





# **Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020**

**No. 112, 2020**

**An Act to amend the *Family Law Act 1975* and the  
*Bankruptcy Act 1966* in relation to Western  
Australian de facto superannuation splitting and  
concurrent bankruptcy proceedings, and for  
related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation  
(<https://www.legislation.gov.au/>)



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## 1 Short title

This Act is the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*.

## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

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Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	A single day to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day section 4 of the <i>Commonwealth Powers (De Facto Relationships) Act 2006</i> (WA) commences.	

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Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendment of the Family Law Act 1975**

### *Family Law Act 1975*

#### **1A Subparagraph 10L(2)(b)(i)**

After “Part VIII B proceedings”, insert “, proceedings for an order under Part VIIC”.

#### **1 After Division 2 of Part V**

Insert:

### **Division 2A—Jurisdiction in matters arising under Part VIIC**

#### **39H Instituting proceedings**

##### *Instituting proceedings under this Act*

- (1) Proceedings in relation to matters arising under Part VIIC may be instituted under this Act in:
  - (a) the Family Court of Western Australia; or
  - (b) the Magistrates Court of Western Australia sitting at a place outside the metropolitan region (within the meaning of the *Family Court Act 1997* (WA)).
- (2) Subsection (1) has effect subject to this Part.

##### *Proceedings only to be instituted under this Act*

- (3) Proceedings in relation to matters arising under Part VIIC that may be instituted under this Act must not be instituted otherwise than under this Act.

#### **39J Jurisdiction in matters arising under Part VIIC**

- (1) The following are each invested with federal jurisdiction with respect to matters arising under Part VIIC:

- (a) the Family Court of Western Australia;
- (b) the Magistrates Court of Western Australia constituted by a magistrate who is not a Family Law Magistrate of Western Australia, sitting at a place outside the metropolitan region (within the meaning of the *Family Court Act 1997* (WA));
- (c) the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia.

(2) This section has effect subject to this Part.

## 2 At the end of section 44

Add:

### *Proceedings under Part VIIC*

- (7) Subject to subsection (9), a party to a de facto relationship may apply for an order under Part VIIC only if:
  - (a) the application is made within the period (the ***standard application period***) of:
    - (i) 2 years after the end of the de facto relationship; or
    - (ii) 12 months after a Western Australian financial agreement (within the meaning of Part VIIC) between the parties to the de facto relationship was set aside, or found to be invalid, as the case may be; or
  - (b) both parties to the de facto relationship consent to the application.
- (8) However, if proceedings are instituted by an application made with the consent of both of the parties to the de facto relationship, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.
- (9) The court may grant the party leave to apply after the end of the standard application period if the court is satisfied that hardship would be caused to the party or a child if leave were not granted.

### **3 At the end of subsection 90RA(3)**

Add:

Note: Western Australia is not a *referring State*. Part VIIC applies if the Parliament of Western Australia has referred to the Parliament of the Commonwealth superannuation matters relating to de facto partners (see paragraphs 4(1)(a) and (b) of the *Commonwealth Powers (De Facto Relationships) Act 2006* (WA)).

### **4 After Part VIIB**

Insert:

## **Part VIIC—Superannuation interests relating to Western Australian de facto relationships**

### **Division 1—Preliminary**

#### **Subdivision A—Scope of this Part**

##### **90YA Object of this Part**

The object of this Part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between de facto partners in a de facto relationship in Western Australia, either by agreement or by court order.

##### **90YB Application of this Part**

- (1) This Part applies if:
  - (a) the Parliament of Western Australia has referred to the Parliament of the Commonwealth superannuation matters relating to de facto partners arising out of the breakdown of de facto relationships; and
  - (b) the referral of the superannuation matters is made:
    - (i) for the purposes of paragraph 51(xxxvii) of the Constitution; and
    - (ii) to the extent that the superannuation matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a

reference under paragraph 51(xxxvii) of the Constitution).

This subsection has effect subject to subsection (4).

- (2) For the purposes of subsection (1), *superannuation matters*, in relation to de facto partners, means the distribution of superannuation benefits or prospective superannuation entitlements of or relating to de facto partners.
- (3) This Part applies even if a law of Western Australia provides that a reference to the Commonwealth Parliament described in subsection (1) is to terminate in particular circumstances.
- (4) This Part ceases to apply if Western Australia's reference to the Commonwealth Parliament described in subsection (1) terminates.

#### **90YC This Part overrides other laws, trust deeds etc.**

- (1) Subject to subsection (3), this Part has effect despite anything to the contrary in any of the following instruments (whether made before or after the commencement of this Part):
  - (a) any other law of the Commonwealth;
  - (b) any law of a State or Territory;
  - (c) anything in a trust deed or other instrument.
- (2) Without limiting subsection (1), nothing done in compliance with this Part by the trustee of an eligible superannuation plan is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).
- (3) This Part has effect subject to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

### **Subdivision B—Interpretation**

#### **90YD Definitions**

In this Part:

*approved deposit fund* has the same meaning as in the SIS Act.

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**declaration time**, in relation to a separation declaration, means the time when the declaration was signed by a party to the de facto relationship (or last signed by a party, if both parties have signed).

Note: If a party has died, the party's legal personal representative may sign a declaration (see subsection 90YU(2)).

**eligible superannuation plan** means any of the following:

- (a) a superannuation fund within the meaning of the SIS Act;
- (b) an approved deposit fund;
- (c) an RSA;
- (d) an account within the meaning of the *Small Superannuation Accounts Act 1995*;
- (e) a superannuation annuity (within the meaning of the *Income Tax Assessment Act 1997*).

**flagging order** means an order mentioned in subsection 90YZ(1).

**flag lifting agreement** has the meaning given by section 90YS.

**in force**, in relation to a superannuation agreement or flag lifting agreement, has the meaning given by section 90YI.

**interest** includes a prospective or contingent interest, and also includes an expectancy.

**member**, in relation to an eligible superannuation plan, includes a beneficiary (including a contingent or prospective beneficiary).

**member spouse**, in relation to a superannuation interest, means the party to the de facto relationship who has the superannuation interest.

**non-member spouse**, in relation to a superannuation interest, means the party to the de facto relationship who is not the member spouse in relation to that interest.

**operative time**:

- (a) in relation to a payment split under a superannuation agreement or flag lifting agreement—has the meaning given by section 90YM; or

- (b) in relation to a payment flag under a superannuation agreement—has the meaning given by section 90YO or paragraph 90YQ(2)(c) as appropriate; or
- (c) in relation to a payment split under a court order—means the time specified in the order.

**payment flag** means:

- (a) the application of section 90YP in relation to a superannuation interest; or
- (b) the application of a flagging order in relation to a superannuation interest.

**payment split** means:

- (a) the application of section 90YN in relation to a splittable payment; or
- (b) the application of a splitting order in relation to a splittable payment.

**percentage-only interest** means a superannuation interest prescribed by the regulations for the purposes of this definition.

**regulated superannuation fund** has the same meaning as in the SIS Act.

**reversionary beneficiary** means a person who becomes entitled to a benefit in respect of a superannuation interest of a party to a de facto relationship, after the party dies.

**reversionary interest** has the meaning given by section 90YH.

**RSA** means a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*.

**secondary government trustee** means a trustee that:

- (a) is the Commonwealth, a State or a Territory; and
- (b) is a trustee only because of the operation of section 90YF.

**separation declaration** has the meaning given by section 90YU.

**SIS Act** means the *Superannuation Industry (Supervision) Act 1993*.

**splittable payment** has the meaning given by section 90YG.

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***splitting order*** means an order mentioned in subsection 90YY(1).

***superannuation agreement*** has the meaning given by section 90YK.

Note: See also subsection 90YL(2).

***superannuation interest*** means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.

***trustee***, in relation to an eligible superannuation plan, means:

- (a) if the plan is a fund that has a trustee (within the ordinary meaning of that word)—the trustee of the plan; or
- (b) if paragraph (a) does not apply and a person is identified in accordance with the regulations as the trustee of the plan for the purposes of this definition—the person identified in accordance with the regulations; or
- (c) in any other case—the person who manages the plan.

***unflaggable interest*** means a superannuation interest prescribed by the regulations for the purposes of this definition.

***unsplittable interest*** means a superannuation interest prescribed by the regulations for the purposes of this definition.

***Western Australian financial agreement*** means an agreement that is a financial agreement within the meaning of Part 5A of the *Family Court Act 1997* (WA).

***Western Australian Rules of Court*** means rules made under section 244 of the *Family Court Act 1997* (WA) as in force from time to time.

### **90YE Meaning of *child of a de facto relationship***

For the purposes of this Part, a child is a ***child of a de facto relationship*** if the child is the child of both of the parties to the de facto relationship.

Note: To determine who is a child of a person, see Subdivision D of Division 1 of Part VII.

### **90YF Extended meaning of trustee**

If a person who is not the trustee of an eligible superannuation plan nevertheless has the power to make payments to members of the plan, then references in this Part to the trustee of the plan include references to that person.

### **90YG Splittable payments**

- (1) Each of the following payments in respect of a superannuation interest of a party to a de facto relationship is a **splittable payment**:
  - (a) a payment to the party;
  - (b) a payment to another person for the benefit of the party;
  - (c) a payment to the legal personal representative of the party, after the death of the party;
  - (d) a payment to a reversionary beneficiary, after the death of the party;
  - (e) a payment to the legal personal representative of a reversionary beneficiary covered by paragraph (d), after the death of the reversionary beneficiary.
- (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection. The regulations may prescribe a payment either:
  - (a) generally (that is, for the purposes of all payment splits in respect of a superannuation interest); or
  - (b) only for the purposes of applying this Part to a particular payment split in respect of a superannuation interest.
- (3) If a payment is made to another person for the benefit of 2 or more persons who include the party to the de facto relationship, then the payment is nevertheless a splittable payment, to the extent to which it is paid for the benefit of the party.

### **90YH Reversionary interest**

For the purposes of this Part, a person's interest in an eligible superannuation plan is a **reversionary interest** at any time while the person's entitlement to benefits in respect of the interest is conditional on the death of another person who is still living.

