clause, a reference to a particular kind of order in force under the old Act includes a reference to:

- (a) an agreement that has effect as that kind of order under the old Act;
and
- (b) an order that is taken to be, or that has effect, as if it were an order of that kind.

Treatment of applications for spousal maintenance and property orders

3.(1) Subject to subclause (3), if immediately before the Part VIII commencement, an application for an order under section 74 of the old Act for the maintenance of a party to the marriage was still awaiting determination, the application must be determined as if it were an application for a spousal maintenance order under section 80A of the amended Act.

(2) Subject to subclause (3), if immediately before the Part VIII commencement, an application for an order under section 79 of the old Act with respect to the property of the parties to a marriage or either of them was still awaiting determination, the application must be determined as if it were an application for a property order under section 86A of the amended Act.

SCHEDULE 2—continued

(3) If the hearing in relation to an application to which subclause (1) or (2) applies has been completed before the Part VIII commencement:

- (a) the application must be determined as if Part VIII of the old Act were still in force; and
- (b) this Schedule applies to any orders made determining the application, or in connection with determining the application, as if the orders had been made before the Part VIII commencement.

Treatment of maintenance agreements registered under section 86 of old Act

4. If, immediately before the Part VIII commencement, the registration of a maintenance agreement under section 86 of the old Act was in force:

- (a) the agreement has effect after that commencement as if it were a financial agreement made under Part VIII of the amended Act; and
- (b) the registration of the agreement has effect after the commencement as if it were a registration of the agreement under section 76D of the amended Act.

Treatment of maintenance agreements approved under section 87 of old Act

5.(1) The amended Act has effect, after the Part VIII commencement, as if the following Division were added at the end of Part VIII:

“Division 7—Continued operation of approved maintenance agreements

Agreements to which Division applies

“90C. This Division applies in relation to an agreement that, immediately before the commencement of section 15 of the *Family Law Reform Act (No. 2) 1995*, was a maintenance agreement the approval of which under section 87 of this Act (as then in force) was in force.

Agreement continues to have effect

“90D. The agreement continues to have effect as provided in this Division.

Registration of agreement in a court

“90E.(1) The agreement is taken to be registered:

- (a) in the court that approved it; and
- (b) in any other court in which the agreement was registered, immediately before the commencement of section 15 of the *Family Law Reform Act (No. 2) 1995*, under subsection 87(7) of this Act as then in force.

SCHEDULE 2—continued

“(2) The agreement may be registered in accordance with the Rules of Court in a court having jurisdiction under this Act.

Agreement not invalid because it substitutes for rights under this Part

“90F. Despite any rule of law or equity, the agreement is not to be taken to be void, voidable or unenforceable merely because it makes provision to the effect that it operates, in relation to the financial matters it deals with, in substitution for any rights of the parties to the agreement under this Part.

Effect of agreement on orders and power to make orders

“90G.(1) An order:

- (a) that would, apart from this subsection, have effect as if it were made under this Part; or
- (b) made under Part VIII of the repealed Act and continued in effect because of paragraph 3(2)(c);

is of no effect in so far as it relates to financial matters dealt with in the agreement.

“(2) Subject to sections 90H and 90J, no court having jurisdiction under this Act may make an order (other than an order under this Division or an order in connection with the enforcement of the agreement) with respect to the financial matters dealt with in the agreement unless the approval of the agreement is revoked.

Court’s power in relation to spousal maintenance—exception to section 90G if agreement approved on or after 1 April 1988

“90H.(1) A court having jurisdiction under this Act to make a maintenance order in relation to the maintenance of a party to the relevant marriage may, despite section 90G, make such an order in relation to the party if:

- (a) the agreement was approved on or after 1 April 1988; and
- (b) the court is satisfied that, at the time the agreement was approved, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party would have been unable to support himself or herself without an income tested pension, allowance or benefit.

“(2) If subsection (1) applies in relation to the agreement, section 81B applies in relation to the variation of the agreement, in so far as the agreement makes provision for the maintenance of a party to the marriage, as if the agreement were an order made by consent under this Act by a court in which the agreement is, or is taken to be, registered.

SCHEDULE 2—continued**Court's power in relation to child maintenance—exception to section 90G**

“90J.(1) A court having jurisdiction under Part VII to make an order in relation to a child of the relevant marriage may make such an order despite section 90G.

“(2) If the agreement makes provision for the maintenance of a child of the marriage, section 66S applies in relation to the variation of the agreement, in so far as it makes that provision, as if the agreement were an order made by consent under that Part by a court in which the agreement is, or is taken to be, registered.

Provisions relating to child maintenance ineffective in certain circumstances

“90K. If:

- (a) the agreement makes provision for the maintenance of a child; and
- (b) at a time when the approval is in force, an application could be made under the *Child Support (Assessment) Act 1989* by one of the parties to the agreement for administrative assessment of child support (within the meaning of that Act) for the child seeking payment of the child support by the other party to the agreement (whether or not such an application has in fact been made by the party or by another person);

the agreement, so far as it makes provision for the maintenance of the child at that time, has no effect and is not enforceable in any way.

Approval of agreement may be revoked

“90L.(1) A court may, by order, revoke the approval of the agreement if, and only if, the agreement is registered or taken to be registered in that court and the court is satisfied that:

- (a) the approval was obtained by fraud; or
- (b) the parties to the agreement want the approval revoked; or
- (c) the agreement is void, voidable or unenforceable; or
- (d) in the circumstances that have arisen since the agreement was approved it is impracticable for the agreement or a part of it to be carried out.