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### **90YI Meaning of *in force***

- (1) Subject to subsection 90YS(7), a superannuation agreement is ***in force*** at any time when the relevant Western Australian financial agreement is binding on the parties to the Western Australian financial agreement in accordance with the *Family Court Act 1997* (WA).
- (2) A flag lifting agreement is ***in force*** if, and only if:
  - (a) it meets the requirements set out in subsection 90YS(3); and
  - (b) it has not been set aside by a court and has not been terminated.

### **Subdivision C—Rules of Court**

#### **90YJ Rules of Court**

- (1) The power of the judges (within the meaning of the *Family Court Act 1997* (WA)), or a majority of them, to make rules regulating the practice and procedure of the Family Court of Western Australia or the Magistrates Court of Western Australia extends to making any rules, not inconsistent with this Part or with any regulations made under this Part, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part.
- (2) This section does not affect any power to make rules under any other law.

### **Division 2—Payment splitting or flagging by agreement**

#### **Subdivision A—Superannuation agreements**

#### **90YK Superannuation agreement to be included in Western Australian financial agreement if about a *de facto* relationship**

- (1) This section applies if a Western Australian financial agreement includes an agreement that deals with superannuation interests of either or both of the parties to the Western Australian financial

agreement. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.

- (2) The part of the Western Australian financial agreement that deals with superannuation interests is a **superannuation agreement** for the purposes of this Part.
- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under the *Family Court Act 1997* (WA).
- (4) A superannuation agreement that is included in a Western Australian financial agreement made under the *Family Court Act 1997* (WA) in contemplation of a de facto relationship has no effect unless and until the parties enter into that de facto relationship.
- (5) In applying the provisions of the *Family Court Act 1997* (WA) relating to making a Western Australian financial agreement for the purposes of this Division, a superannuation interest of a party to a Western Australian financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

**90YL Part VIIIIB superannuation agreements that become superannuation agreements for the purposes of this Part**

- (1) Subsection (2) applies if:
  - (a) 2 people (the **couple**) have made a superannuation agreement within the meaning of Part VIIIIB (the **Part VIIIIB superannuation agreement**) that is included in a Part VIIIAB financial agreement; and
  - (b) at a later time after the commencement of this section (the **transition time**), the couple's circumstances change so that:
    - (i) if the de facto relationship has not broken down—sections 90YZB and 90YZC would not prevent a court from making an order or declaration under this Part in relation to the de facto relationship if the de facto relationship were to break down; or
    - (ii) if the de facto relationship has broken down—sections 90YZB and 90YZC do not prevent a court from making

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an order or declaration under this Part in relation to the de facto relationship; and

- (c) immediately before the transition time:
  - (i) the Part VIII B superannuation agreement was in force; and
  - (ii) the couple were not married to each other; and
- (d) as at the transition time, the Part VIII AB financial agreement is taken, under a law of Western Australia, to be a Western Australian financial agreement.

Paragraph (a) extends to agreements made before the commencement of this section, and to agreements made with one or more other people.

- (2) The Part VIII B superannuation agreement is taken, from the transition time, to be a superannuation agreement within the meaning of this Part.

Note: Subsection (2) means that, from the transition time, the agreement has effect only in accordance with this Part.

- (3) This Part applies in relation to a superannuation agreement covered by subsection (2) with such modifications as are necessary.

## **Subdivision B—Payment splitting**

### **90YM Operative time for payment split**

- (1) The *operative time* for a payment split under a superannuation agreement or flag lifting agreement is the beginning of the fourth business day after the day on which a copy of the agreement is served on the trustee, accompanied by:
  - (a) for a payment split under a superannuation agreement if a separation declaration is not part of the superannuation agreement—a separation declaration; and
  - (b) if the agreement specifies a method for calculating a base amount—a document setting out the amount calculated using that method; and
  - (c) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) For the purposes of subsection (1), the separation declaration must have a declaration time that is not more than 28 days before the service on the trustee.

**90YN Payment split under superannuation agreement or flag lifting agreement**

- (1) This section applies to a superannuation interest if:
- (a) the interest is identified in a superannuation agreement or flag lifting agreement; and
  - (b) if the interest is a percentage-only interest—the agreement does one of the following:
    - (i) it specifies a percentage that is to apply for the purposes of this subparagraph;
    - (ii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
  - (c) if the interest is not a percentage-only interest—the agreement does one of the following:
    - (i) it specifies an amount as a base amount in relation to the interest for the purposes of this Part;
    - (ii) it specifies a method by which such a base amount can be calculated at the time when the agreement is served on the trustee under section 90YM;
    - (iii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
  - (d) the agreement is in force at the operative time; and
  - (e) the de facto relationship to which the agreement relates is broken down at the operative time; and
  - (f) the interest is not an unsplittable interest.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) The following provisions begin to apply to the interest at the operative time.
- (3) Whenever a splittable payment becomes payable in respect of the interest:
- (a) the non-member spouse is entitled to be paid the amount (if any) that is calculated under subsection (4); and

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- (b) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the payment split.
- (4) The amount is calculated as follows:
- (a) if the agreement specifies a percentage as mentioned in subparagraph (1)(b)(ii) or (c)(iii)—the amount is calculated by applying the specified percentage to the splittable payment;
  - (b) otherwise—the amount is calculated in accordance with the regulations.
- (5) Subject to section 90YZL, this section continues to apply to the superannuation interest even if the agreement referred to in subsection (1) of this section later ceases to be in force.

### **Subdivision C—Payment flagging**

#### **90YO Operative time for payment flag**

- (1) The *operative time* for a payment flag under a superannuation agreement is:
- (a) the service time, if the eligible superannuation plan is a self-managed superannuation fund; or
  - (b) otherwise, the beginning of the fourth business day after the day on which the service time occurs.

- (2) In this section:

*self-managed superannuation fund* has the same meaning as in the SIS Act.

*service time* means the time when a copy of the agreement is served on the trustee, accompanied by:

- (a) a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

### 90YP Payment flag

- (1) This section applies to a superannuation interest if:
  - (a) the interest is identified in a superannuation agreement; and
  - (b) the agreement provides that the interest is to be subject to a payment flag under this Part; and
  - (c) the agreement is in force at the operative time; and
  - (d) the interest is not an unflaggable interest.
- (2) A payment flag starts to operate on the superannuation interest at the operative time and continues to operate until either:
  - (a) a court terminates the operation of the payment flag by an order mentioned in section 90YR; or
  - (b) a flag lifting agreement is served on the trustee as mentioned in section 90YM in respect of the superannuation interest.
- (3) If a payment flag ceases to operate because of paragraph (2)(b), the cessation is not affected by a later termination of the flag lifting agreement.
- (4) While a payment flag is operating on a superannuation interest, the trustee must not make any splittable payment to any person in respect of the interest.

Penalty: 50 penalty units.

- (5) Subsection (4) does not apply if the splittable payment is made in circumstances in which section 90YQ applies.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

- (6) If a splittable payment becomes payable in respect of a superannuation interest while a payment flag is operating, the trustee must, within 14 days after it became payable, give written notice to the member spouse and the non-member spouse.

Penalty: 50 penalty units.

- (7) Subsection (6) does not apply if the trustee has previously given a notice under that subsection, for an earlier splittable payment, in respect of the payment flag.

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Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

- (8) If either party to the de facto relationship dies while a payment flag is operating:
- (a) the payment flag nevertheless continues to operate; and
  - (b) the legal personal representative of the deceased party has all the rights the deceased party would have had in respect of the payment flag.

Note: The rights of the legal personal representative under paragraph (b) include the right to enter into a flag lifting agreement under section 90YS.

### **90YQ Some splittable payments payable if payment flag operating**

- (1) This section applies if:
- (a) a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) is identified in a superannuation agreement; and
  - (b) a payment flag under section 90YP is operating on the original interest; and
  - (c) a splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If this section applies, then:
- (a) the new interest in the new ESP is taken to be the original interest identified in the superannuation agreement; and
  - (b) the payment flag operates on the new interest; and
  - (c) despite section 90YO, the operative time for the payment flag in respect of the new interest is the time that the payment to the trustee of the new ESP is made.
- (3) In this section:

**successor fund transfer** means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and

- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

### **90YR Payment flag may be terminated by court**

If the Family Court of Western Australia, or the Magistrates Court of Western Australia, makes an order under the *Family Court Act 1997* (WA) setting aside a Western Australian financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90YK, a superannuation agreement relating to a de facto relationship must be part of a Western Australian financial agreement. Therefore, setting aside the Western Australian financial agreement also has the effect of setting aside the superannuation agreement.

### **90YS Flag lifting agreement etc.**

- (1) At any time when a payment flag is operating on a superannuation interest, the parties to the de facto relationship may make an agreement (a ***flag lifting agreement***) that either:
  - (a) provides that the flag is to cease operating without any payment split; or
  - (b) specifies an amount, method or percentage in accordance with subsection 90YN(1).
- (2) If the flag lifting agreement provides for a payment split, the parties to the de facto relationship may at any time make an agreement (a ***termination agreement***) that terminates the flag lifting agreement.
- (3) A flag lifting agreement or termination agreement has no effect unless it complies with the following requirements:
  - (a) the agreement must be signed by both parties to the de facto relationship;
  - (b) for each party, the agreement must contain a statement that the party has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement;

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- (c) a certificate must be attached to the agreement, signed by the person who provided the legal advice and stating that the advice was provided;
  - (d) after the agreement is signed by the parties, each party must be provided with a copy of the agreement.
- (4) The Family Court of Western Australia or the Magistrates Court of Western Australia may make an order setting aside a flag lifting agreement or termination agreement if, and only if, the court is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
  - (b) a party to the agreement entered into the agreement:
    - (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
    - (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
  - (c) a party (the **agreement party**) to the agreement entered into the agreement:
    - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the **other de facto relationship**) with a party to the agreement; or
    - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM or 90YX of this Act or section 205ZG of the *Family Court Act 1997* (WA), or a declaration under section 90SL of this Act or section 205ZA of the *Family Court Act 1997* (WA), in relation to the other de facto relationship; or
    - (iii) with reckless disregard of those interests of that other person; or
  - (d) a party (the **agreement party**) to the agreement entered into the agreement:
    - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a party to the agreement; or
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- (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or
- (iii) with reckless disregard of those interests of that other person; or
- (e) the agreement is void, voidable or unenforceable; or
- (f) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
- (g) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (6)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
- (h) a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
- (i) the agreement covers at least one superannuation interest that is an unspittable interest for the purposes of this Part.