“(2) If the approval of the agreement is revoked:

- (a) the agreement ceases, for all purposes, to be in force; and

SCHEDULE 2—continued

- (b) the court may, in proceedings for the revocation of the approval or on application of a party to the agreement or any other interested person, make such orders (including an order for the transfer of property) as it considers just and equitable to preserve or adjust the rights of the parties to the agreement and any other interested persons, having regard to the ground on which it revoked the approval of the agreement.

Effect of death

“90M.(1) Unless the agreement provides otherwise, the agreement (other than provisions for the periodic payment of maintenance) continues to operate in spite of the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

“(2) If the agreement includes provisions (the *periodic provisions*) for the periodic payment of maintenance:

- (a) the periodic provisions continue to operate, if the agreement so provides, in spite of the death of the party to the agreement who is liable to make the periodic payments, and are binding on the legal personal representative of that party; but
- (b) the periodic provisions do not continue to operate, in spite of anything in the agreement, after the death of the person entitled to receive the periodic payments.

Validity and enforceability of agreement

“90N.(1) Subject to sections 90F, 90H, 90J, 90L and 90M, the validity, enforceability and effect of the agreement are to be determined according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts.

“(2) In proceedings of the kind referred to in subparagraph (da)(iii) of the definition of *matrimonial cause* in subsection 4(1), being proceedings instituted in a court in which the agreement is registered or taken to be registered, the court:

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and is to have the same regard to the rights of third parties, as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and

SCHEDULE 2—continued

- (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the Rules of Court; and
- (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.”.

(2) The amended Act, as it has effect under subsection (1), also has effect as if, before paragraph (e) of the definition of *matrimonial cause* in subsection 4(1), the following paragraphs were inserted:

“(da) proceedings between:

- (i) the parties to a marriage; or
- (ii) if one of the parties to a marriage has died—the other party to the marriage and the legal personal representative of the deceased party;

being proceedings:

- (iii) for the enforcement of, or otherwise in relation to, an agreement to which Division 7 of Part VIII applies and the approval of which has not been revoked; or
- (iv) in relation to such an agreement the approval of which has been revoked;

“(db) proceedings between the parties to a marriage for the revocation of the approval of an agreement to which Division 7 of Part VIII applies;”.

Other things done under old Act have effect for purposes of corresponding provisions of amended Act

6.(1) Subject to clauses 2 to 5, a thing done for the purposes of a provision (the *old provision*) of Part VIII of the old Act has effect, after the Part VIII commencement, as if it were an equivalent thing done under the provision of Part VIII of the amended Act that corresponds to the old provision (see the Table at the end of this Schedule).

- (2) In this clause, a reference to a thing done includes, for example:
 - (a) the making of a Regulation or Rule of Court; or
 - (b) the making of an application to, or filing of a notice or other document in, a court; or
 - (c) the making of an order, declaration or other decree by a court.

SCHEDULE 2—continued

Provision of old Act	Corresponding provision of amended Act
Section 72	Section 79A
Section 74	Subsection 80A(1) (<i>and see clauses 2 and 3</i>)
Section 75	Section 80B
Section 77	Section 81
Section 77A	Section 81A
Section 78	Section 84
Subsection 79(1)	Subsection 86A(1) (<i>and see clauses 2 and 3</i>)
Subsection 79(1A)	Subsection 86K(3)
Subsections 79(1B) and (1C)	Section 86G
Subsections 79(2) and (4)	Sections 86B, 86C and 86D
Subsections 79(5), (6) and (7)	Section 86H
Subsection 79(8)	Subsections 86K(1) and (2)
Subsection 79(9)	Section 86F
Subsection 79A(1)	Section 87
Subsection 79A(1A)	Section 87A
Subsection 79A(1B)	Subsection 87B(3)
Subsection 79A(1C)	Subsections 87B(1) and (2)
Subsection 79A(2)	Section 107B (<i>see section 19 of this Act</i>)
Section 80	Section 89A
Section 81	Section 89B
Subsections 82(1), (2) and (3)	Section 82
Subsections 82(4), (6) and (7)	Section 82A
Subsection 82(8)	Section 82B
Subsection 83(1)	Subsections 81B(1) and (2)
Subsection 83(2)	Subsection 81B(3)
Subsection 83(3)	Subsection 81B(4)

SCHEDULE 2—continued

Subsection 83(4)	Subsection 81B(5)
Subsection 83(5)	Subsection 81B(6)
Subsection 83(5A)	Subsection 81B(7)
Subsection 83(6)	Subsection 81C(1)
Subsection 83(6A)	Subsection 81C(2)
Subsection 83(6B)	Subsection 81C(3)
Section 84	Section 107A (<i>see section 19 of this Act</i>)
Section 85	Section 107B (<i>see section 19 of this Act</i>)
Section 85A	Section 88
Sections 86 to 88	<i>No direct equivalent (dealt with in clauses 4 and 5)</i>
Section 89	Section 76H
Section 89A	Subsection 80(2)
Section 90	Section 90A

NOTES

1. No. 53, 1975, as amended. For previous amendments, see Nos. 63, 95 and 209, 1976; No. 102, 1977; No. 23, 1979; No. 2, 1982; Nos. 67 and 72, 1983; Nos. 63, 72 and 165, 1984; Nos. 65, 166 and 193, 1985; Nos. 76 and 168, 1986; Nos. 141 and 181, 1987; Nos. 8, 99 and 120, 1988; Nos. 124, 157 and 182, 1989; Nos. 115 and 138, 1990; Nos. 37, 113, 122, 136, 159 and 199, 1991; and Nos. 22, 23, 94, 104, 143 and 229, 1992.
2. No. 000, 1995.



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