Note: If a court makes an order setting aside a flag lifting agreement, the court may then make an order under section 90YX in relation to the superannuation interest.

- (5) For the purposes of paragraph (4)(b), **creditor**, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.
- (6) For the purposes of paragraph (4)(g), a person has **caring responsibility** for a child if:
  - (a) the person is a parent of the child with whom the child lives; or
  - (b) a parenting order provides that:
    - (i) the child is to live with the person; or
    - (ii) the person has parental responsibility for the child.

- (7) An order setting aside a flag lifting agreement also operates to set aside the related superannuation agreement.
- (8) If the Family Court of Western Australia, or the Magistrates Court of Western Australia, makes an order under the *Family Court Act 1997* (WA) setting aside a Western Australian financial agreement that has a related flag lifting agreement, the court must also make an order setting aside the flag lifting agreement. Subsection (4) of this section does not apply to the order setting aside the flag lifting agreement.

Note: If a court makes an order setting aside a flag lifting agreement, the court may then make an order under section 90YX in relation to the superannuation interest.

## **Subdivision D—Miscellaneous**

### **90YT Limitation on section 90YX order**

- (1) A court cannot make an order under section 90YX with respect to a superannuation interest if:
  - (a) the superannuation interest is covered by a superannuation agreement that is in force; or
  - (b) the non-member spouse has served a waiver notice on the trustee under section 90YZQ in respect of the interest; or
  - (c) a payment flag is operating on the superannuation interest.

Note: Under section 90YR, the Family Court of Western Australia or the Magistrates Court of Western Australia can terminate the operation of a payment flag in certain circumstances.

- (2) Subsection (1) does not prevent the court taking superannuation interests into account when making an order under the *Family Court Act 1997* (WA) with respect to other property of the parties to the de facto relationship.

### **90YU Separation declaration**

- (1) A *separation declaration* is a written declaration that complies with this section, and may be included in the superannuation agreement to which it relates.

- (2) The declaration must be signed by at least one of the parties to the de facto relationship. For this purpose, if a party has died the party's legal personal representative may sign the declaration.
- (3) If section 90YV applies to the declaration, then the declaration must state that:
- (a) the parties lived in a de facto relationship; and
  - (b) the parties separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time; and
  - (c) in the opinion of the party (or parties) making the declaration, there is no reasonable likelihood of cohabitation being resumed.
- (4) If section 90YV does not apply to the declaration, then the declaration must state that the parties lived in a de facto relationship, but are separated, at the declaration time.
- (5) If either or both of the parties to the de facto relationship have died, then the declaration must state:
- (a) if section 90YV applies to the declaration—that:
    - (i) the parties lived in a de facto relationship; but
    - (ii) at the most recent time when both parties were alive, the parties were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time; or
  - (b) if section 90YV does not apply to the declaration—that the parties:
    - (i) lived in a de facto relationship; but
    - (ii) were separated at the most recent time when both parties were alive.

Subsections (3) and (4) have effect subject to this subsection.

- (6) For the purposes of subsection (3) and paragraph (5)(a), the parties to the de facto relationship can have separated and be living separately and apart even if:
- (a) their cohabitation was brought to an end by the action or conduct of one only of them; or
  - (b) they have continued to reside in the same residence; or

- (c) either of them has rendered some household services to the other.
- (7) For the purposes of subsection (3) and paragraph (5)(a), if, after the parties to the de facto relationship separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the relevant time referred to in paragraph (3)(b) or (5)(a):
  - (a) the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period; but
  - (b) the period of cohabitation shall not be taken to be part of the period of living separately and apart.

### **90YV Superannuation interests in excess of low rate cap amount**

- (1) This section applies to a declaration if:
  - (a) if both parties to the de facto relationship are alive at the declaration time—at the declaration time; or
  - (b) otherwise—at the most recent time when both parties to the de facto relationship were alive;the total withdrawal value for all the superannuation interests of the member spouse is more than the member spouse's low rate cap amount for the income year in which that time occurs.
- (2) This section does not apply in the circumstances (if any) prescribed by the regulations.
- (3) In this section:
  - low rate cap amount** has the meaning given by the *Income Tax Assessment Act 1997* (disregarding subsection 307-345(2) of that Act and section 307-345 of the *Income Tax (Transitional Provisions) Act 1997*).
  - total withdrawal value** means the amount determined in accordance with the regulations.

### **90YW Enforcement by court order**

- (1) The Family Court of Western Australia or the Magistrates Court of Western Australia may make such orders as it thinks necessary for the enforcement of a payment split or payment flag under this Division.
- (2) The question whether a superannuation agreement or flag lifting agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts.
- (3) Without limiting subsection (2), in proceedings relating to a superannuation agreement or flag lifting agreement, the Family Court of Western Australia, or the Magistrates Court of Western Australia, has the same powers, may grant the same remedies and must 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.

## **Division 3—Payment splitting or flagging by court order**

### **Subdivision A—Orders in relation to superannuation interests**

#### **90YX Orders in relation to superannuation interests**

- (1) In proceedings between the parties to a de facto relationship with respect to a superannuation interest of either or both of the parties, the Family Court of Western Australia or the Magistrates Court of Western Australia may, in accordance with this Division, make orders in relation to the superannuation interest.

Note 1: The geographical requirement in section 90YZB must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90YZC.

Note 3: Subsections 44(7) and (9) and sections 90YT and 90YZD limit the scope of this section.

- (2) A court cannot make an order under this section in relation to a superannuation interest except in accordance with this Part.

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**90YY Splitting order**

- (1) The Family Court of Western Australia or the Magistrates Court of Western Australia may, under section 90YX, make the following orders in relation to a superannuation interest (other than an unsplittable interest):
  - (a) if the interest is not a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations; and
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
  - (b) an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid a specified percentage of the splittable payment; and
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
  - (c) if the interest is a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
    - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations by reference to the percentage specified in the order; and
    - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
  - (d) such other orders as the court thinks necessary for the enforcement of an order under paragraph (a), (b) or (c).
- (2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) of this subsection as follows:

- (a) if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
  - (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate.
- (3) The amount determined under paragraph (2)(a) is taken to be the value of the interest.
- (4) Regulations for the purposes of paragraph (2)(a) may provide for the amount to be determined wholly or partly by reference to methods or factors that are approved in writing by the Minister for the purposes of the regulations.
- (5) Before making an order referred to in paragraph (1)(a), the court must allocate a base amount to the non-member spouse, not exceeding the value determined under subsection (2).

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

### **90YZ Flagging order**

- (1) The Family Court of Western Australia or the Magistrates Court of Western Australia may, under section 90YX, make an order in relation to a superannuation interest (other than an unflaggable interest):
  - (a) directing the trustee not to make any splittable payment in respect of the interest without the leave of the court; and
  - (b) requiring the trustee to notify the member spouse and the non-member spouse, within a period specified in the order, of the next occasion when a splittable payment becomes payable in respect of the interest.
- (2) In deciding whether to make an order in accordance with this section, the court may take into account such matters as it considers relevant and, in particular, may take into account the likelihood that a splittable payment will soon become payable in respect of the superannuation interest.

**90YZA Some splittable payments may be made without leave of court**

- (1) A flagging order made under subsection 90YZ(1) in relation to a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) does not apply to a splittable payment if the splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If the splittable payment is made, then the flagging order is taken to be made in relation to the new interest from the time that the payment to the trustee of the new ESP is made.
- (3) In this section:

*successor fund transfer* means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

**90YZB Geographical requirement**

Before making an order under section 90YX, a court must be satisfied:

- (a) that one or both of the parties to the application were resident in Western Australia on the day on which the application was made; and
- (b) that:
  - (i) both parties have resided in Western Australia for at least one third of the duration of their de facto relationship; or
  - (ii) substantial contributions of the kind referred to in paragraph 205ZG(4)(a), (b) or (c) of the *Family Court Act 1997* (WA) have been made in the State by the applicant.

**90YZC Length of relationship etc.**

- (1) A court may make an order under section 90YX in relation to a de facto relationship only if satisfied:
  - (a) that there has been a de facto relationship between the parties to the de facto relationship for at least 2 years; or
  - (b) that there is a child (within the meaning of the *Family Court Act 1997* (WA)) of the de facto relationship and failure to make the order would result in serious injustice to the partner caring or responsible for the child; or
  - (c) that the party to the de facto relationship who applies for the order made substantial contributions of a kind mentioned in paragraph 205ZG(4)(a), (b) or (c) of the *Family Court Act 1997* (WA) and failure to make the order would result in serious injustice to that party.
- (2) In deciding whether there has been a de facto relationship between the parties to the de facto relationship for at least 2 years, the court must consider whether there was any break in the continuity of the relationship and, if so, the length of the break and the extent of the breakdown in the relationship.
- (3) Subsection (2) does not limit the matters the court may consider.

**90YZD Other rules relating to proceedings under section 90YX**

- (1) If a party to a de facto relationship dies after the breakdown of the de facto relationship, an order made under section 90YX in relation to the de facto relationship may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (2) A court must not make an order under section 90YX unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
- (3) To avoid doubt, for the purposes of being satisfied under subsection (2) of this section that, in all the circumstances, it is just and equitable to make an order under section 90YX of this Act, the circumstances include any other orders made, or to be made, under section 205ZG of the *Family Court Act 1997* (WA) in relation to property of the parties to the de facto relationship.

- (4) In considering what order (if any) should be made under section 90YX of this Act, the court must take into account:
- (a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
    - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
    - (ii) otherwise in relation to any of that last-mentioned property;  
whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and
  - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
    - (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
    - (ii) otherwise in relation to any of that last-mentioned property;  
whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and
  - (c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and
  - (d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and
  - (e) the following matters, so far as they are relevant:
    - (i) the age and state of health of each of the parties to the de facto relationship (the ***subject de facto relationship***);
    - (ii) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

- (iii) whether either party has the care or control of a child of the subject de facto relationship who has not attained the age of 18 years;
  - (iv) commitments of each of the parties that are necessary to enable the party to support themselves and a child or another person that the party has a duty to maintain;
  - (v) the responsibilities of either party to support any other person;
  - (vi) the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth, of a State or Territory or of another country or under 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;
  - (vii) a standard of living that in all the circumstances is reasonable;
  - (viii) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant;
  - (ix) the duration of the subject de facto relationship and the extent to which it has affected the earning capacity of the parties to the subject de facto relationship;
  - (x) the need to protect a party who wishes to continue that party's role as a parent;
  - (xi) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation; and
- (f) the terms of any other order made or proposed to be made under section 205ZG of the *Family Court Act 1997* (WA) in relation to vested bankruptcy property in relation to a bankrupt de facto party to the subject de facto relationship; and
- (g) the terms of any other order or declaration made, or proposed to be made, under Part 5A of the *Family Court Act 1997* (WA) in relation to vested bankruptcy property in relation to:
- (i) a party to the subject de facto relationship (in relation to another de facto relationship); or
  - (ii) a person who is a party to another de facto relationship with a party to the subject de facto relationship; and
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- (h) the terms of any order or declaration made, or proposed to be made, under Part VIII of this Act in relation to vested bankruptcy property in relation to:
  - (i) a party to the subject de facto relationship; or
  - (ii) a person who is a party to a marriage with a party to the subject de facto relationship; and
- (i) any other order made under Part 5A of the *Family Court Act 1997* (WA) affecting a party to the subject de facto relationship or a child of the subject de facto relationship; and
- (j) any child support under the *Child Support (Assessment) Act 1989* that a party to the subject de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the subject de facto relationship; and
- (k) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and
- (l) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship; and
- (m) the terms of any financial agreement that is binding on a party to the subject de facto relationship; and
- (n) the terms of any Western Australian financial agreement that is binding on a party to the subject de facto relationship.

Note: For *child of a de facto relationship*, see section 90YE.

- (5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, if, in proceedings under section 90YX, a court is of the opinion:
  - (a) that there is likely to be a significant change in the financial circumstances of the parties to the de facto relationship or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
  - (b) that an order that the court could make with respect to:
    - (i) the superannuation interests of the parties to the de facto relationship or either of them; or
    - (ii) any vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship;

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the de facto relationship than an order that the court could make immediately with respect to:

- (iii) the superannuation interests of the parties to the de facto relationship or either of them; or
- (iv) any vested bankruptcy property in relation to a bankrupt party to the de facto relationship;

the court may, if so requested by either party to the de facto relationship or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the de facto relationship or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

- (6) If a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:
  - (a) a superannuation interest of the parties to the de facto relationship or of either of them; or
  - (b) any vested bankruptcy property in relation to a bankrupt party to the de facto relationship.
- (7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the de facto relationship, have regard to any change in the financial circumstances of a party to the de facto relationship that may occur by reason that the party to the de facto relationship:
  - (a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or
  - (b) may become entitled to property as the result of the exercise in the party's favour, by the trustee of a discretionary trust, of a power to distribute trust property;but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant

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change in the financial circumstances of a party to the de facto relationship.

- (8) If a party to the de facto relationship dies after the breakdown of the de facto relationship, but before proceedings under section 90YX are completed:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the Western Australian Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
  - (b) if the court is of the opinion:
    - (i) that it would have made an order with respect to a superannuation interest if the deceased party had not died; and
    - (ii) that it is still appropriate to make an order with respect to a superannuation interest;the court may make such order as it considers appropriate with respect to:
    - (iii) a superannuation interest of the parties to the de facto relationship or either of them; or
    - (iv) any vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship; and
  - (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (9) A court must not make an order under section 90YX (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:
- (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a person referred to in paragraph 205ZG(9)(a) of the *Family Court Act 1997* (WA); or
  - (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a) of this subsection; or

- (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a) of this subsection.
- (10) The following are entitled to become a party to proceedings in which an application is made for an order under section 90YX by a party to a de facto relationship (the ***subject de facto relationship***):
- (a) a creditor of a party to the proceedings if the creditor may not be able to recover the creditor's debt if the order were made;
  - (b) a person:
    - (i) who is a party to a de facto relationship (the ***other de facto relationship***) with a party to the subject de facto relationship; and
    - (ii) who could apply, or has an application pending, for an order under section 90YX in relation to the other de facto relationship;
  - (c) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) or a Western Australian financial agreement with a party to the subject de facto relationship;
  - (d) a person:
    - (i) who is a party to a marriage with a party to the subject de facto relationship; and
    - (ii) who could apply, or has an application pending, for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage);
  - (e) a person who is a party to a financial agreement (that is binding on the person) with a party to the subject de facto relationship;
  - (f) any other person whose interests would be affected by the making of the order.
- (11) Subsection (10) does not apply to a creditor of a party to the proceedings:
- (a) if the party is a bankrupt—to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or

- (b) if the party is a debtor subject to a personal insolvency agreement—to the extent to which the debt is covered by the personal insolvency agreement.
- (12) If a person becomes a party to proceedings under section 90YX because of paragraph (10)(b) of this section, the person may, in the proceedings, apply for an order under that section in relation to the other de facto relationship described in that paragraph.
- (13) If a person becomes a party to proceedings under section 90YX because of paragraph (10)(d) of this section, the person may, in the proceedings, apply for:
  - (a) an order under section 79; or
  - (b) a declaration under section 78;in relation to the marriage (or void marriage) described in that paragraph.
- (14) If:
  - (a) an application is made for an order under section 90YX in proceedings between the parties to a de facto relationship with respect to a superannuation interest of either or both of the parties; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the application was made, the party was a bankrupt;
    - (ii) after the application was made but before it is finally determined, the party became a bankrupt; and
  - (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
  - (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under section 90YX in the proceedings;the court must join the bankruptcy trustee as a party to the proceedings.
- (15) If a bankruptcy trustee is a party to proceedings under this Part in relation to a superannuation interest of either or both of the parties to a de facto relationship, then, except with the leave of the court, the bankrupt party to the de facto relationship is not entitled to

make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

- (16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.
- (17) If:
- (a) an application is made for an order under section 90YX in proceedings between the parties to a de facto relationship with respect to a superannuation interest of either or both of the parties; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship (the *debtor party*):
    - (i) when the application was made, the party was a debtor subject to a personal insolvency agreement;
    - (ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and
  - (c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and
  - (d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;
- the court must join the trustee of the agreement as a party to the proceedings.
- (18) If the trustee of a personal insolvency agreement is a party to proceedings under this Part in relation to a superannuation interest of either or both of the parties to a de facto relationship, then, except with the leave of the court, the party to the de facto relationship who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any superannuation interest subject to the agreement.
- (19) The court must not grant leave under subsection (18) unless the court is satisfied that there are exceptional circumstances.
- (20) For the purposes of subsections (14) and (17), an application for an order under section 90YX is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or

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- (b) an order (other than an interim order) is made as a result of the application.

**90YZE Varying and setting aside orders under section 90YX**

- (1) If, on application by a person affected by an order made by the Family Court of Western Australia or the Magistrates Court of Western Australia under section 90YX, the court is satisfied that:
- (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or
  - (b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or
  - (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
  - (d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the de facto relationship, the child or, where 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 set the order aside and make another order in substitution for the order; or
  - (e) a proceeds of crime order has been made covering property of the parties to the de facto relationship or either of them, or a proceeds of crime order has been made against a party to the de facto relationship;

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 90YX in substitution for the order so set aside.

Note: For *child of a de facto relationship*, see section 90YE.

- (2) A court may, on application by a person affected by an order under section 90YX, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the

order aside and, if it considers appropriate, make another order under section 90YX in substitution for the order so set aside.

- (3) For the purposes of paragraph (1)(d), a person has ***caring responsibility*** for a child if:
- (a) the person is a parent of the child with whom the child lives; or
  - (b) a parenting order provides that:
    - (i) the child is to live with the person; or
    - (ii) the person has parental responsibility for the child.
- (4) An order varied or made under subsection (1) or (2) may, after the death of a party to the de facto relationship in relation to which the order was so varied or made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (5) If, before proceedings under this section in relation to an order made under section 90YX are completed, a party to the de facto relationship dies:
- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the Western Australian Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and
  - (b) if the court is of the opinion:
    - (i) that it would have exercised its powers under subsection (1) or (2) of this section in relation to the order if the deceased party had not died; and
    - (ii) that it is still appropriate to exercise its powers under subsection (1) or (2) of this section in relation to the order;the court may vary the order, set the order aside, or set the order aside and make another order under section 90YX in substitution for the order so set aside; and
  - (c) an order varied or made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (6) In the exercise of its powers under subsection (1), (2) or (5), a 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.

- (7) For the purposes of this section, a creditor of a party to the proceedings in which the order under section 90YX was made is taken to be a person whose interests are affected by the order if the creditor may not be able to recover the creditor's debt because the order has been made.
- (8) For the purposes of this section, if:
- (a) an order is made by a court under section 90YX in proceedings with respect to a superannuation interest of the parties to a de facto relationship or either of them; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the order was made, the party was a bankrupt;
    - (ii) after the order was made, the party became a bankrupt;
- the bankruptcy trustee is taken to be a person whose interests are affected by the order.
- (9) For the purposes of this section, if:
- (a) a party to a de facto relationship is a bankrupt; and
  - (b) an order is made by a court under section 90YX in proceedings with respect to any vested bankruptcy property in relation to the bankrupt party;
- the bankruptcy trustee is taken to be a person whose interests are affected by the order.
- (10) For the purposes of this section, if:
- (a) an order is made by a court under section 90YX in proceedings with respect to a superannuation interest of the parties to a de facto relationship or either of them; and
  - (b) either of the following subparagraphs apply to a party to the de facto relationship:
    - (i) when the order was made, the party was a debtor subject to a personal insolvency agreement;
    - (ii) after the order was made, the party became a debtor subject to a personal insolvency agreement;
- the trustee of the agreement is taken to be a person whose interests are affected by the order.
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## **Subdivision B—Notification of application**

### **90YZF Notifying third parties about application**

The Western Australian Rules of Court may specify the circumstances in which a person who:

- (a) applies for an order under this Division; or
- (b) is a party to a proceeding for an order under this Division;

is to give notice of the application to a person who is not a party to the proceedings.

Note: The Western Australian Rules of Court may, for example, make provision for the notification of a person married to, or in a de facto relationship with, the applicant or respondent to the proceedings.

### **90YZG Notifying bankruptcy trustee etc. about application under section 90YX or 90YZE**

- (1) The Western Australian Rules of Court may make provision for a bankrupt who becomes a party to a proceeding for an application under section 90YX or 90YZE to give notice of the application to the bankruptcy trustee.
- (2) The Western Australian Rules of Court may make provision for a debtor subject to a personal insolvency agreement who becomes a party to a proceeding for an application under section 90YX or 90YZE to give notice of the application to the trustee of the agreement.

### **90YZH Notifying court about bankruptcy etc.**

#### *Bankruptcy*

- (1) The Western Australian Rules of Court may make provision for a person who:
  - (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90YX or 90YZE; and
  - (c) before that application is finally determined, becomes a bankrupt;

to notify a court exercising jurisdiction under this Part that the person has become a bankrupt.

*Debtor subject to a personal insolvency agreement*

- (2) The Western Australian Rules of Court may make provision for a person who:
- (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90YX or 90YZE; and
  - (c) before that application is finally determined, becomes a debtor subject to a personal insolvency agreement;
- to notify a court exercising jurisdiction under this Part that the person has become a debtor subject to a personal insolvency agreement.

*Institution of proceeding under the Bankruptcy Act 1966*

- (3) The Western Australian Rules of Court may make provision for a person who:
- (a) is a party to a de facto relationship that has broken down; and
  - (b) is a party to a proceeding for an application under section 90YX or 90YZE; and
  - (c) before that application is finally determined, becomes a party to a proceeding before the Federal Court or the Federal Circuit Court of Australia under the *Bankruptcy Act 1966* that relates to:
    - (i) the bankruptcy of the person; or
    - (ii) the person's capacity as a debtor subject to a personal insolvency agreement;
- to notify a court exercising jurisdiction under this Part of the institution of the proceeding under the *Bankruptcy Act 1966*.
- (4) The Western Australian Rules of Court may make provision for a person who:
- (a) is the bankruptcy trustee of a bankrupt party to a de facto relationship that has broken down; and
  - (b) applies under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act;

to notify a court exercising jurisdiction under this Part of the making of the application.

*When application finally determined*

- (5) For the purposes of this section, an application for an order under section 90YX or 90YZE is taken to be finally determined when:
- (a) the application is withdrawn or dismissed; or
  - (b) an order (other than an interim order) is made as a result of the application.

**90YZI Notifying non-bankrupt de facto party about application under section 139A of the *Bankruptcy Act 1966***

The Western Australian Rules of Court may make provision for a person who:

- (a) is the bankruptcy trustee of a bankrupt party to a de facto relationship; and
- (b) applies under section 139A of the *Bankruptcy Act 1966* for an order under Division 4A of Part VI of that Act in relation to an entity (other than the other party to the de facto relationship);

to notify the other party to the de facto relationship of the making of the application if that bankruptcy trustee is aware:

- (c) that the de facto relationship has broken down; and
- (d) that either party to the de facto relationship is a party to proceedings under this Part.

**Subdivision C—Duty of court to end financial relations**

**90YZJ Duty of court to end financial relations**

In proceedings under this Division, the court must, as far as practicable, make such orders as will finally determine the distribution of superannuation benefits or prospective superannuation entitlements of the parties to the de facto relationship or either of them.

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## **Subdivision D—Orders and injunctions binding third parties**

### **90YZK Orders and injunctions binding third parties**

- (1) In addition to the effect Part VIII AA has apart from this section, that Part also has effect in relation to:
  - (a) orders under this Division; and
  - (b) proceedings for orders under this Division;
 with the modifications provided for in subsections (2) and (3).
- (2) Part VIII AA has effect in accordance with subsection (1) as if the following substitutions were made:

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#### **Substitutions to be made**

<b>Item</b>	<b>For a reference in Part VIII AA to ...</b>	<b>substitute a reference to ...</b>
1	marriage	de facto relationship
2	section 79	section 90YX
3	property (other than a reference in section 90AK)	superannuation

- (3) Part VIII AA has effect in accordance with subsection (1) as if:
  - (a) section 90AD were omitted; and
  - (b) paragraph 90AF(3)(d) were omitted.

## **Division 4—General provisions about payment splitting**

### **90YZL Court may cancel payment split**

- (1) The Family Court of Western Australia or the Magistrates Court of Western Australia may, under section 90YX, make an order terminating the operation of a payment split if:
  - (a) the superannuation agreement in respect of the payment split has ceased to be in force; and
  - (b) the non-member spouse has not served a waiver notice on the trustee under section 90YZQ in respect of the payment split.
- (2) The termination has effect for splittable payments that become payable after the date specified in the order.

**90YZM Deductions from splittable payment before calculating payment split**

Any deduction that the trustee is entitled to make from a splittable payment is to be deducted from the splittable payment before calculating any payment split and before applying section 90YZN.

**90YZN Multiple payment splits applying to the same splittable payment**

- (1) This section applies if 2 or more payment splits apply to the same splittable payment.
- (2) The payments splits are to be calculated in order of their operative times, starting with the earliest time.
- (3) For the purpose of calculating each of those payment splits (other than the one with the earliest operative time), the amount of the splittable payment is taken to be reduced by the amount to which a person other than the member spouse is entitled under the payment split with the next earlier operative time.

Example: W has a superannuation interest that is subject to 3 payment splits in respect of W's de facto relationship with X, W's de facto relationship with Y and W's de facto relationship with Z (in that order). The operative times of the payment splits are in the same order as the relationships. Assume each payment split provides for a 50% share to the non-member spouse. W becomes entitled to a splittable payment of \$100. The final payment entitlements are as follows: X gets \$50. Y gets \$25. Z gets \$12.50. W gets the remaining \$12.50.

**90YZO Fees payable to trustee**

- (1) The regulations may:
  - (a) allow trustees to charge reasonable fees:
    - (i) in respect of a payment split; or
    - (ii) otherwise in respect of the operation of this Part in relation to a superannuation interest; and
  - (b) prescribe the person or persons liable to pay those fees.
- (2) If any such fee remains unpaid after the time it is due for payment, then the trustee may recover any unpaid amount by deduction from amounts that would otherwise become payable by the trustee, in

respect of the superannuation interest, to the person who is liable to pay the fee.

### **90YZP Superannuation preservation requirements**

- (1) If the eligible superannuation plan for a payment split is a regulated superannuation fund or approved deposit fund, then the entitlement of the non-member spouse is subject to any regulations made under the SIS Act that provide for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.
- (2) If the eligible superannuation plan for a payment split is an RSA, then the entitlement of the non-member spouse is subject to any regulations made under the *Retirement Savings Accounts Act 1997* that provide for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.
- (3) If the eligible superannuation plan for a payment split is a constitutionally protected fund (within the meaning of the *Income Tax Assessment Act 1997*) or an exempt public sector superannuation scheme within the meaning of the SIS Act, then the entitlement of the non-member spouse is subject to any law or other instrument that provides for payment of that entitlement to a regulated superannuation fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act for the benefit of the non-member spouse.

### **90YZQ Waiver of rights under payment split**

- (1) If the non-member spouse serves a waiver notice on the trustee in respect of a payment split, then the following provisions apply for each splittable payment that becomes payable after the date specified in the waiver notice:
  - (a) the non-member spouse is not entitled to be paid any amount under the payment split in respect of the splittable payment;

- (b) the entitlement of the person to whom the splittable payment would have been made but for the payment split continues to be reduced in the same way as it would have been reduced if the entitlement of the non-member spouse had not been terminated.

Example: X has a superannuation interest that is subject to a 50:50 payment split in favour of Y. Y serves a waiver notice on the trustee, in exchange for a lump sum payment made by the trustee to another fund for the benefit of Y. The effect is that X's payments will continue to be reduced by half, but Y will receive no further payments under the payment split.

- (2) To be effective for the purposes of this section, a waiver notice must be in the prescribed form and must be accompanied by:
  - (a) a statement to the effect that the non-member spouse has been provided with independent financial advice from a prescribed financial adviser as to the financial effect of the waiver notice; and
  - (b) a certificate signed by the person who provided the financial advice, stating that the advice was provided.

### **90YZR Trustee to provide information**

- (1) An eligible person may make an application to the trustee of an eligible superannuation plan for information about a superannuation interest of a member of the plan.
- (2) The application must be accompanied by:
  - (a) a declaration, in the prescribed form, stating that the applicant requires the information for either or both of the following purposes:
    - (i) to assist the applicant to properly negotiate a superannuation agreement;
    - (ii) to assist the applicant in connection with the operation of this Part in relation to the applicant; and
  - (b) the fee (if any) payable under regulations made for the purposes of section 90YZO.
- (3) If the trustee receives an application that complies with this section, the trustee must, in accordance with the regulations,

provide information about the superannuation interest to the applicant.

Penalty: 50 penalty units.

- (4) Regulations for the purposes of subsection (3) may specify circumstances in which the trustee is not required to provide information.

Example: The regulations might provide that a secondary government trustee is not required to provide information where there is another trustee of the eligible superannuation plan who is better able to provide the information.

- (5) The trustee must not, in response to an application under this section by a party to a de facto relationship with the member, provide the party with any address of the member. For this purpose, **address** includes a postal address.

Penalty: 50 penalty units.

- (6) If the trustee receives an application under this section from a person other than the member, the trustee must not inform the member that the application has been received.

Penalty: 50 penalty units.

- (7) The regulations may require the trustee of an eligible superannuation plan, after the operative time for a payment split, to provide information to the non-member spouse about the superannuation interest concerned. Such regulations may prescribe penalties for contravention, not exceeding 10 penalty units.

- (8) In this section:

**eligible person**, in relation to a superannuation interest of a member of an eligible superannuation plan, means:

- (a) the member; or
- (b) if the member has died—the legal personal representative of the member; or
- (c) a party to a de facto relationship with the member; or
- (d) if a party to a de facto relationship with the member has died—the legal personal representative of the party; or

- (e) a person who intends to enter into a superannuation agreement with the member.

### **90YZS Death of non-member spouse**

If the non-member spouse dies after the operative time for a payment split:

- (a) the payment split nevertheless continues to operate; and
- (b) the payment split then operates in favour of the legal personal representative of the deceased non-member spouse and is binding on that legal personal representative; and
- (c) the legal personal representative has all the rights the deceased non-member spouse would have had in respect of the payment split, including the right to serve a waiver notice under section 90YZQ.

## **Division 5—Miscellaneous**

### **90YZT Orders binding on trustee**

- (1) An order under this Part in relation to a superannuation interest may be expressed to bind the person who is the trustee of the eligible superannuation plan at the time when the order takes effect. However:
  - (a) in the case of a trustee who is not a secondary government trustee—the court cannot make such an order unless the trustee has been accorded procedural fairness in relation to the making of the order; and
  - (b) in the case of a secondary government trustee:
    - (i) the court cannot make such an order unless another trustee of the eligible superannuation plan has been accorded procedural fairness in relation to the making of the order; and
    - (ii) the court may, if it thinks fit, require that the secondary government trustee also be accorded procedural fairness.
- (2) If an order is binding on the person who is the trustee of an eligible superannuation plan at the time when the order takes effect, then the order is also binding (by force of this subsection) on:

- (a) any person who subsequently becomes the trustee of that eligible superannuation plan; or
- (b) in a case where section 90YZA applies—a person who is the trustee, or any person who subsequently becomes the trustee, of the new ESP.

#### **90YZU Protection for trustee**

The trustee of an eligible superannuation plan is not liable for loss or damage suffered by any person because of things done (or not done) by the trustee in good faith in reliance on:

- (a) any document served on the trustee for the purposes of this Part; or
- (b) an order made by a court in accordance with this Part.

#### **90YZV Service of documents on trustee**

- (1) If a document is required or permitted to be served for the purposes of this Part on the trustee of an eligible superannuation plan, the document may be served in any of the ways in which a document may be served under the Western Australian Rules of Court.
- (2) Subsection (1) is in addition to any other method of service permitted by law.

#### **90YZW False declarations**

- (1) A person commits an offence if:
  - (a) the person makes a statement in a declaration, knowing that the statement is false or misleading; and
  - (b) the declaration is served on the trustee of an eligible superannuation plan for the purposes of this Part.

Penalty: Imprisonment for 12 months.

- (2) Subsection (1) does not apply if the statement is not false or misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

- (3) Subsection (1) does not apply in relation to a declaration if a party to the de facto relationship to whom the declaration relates died before the declaration was made.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

### **90YZX Terminating employment because of payment flag etc.**

A person must not terminate the employment of an employee on either of the following grounds:

- (a) a payment flag is operating in respect of a superannuation interest of the employee;
- (b) a superannuation agreement or splitting order is in force in respect of a superannuation interest of the employee.

Penalty: 100 penalty units.

### **5 Subsection 94(1)**

Omit “94AAA and 94AA”, substitute “94AAA, 94AAC and 94AA”.

### **6 After subsection 94AAA(2)**

Insert:

- (2A) Subsection (1A) also has effect subject to section 94AAC.

### **7 After section 94AAB**

Insert:

### **94AAC Appeals relating to matters arising under Part VIII C**

- (1) An appeal lies to the Family Court of Western Australia from:
- (a) an interlocutory order of the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia; or
  - (b) a decree of the Magistrates Court of Western Australia constituted by a magistrate who is not a Family Law Magistrate of Western Australia;
- exercising original jurisdiction invested by Division 2A of Part V.

Note: Division 2A of Part V invests jurisdiction with respect to matters arising under Part VIIIC (Superannuation interests relating to Western Australian de facto relationships).

- (2) An appeal lies to the Court of Appeal established under the *Supreme Court Act 1935* (WA) from:
- (a) a decree of the Family Court of Western Australia exercising original jurisdiction invested by Division 2A of Part V of this Act or appellate jurisdiction under this Act; or
  - (b) a decree (other than an interlocutory order) of the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia exercising original jurisdiction invested by Division 2A of Part V of this Act.

Note: Division 2A of Part V invests jurisdiction with respect to matters arising under Part VIIIC (Superannuation interests relating to Western Australian de facto relationships).

- (3) The Court of Appeal established under the *Supreme Court Act 1935* (WA) and the Family Court of Western Australia are each invested with federal jurisdiction with respect to matters arising under Part VIIIC of this Act in respect of which appeals are instituted under this section.

#### **8 Subsection 96(1AA) (note)**

Omit “section 94AAA”, substitute “sections 94AAA and 94AAC”.

#### **9 Subsection 123(1)**

After “subsection 69GA(3)”, insert “and section 90YJ”.

## Schedule 2—Amendment of the Bankruptcy Act 1966

### *Bankruptcy Act 1966*

#### **1 Subsection 5(1) (at the end of the definition of *maintenance agreement*)**

Add “or a financial agreement within the meaning of Part 5A of the *Family Court Act 1997* (WA)”.

#### **2 Section 35B**

Repeal the section, substitute:

#### **35B Family Court of Western Australia**

##### *Bankruptcy courts*

- (1) Section 27 applies to the Family Court of Western Australia in a corresponding way to the way in which it applies to the Family Court of Australia.

##### *Jurisdiction in bankruptcy—bankrupt is a party to a marriage*

- (2) Subject to subsection (3) of this section, subsection 35(1) (and subsection 35(3) so far as it relates to subsection 35(1)) applies to the Family Court of Western Australia in a corresponding way to the way in which it applies to the Family Court of Australia.
- (3) Appeals lie to the Family Court of Australia from a judgment of the Family Court of Western Australia exercising jurisdiction under subsection 35(1) as applied by subsection (2) of this section, and do not otherwise lie.

##### *Jurisdiction in bankruptcy—bankrupt is a party to a de facto relationship*

- (4) If, at a particular time:
- (a) a party to a de facto relationship is a bankrupt; and
  - (b) the trustee of the bankrupt’s estate is:

- (i) a party to proceedings under Part 5A of the *Family Court Act 1997* (WA), or Part VIIIIC of the *Family Law Act 1975*, in relation to either or both of the parties to the de facto relationship; or
- (ii) an applicant under section 205ZH of the *Family Court Act 1997* (WA) for the variation or setting aside of an order made under section 205ZG of that Act in proceedings with respect to the property of either or both of the parties to the de facto relationship; or
- (iii) an applicant under section 90YZE of the *Family Law Act 1975* for the setting aside of an order made under section 90YX of that Act in proceedings between the parties to the de facto relationship with respect to a superannuation interest of either or both of the parties to the de facto relationship; or
- (iv) an applicant for an order under subsection 205ZV(1) or (3) of the *Family Court Act 1997* (WA) in relation to the setting aside of a financial agreement (within the meaning of Part 5A of that Act) of the parties to the de facto relationship;

then, at and after that time, the Family Court of Western Australia has jurisdiction in bankruptcy in relation to any matter connected with, or arising out of, the bankruptcy of the bankrupt.

- (5) An expression used in subsection (4) that is also used in the *Family Law Act 1975* has the same meaning in that subsection as it has in that Act.
- (6) Appeals lie to the Court of Appeal established under the *Supreme Court Act 1935* (WA) from a judgment of the Family Court of Western Australia exercising jurisdiction under subsection (4) of this section, and do not otherwise lie.
- (7) The Court of Appeal established under the *Supreme Court Act 1935* (WA) is invested with federal jurisdiction with respect to matters in respect of which appeals are instituted under subsection (6) of this section.

*Transfer of proceedings*

- (8) If a proceeding is pending in the Federal Court, the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Family Court of Western Australia.
- (9) If a proceeding is pending in the Federal Circuit Court, the Federal Circuit Court may, on the application of a party to the proceeding or on its own initiative, transfer the proceeding to the Family Court of Western Australia.
- (10) Subject to subsection (11), where a proceeding is transferred to the Family Court of Western Australia:
  - (a) the Family Court of Western Australia has jurisdiction to hear and determine the proceeding; and
  - (b) the Family Court of Western Australia also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether by virtue of paragraph (a) or otherwise):
    - (i) that are associated with matters arising in the proceeding; or
    - (ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976*, the Federal Court would have had jurisdiction to hear and determine in the proceeding; and
  - (c) the Family Court of Western Australia may, in and in relation to the proceeding:
    - (i) grant such remedies; and
    - (ii) make orders of such kinds; and
    - (iii) issue, and direct the issue of, writs of such kinds; as the Federal Court could have granted, made, issued or directed the issue of, as the case may be, in and in relation to the proceeding; and
  - (d) remedies, orders and writs granted, made or issued by the Family Court of Western Australia in and in relation to the proceeding have effect, and may be enforced by the Family Court of Western Australia, as if they had been granted, made or issued by the Federal Court; and
  - (e) appeals lie from judgments of the Family Court of Western Australia given in and in relation to the proceeding as if the

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judgments were judgments of the Federal Court constituted by a single Judge, and do not otherwise lie; and

- (f) subject to paragraphs (a) to (e) (inclusive), this Act, the *Federal Court of Australia Act 1976*, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:
- (i) a reference to the Federal Court (other than in the expression “the Court or a Judge”) included a reference to the Family Court of Western Australia; and
  - (ii) a reference to a Judge of the Federal Court (other than in the expression “the Court or a Judge”) included a reference to a judge of the Family Court of Western Australia; and
  - (iii) a reference to the expression “the Court or a Judge” when used in relation to the Federal Court included a reference to a judge of the Family Court of Western Australia sitting in Chambers; and
  - (iv) a reference to a Registrar included a reference to a registrar of the Family Court of Western Australia; and
  - (v) any other necessary changes were made.
- (11) Where any difficulty arises in the application of paragraphs (10)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court of Western Australia may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.
- (12) An appeal does not lie from a decision of the Federal Court or the Federal Circuit Court in relation to the transfer of a proceeding under this Act to the Family Court of Western Australia.

### **3 At the end of subparagraph 40(1)(o)(ii)**

Add “or”.

### **4 After subparagraph 40(1)(o)(ii)**

Insert:

- (iii) a financial agreement within the meaning of Part 5A of the *Family Court Act 1997* (WA) (including a superannuation

agreement (within the meaning of Part VIIC of the *Family Law Act 1975*) that is included in such a financial agreement);

**5 At the end of paragraphs 40(3)(a), (b) and (d)**

Add “and”.

**6 At the end of subsection 40(3)**

Add:

; and (g) an order made after the commencement of this paragraph under the *Family Court Act 1997* (WA) for the payment by a person of arrears of maintenance for another person shall be deemed to be a final order against the first-mentioned person obtained by the other person.

**7 Section 59A**

Repeal the section, substitute:

**59A Orders to which sections 58 and 59 are subject**

Sections 58 and 59 have effect subject to an order under:

- (a) Part VIII, VIIIAB or VIIC of the *Family Law Act 1975*; or
- (b) Part 5A of the *Family Court Act 1997* (WA).

**8 Subparagraphs 116(2)(d)(iva) and (vii)**

After “VIIIIB”, insert “or VIIC”.

**9 Paragraph 116(2)(r)**

After “VIIIAB”, insert “or VIIC”.

**10 After paragraph 116(2)(r)**

Insert:

- (ra) any property that, under an order under Part 5A of the *Family Court Act 1997* (WA), the trustee is required to transfer to a former de facto partner of the bankrupt;

**11 At the end of paragraphs 120(5)(f) and 121(6)(f)**

Add “or the *Family Court Act 1997* (WA)”.

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**12 Section 128N (definition of *family law payment split*)**

After “VIII B”, insert “or VIII C”.

**13 At the end of subsection 140(11)**

Add “or an interlocutory injunction under section 205ZI or 235A of the *Family Court Act 1997* (WA)”.

**14 Subsections 161(3) and (4)**

After “*Family Law Act 1975*”, insert “or the *Family Court Act 1997* (WA)”.

## Schedule 3—Consequential amendments

### *Australian Defence Force Cover Act 2015*

#### **1 Section 4 (definition of *member spouse*)**

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

#### **2 Section 4 (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

#### **3 Section 4 (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split (within the meaning of that Part).

#### **4 Section 4 (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

#### **5 Section 4 (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

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**6 Section 64 (paragraph beginning “Benefits”)**

After “VIII B”, insert “or VIII C”.

**7 Subsection 65(1)**

Omit “Part VIII B of the *Family Law Act 1975* (which deals”, substitute “Parts VIII B and VIII C of the *Family Law Act 1975* (which deal”.

***Australian Defence Force Superannuation Act 2015*****8 Subsection 9(2)**

Repeal the subsection, substitute:

(2) In this Act:

***member spouse*** means a member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***non-member spouse*** means a non-member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***splitting agreement*** means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*) that provides for a payment split (within the meaning of that Part).

***splitting order*** means a splitting order within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***superannuation interest*** means a superannuation interest within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***Defence Force Retirement and Death Benefits Act 1973*****9 Section 49A (paragraph (b) of the definition of *base amount*)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

## 10 Section 49A (definition of *family law value*)

Repeal the definition, substitute:

*family law value* means:

- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

## 11 Section 49A (definition of *member spouse*)

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

## 12 Section 49A (definition of *non-member spouse*)

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

## 13 Section 49A (definition of *operative time*)

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIIIB of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for

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the purposes of that Part in relation to a payment split under the agreement or order; or

- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIC of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

#### **14 Section 49A (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

#### **15 Section 49A (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*) that provides for a payment split.

#### **16 Section 49A (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

#### **17 Section 49A (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or

- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**18 Section 49A (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***Defence Forces Retirement Benefits Act 1948***

**19 Section 80A (paragraph (b) of the definition of *base amount*)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

**20 Section 80A (definition of *family law value*)**

Repeal the definition, substitute:

*family law value* means:

- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

**21 Section 80A (definition of *member spouse*)**

Repeal the definition, substitute:

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*member spouse* means a member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**22 Section 80A (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**23 Section 80A (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII B of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII C of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

**24 Section 80A (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**25 Section 80A (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*); or

- (b) a flag lifting agreement (within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*) that provides for a payment split.

**26 Section 80A (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

**27 Section 80A (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**28 Section 80A (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

***Governor-General Act 1974***

**29 Subsection 2A(2) (paragraph (b) of the definition of *base amount*)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

**30 Subsection 2A(2) (definition of *family law value*)**

Repeal the definition, substitute:

*family law value* means:

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- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
  - (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

### **31 Subsection 2A(2) (definition of *member spouse*)**

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### **32 Subsection 2A(2) (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### **33 Subsection 2A(2) (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIIIB of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
  - (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIC
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of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

**34 Subsection 2A(2) (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**35 Subsection 2A(2) (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split.

**36 Subsection 2A(2) (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**37 Subsection 2A(2) (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

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**38 Subsection 2A(2) (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***Income Tax Assessment Act 1997*****39 Paragraph 118-313(a)**

After “VIIIIB”, insert “or VIIC”.

**40 Paragraph 126-140(1)(b)**

After “90XZA”, insert “or 90YZQ”.

**41 Paragraph 126-140(2B)(b)**

After “90SM”, insert “or 90YX”.

**42 Paragraph 294-90(4)(a)**

After “VIIIIB”, insert “or VIIC (as the case may be)”.

**43 Subparagraph 307-5(7)(a)(i)**

After “VIIIIB”, insert “or VIIC”.

**44 Subsection 995-1(1) (definition of *member spouse*)**

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**45 Subsection 995-1(1) (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**46 Subsection 995-1(1) (definition of *payment split*)**

Repeal the definition, substitute:

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*payment split* means a payment split within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**47 Subsection 995-1(1) (definition of *splittable payment*)**

Repeal the definition, substitute:

*splittable payment* means a splittable payment within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***Judges' Pensions Act 1968***

**48 Subsection 4(1) (paragraph (b) of the definition of *base amount*)**

After "90XT(4)", insert "or 90YY(5) (as the case may be)".

**49 Subsection 4(1) (definition of *family law value*)**

Repeal the definition, substitute:

*family law value* means:

- (a) in relation to a superannuation interest within the meaning of Part VIII B of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIII C of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

**50 Subsection 4(1) (definition of *member spouse*)**

Repeal the definition, substitute:

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*member spouse* means a member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**51 Subsection 4(1) (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**52 Subsection 4(1) (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII B of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII C of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

**53 Subsection 4(1) (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**54 Subsection 4(1) (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*); or

- (b) a flag lifting agreement (within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*) that provides for a payment split.

**55 Subsection 4(1) (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

**56 Subsection 4(1) (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**57 Subsection 4(1) (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

***Military Superannuation and Benefits Act 1991***

**58 Subsection 5A(4)**

Repeal the subsection, substitute:

- (4) In this section:

*member spouse* means a member spouse within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

*non-member spouse* means a non-member spouse within the meaning of Part VIII B or VIIC of the *Family Law Act 1975*.

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***splitting agreement*** means:

- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split (within the meaning of that Part).

***splitting order*** means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***superannuation interest*** means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### ***Parliamentary Contributory Superannuation Act 1948***

#### **59 Section 22CA (paragraph (b) of the definition of *base amount*)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

#### **60 Section 22CA (definition of *family law value*)**

Repeal the definition, substitute:

***family law value*** means:

- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

**61 Section 22CA (definition of *member spouse*)**

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**62 Section 22CA (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**63 Section 22CA (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIIIB of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIC of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

**64 Section 22CA (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**65 Section 22CA (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

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- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
  - (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split.

**66 Section 22CA (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**67 Section 22CA (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**68 Section 22CA (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***Proceeds of Crime Act 2002*****69 At the end of subparagraph 330(4)(ba)(ii)**

Add “or a superannuation agreement within the meaning of Part VIIC of that Act”.

### ***Small Superannuation Accounts Act 1995***

#### **70 Subsection 15(7)**

Repeal the subsection, substitute:

(7) In this section:

***member spouse*** means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***non-member spouse*** means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***payment split*** means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### ***Social Security Act 1991***

#### **71 Subparagraphs 9A(2)(h)(iva), 9B(2)(h)(iva), 9BA(2)(f)(vi) and 9C(b)(i)**

After “VIIIIB”, insert “or VIIC”.

### ***Superannuation Act 1922***

#### **72 Section 93DA (paragraph (b) of the definition of *base amount*)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

#### **73 Section 93DA (definition of *family law value*)**

Repeal the definition, substitute:

***family law value*** means:

- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount

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determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act. In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

#### **74 Section 93DA (definition of *member spouse*)**

Repeal the definition, substitute:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

#### **75 Section 93DA (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

#### **76 Section 93DA (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIIIB of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIIC of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

#### **77 Section 93DA (definition of *payment split*)**

Repeal the definition, substitute:

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*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**78 Section 93DA (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split.

**79 Section 93DA (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**80 Section 93DA (definition of *splitting percentage*)**

Repeal the definition, substitute:

*splitting percentage* means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**81 Section 93DA (definition of *superannuation interest*)**

Repeal the definition, substitute:

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

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***Superannuation Act 1976*****82 Section 146MA (paragraph (b) of the definition of base amount)**

After “90XT(4)”, insert “or 90YY(5) (as the case may be)”.

**83 Section 146MA (definition of *family law value*)**

Repeal the definition, substitute:

***family law value*** means:

- (a) in relation to a superannuation interest within the meaning of Part VIIIIB of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90XT(2)(a) of that Act; or
- (b) in relation to a superannuation interest within the meaning of Part VIIC of the *Family Law Act 1975*—the amount determined in accordance with regulations under that Act that apply for the purposes of paragraph 90YY(2)(a) of that Act.

In applying regulations referred to in paragraph (a) or (b), the relevant date is taken to be the date on which the operative time occurs.

Note: This amount is determined by applying those regulations, whether or not an order has been made under subsection 90XT(1) or 90YY(1) (as the case may be) of the *Family Law Act 1975*.

**84 Section 146MA (definition of *member spouse*)**

Repeal the definition, substitute:

***member spouse*** means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**85 Section 146MA (definition of *non-member spouse*)**

Repeal the definition, substitute:

***non-member spouse*** means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**86 Section 146MA (definition of *operative time*)**

Repeal the definition, substitute:

*operative time* means:

- (a) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII B of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order; or
- (b) for a splitting agreement that is a superannuation agreement or a flag lifting agreement within the meaning of Part VIII C of the *Family Law Act 1975* or for a splitting order within the meaning of that Part—the time that is the operative time for the purposes of that Part in relation to a payment split under the agreement or order.

**87 Section 146MA (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

**88 Section 146MA (definition of *splitting agreement*)**

Repeal the definition, substitute:

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*) that provides for a payment split.

**89 Section 146MA (definition of *splitting order*)**

Repeal the definition, substitute:

*splitting order* means a splitting order within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

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**90 Section 146MA (definition of *splitting percentage*)**

Repeal the definition, substitute:

***splitting percentage*** means:

- (a) for a splitting agreement—the percentage specified in the agreement under subparagraph 90XJ(1)(c)(iii) or 90YN(1)(c)(iii) (as the case may be) of the *Family Law Act 1975*; or
- (b) for a splitting order—the percentage specified in the order under subparagraph 90XT(1)(b)(i) or 90YY(1)(b)(i) (as the case may be) of the *Family Law Act 1975*.

**91 Section 146MA (definition of *superannuation interest*)**

Repeal the definition, substitute:

***superannuation interest*** means a superannuation interest within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***Superannuation Act 1990*****92 Subsection 5A(3)**

Repeal the subsection, substitute:

- (3) In this section:

***member spouse*** means a member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***non-member spouse*** means a non-member spouse within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

***splitting agreement*** means:

- (a) a superannuation agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*) that provides for a payment split (within the meaning of that Part).

***splitting order*** means a splitting order within the meaning of Part VIII B or VIII C of the *Family Law Act 1975*.

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### ***Superannuation Act 2005***

#### **93 Subsection 12(2)**

Repeal the subsection, substitute:

(2) In this section:

*member spouse* means a member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*splitting agreement* means:

- (a) a superannuation agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*); or
- (b) a flag lifting agreement (within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*) that provides for a payment split (within the meaning of that Part).

*splitting order* means a splitting order within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*superannuation interest* means a superannuation interest within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

### ***Superannuation Contributions Tax (Assessment and Collection) Act 1997***

#### **94 Subsection 10A(2)**

Repeal the subsection, substitute:

(2) In this section:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*splittable payment* means a splittable payment within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**95 Subsection 16(11)**

Repeal the subsection, substitute:

*Definitions*

(11) In this section:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*splittable payment* means a splittable payment within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997***

**96 Subsection 12(8)**

Repeal the subsection, substitute:

*Definitions*

(8) In this section:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*splittable payment* means a splittable payment within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**97 Subsection 15(11)**

Repeal the subsection, substitute:

*Definitions*

(11) In this section:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

*splittable payment* means a splittable payment within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

***Superannuation Industry (Supervision) Act 1993***

**98 Subparagraph 66(2B)(d)(ii)**

After “VIIIIB”, insert “or VIIC”.

**99 Subparagraph 71EA(1)(d)(ii)**

After “VIIIIB”, insert “or VIIC”.

***Superannuation (Unclaimed Money and Lost Members) Act 1999***

**100 Section 8 (definition of *non-member spouse*)**

Repeal the definition, substitute:

*non-member spouse* means a non-member spouse within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**101 Section 8 (definition of *payment split*)**

Repeal the definition, substitute:

*payment split* means a payment split within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

**102 Section 8 (definition of *splittable payment*)**

Repeal the definition, substitute:

*splittable payment* means a splittable payment within the meaning of Part VIIIIB or VIIC of the *Family Law Act 1975*.

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**103 Paragraph 20F(4)(b)**

Repeal the paragraph, substitute:

- (b) take account only of the person's entitlement to payment remaining after any reduction by a payment split under:
  - (i) Part VIII B of the *Family Law Act 1975* (disregarding subsection 90XB(3) of that Act); or
  - (ii) Part VIII C of the *Family Law Act 1975* (disregarding subsection 90YC(3) of that Act).

**104 At the end of subsection 20F(4)**

Add:

- Note 3: Part VIII C of the *Family Law Act 1975* is about splitting amounts payable in respect of a superannuation interest between de facto partners in a de facto relationship in Western Australia. Subsection 90YC(3) of that Act provides that the Part has effect subject to this Act.

**105 Paragraph 20QD(4)(a)**

Omit "90MB(3)", substitute "90XB(3) or 90YC(3) (as the case may be)".

**106 Subsection 20QD(4) (note 1)**

Omit "90MB(3)", substitute "90XB(3)".

**107 Subsection 20QD(4) (after note 1)**

Insert:

- Note 1A: Part VIII C of the *Family Law Act 1975* is about splitting amounts payable in respect of a superannuation interest between de facto partners in a de facto relationship in Western Australia. Subsection 90YC(3) of that Act provides that the Part has effect subject to this Act.

**108 Paragraph 24E(4)(a)**

After "90XB(3)", insert "or 90YC(3) (as the case may be)".

**109 Subsection 24E(4) (after note 1)**

Insert:

- Note 1A: Part VIII C of the *Family Law Act 1975* is about splitting amounts payable in respect of a superannuation interest between de facto

**Schedule 3** Consequential amendments

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partners in a de facto relationship in Western Australia. Subsection 90YC(3) of that Act provides that the Part has effect subject to this Act.

***Veterans' Entitlements Act 1986***

**110 Subparagraph 5JA(2)(h)(iva)**

After "Part VIIIB", insert "or VIIC".

## **Schedule 4—Application and transitional provisions**

### **Part 1—Preliminary**

#### **1 Definitions**

In this Schedule:

*commencement* means the commencement of this Schedule.

*new Family Law Act* means the *Family Law Act 1975* as amended by this Act.

## Part 2—Amendment of the Family Law Act 1975

### 2 Superannuation agreements

Section 90YK of the new Family Law Act applies in relation to a Western Australian financial agreement made after commencement.

### 3 Payment splitting or flagging by court order

- (1) Subject to subitems (2) to (5), section 90YX of the new Family Law Act applies in relation to all de facto relationships, including those that ended before the commencement of that section (the *startup time*).

#### *Previous orders*

- (2) Subject to subitem (3), section 90YX of the new Family Law Act does not apply in relation to a de facto relationship if an order (the *previous order*), other than an interim order, under section 90SM of the *Family Law Act 1975* or section 205ZG of the *Family Court Act 1997* (WA) was in force in relation to the relationship at the startup time.
- (3) If the previous order is set aside after the startup time under section 90SN of the *Family Law Act 1975* or section 205ZH of the *Family Court Act 1997* (WA), section 90YX of the new Family Law Act applies in relation to the de facto relationship after the order is set aside.

#### *Previous financial agreements*

- (4) Subject to subitem (5), section 90YX of the new Family Law Act does not apply in relation to a de facto relationship if a financial agreement (the *previous agreement*) within the meaning of Part 5A of the *Family Court Act 1997* (WA) was in force in relation to the relationship at the startup time.
- (5) If the previous agreement is terminated or set aside after the startup time under section 205ZU or 205ZV of the *Family Court Act 1997* (WA), section 90YX of the new Family Law Act applies in relation to the de facto relationship after the agreement is terminated or set aside.

## **Part 3—Amendment of the Bankruptcy Act 1966**

### **4 Application of amendments**

- (1) The amendments of subsection 40(1) of the *Bankruptcy Act 1966* made by Schedule 2 to this Act apply in relation to transfers of property after commencement.
- (2) Section 59A of the *Bankruptcy Act 1966*, as substituted by Schedule 2 to this Act, applies in relation to an order under Part 5A of the *Family Court Act 1997* (WA) made after commencement.
- (3) Paragraph 116(2)(ra) of the *Bankruptcy Act 1966*, as inserted by Schedule 2 to this Act, applies in relation to an order under Part 5A of the *Family Court Act 1997* (WA) made after commencement.

## Part 4—Consequential amendments

### 5 Application of amendments

The amendments of the following Acts made by Schedule 3 to this Act apply to a splitting agreement, or splitting order, if the operative time for the purposes of Part VIIIC of the *Family Law Act 1975* in relation to a payment split under the agreement or order is after commencement:

- (a) the *Australian Defence Force Cover Act 2015*;
- (b) the *Australian Defence Force Superannuation Act 2015*;
- (c) the *Defence Force Retirement and Death Benefits Act 1973*;
- (d) the *Defence Forces Retirement Benefits Act 1948*;
- (e) the *Governor-General Act 1974*;
- (f) the *Judges' Pensions Act 1968*;
- (g) the *Military Superannuation and Benefits Act 1991*;
- (h) the *Parliamentary Contributory Superannuation Act 1948*;
- (i) the *Superannuation Act 1922*;
- (j) the *Superannuation Act 1976*;
- (k) the *Superannuation Act 1990*;
- (l) the *Superannuation Act 2005*.

## **Part 5—Transitional rules**

### **6 Transitional rules**

- (1) The Minister may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this Act.
- (2) Without limiting subitem (1), rules made under this item before the end of the period of 12 months starting on the day this Schedule commences may provide that provisions of this Act, or any other Act or instrument, have effect with any modifications prescribed by the rules. Those provisions then have effect as if they were so modified.
- (3) Subsection 12(2) (retrospective application of legislative instruments) of the *Legislation Act 2003* does not apply in relation to rules made under this item before the end of the period of 12 months starting on the day this Schedule commences.
- (4) To avoid doubt, the rules may not do the following:
  - (a) create an offence or civil penalty;
  - (b) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;
  - (c) impose a tax;
  - (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
  - (e) directly amend the text of this Act.
- (5) This Schedule (other than subitem (4)) does not limit the rules that may be made under this item.

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*[Minister's second reading speech made in—  
House of Representatives on 27 November 2019  
Senate on 11 November 2020]*

*(227/19)*

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90      *Family Law Amendment (Western Australia De Facto Superannuation  
Splitting and Bankruptcy) Act 2020*      No. 112, 2020