ANNEXURE A

The Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018 (Cth) (the Act) received Royal Assent 22 May 2018 and, as noted below, some provisions commenced the day after and others 1 July 2018.

This Act:

- implements recommendations of the House of Representatives Standing Committee Social Policy and Legal Affairs (the Committee) report From conflict to cooperation: Inquiry Into the Child Support Program; and
- amends four statutes –
  - the A New Tax System (Family Assistance) Act 1999 (Cth);
  - the A New Tax System (Family Assistance) (Administration) Act 1999 (Cth);
  - the Child Support (Assessment) Act 1989 (Cth); and

Schedule 1 Parts 1, 2 and 3 of the Act amend the Child Support (Assessment) Act 1989 (Cth) and commence on the day after the Act receives the Royal Assent which was 22 May 2018.

Schedule 1 Part 4 Division 1 commences 1 July 2018 and amends both the Child Support (Assessment) Act 1989 (Cth) and the Child Support (Registration and Collection) Act 1988 (Cth).

Schedule 1 Part 4 Division 3 amends the Child Support (Assessment) Act 1989 (Cth) and commences 1 July 2018.

Schedule 1 Part 1—Interim care determination periods
The formula for a child support assessment is based in part on the amount of time the child spends with each parent. When subsequent to the assessment a parent disputes the assessment on the grounds that the level of care has changed an interim care determination can be made until the matter is resolved. Previously, that interim determination was for a period of up to 14 weeks, or up to 26 weeks in special circumstances.

The Committee considered that the fourteen week period did not provide sufficient time for relevant legal proceedings to be completed or for prior agreed arrangements to be enforced by a court or for revised arrangements to be agreed upon. The Committee recommended legislative amendment.

Part 1 of Schedule 1 will:
- allow for interim care determinations to be extended to a maximum period of 52 weeks where the disputed care change occurs within the first year of a court ordered care arrangement;
- in the case of older court orders, allow for interim care determinations to be extended to up to 26 weeks if the person with increased care does not take reasonable action to participate in dispute resolution;
- maintain the maximum 14-week interim care determination period for care arrangements that take the form of care agreements or parenting plans, where the disputed care change occurs in the first year after the agreement or plan is made; and
- apply a shortened maximum interim care determination period where the agreement or plan is older than a year, and the person with increased care continuously takes reasonable action to participate in family dispute resolution.
Schedule 1 Part 2 Amended tax assessments

Previously where a parent’s tax assessment was amended after it had been used in an assessment to calculate child support, the Registrar could not amend the assessment to take into account the amended tax assessment except in restricted circumstances – for example where the tax assessment was amended due to fraud or tax evasion.

The Committee noted that the Commonwealth Ombudsman “raised concern around the rigidity of rules around the Registrar’s ability to amend an assessment when a tax assessment turns out to be incorrect”. The Ombudsman related a case study where, as the result of an error by his accountant the ATO assessed the taxable income of the payer of child support to be $292,000 when in fact it should have been $92,000. His child support assessment increased accordingly. The ATO informed the Registrar of the error but under the existing legislation, the Registrar was unable to correct the error unless the payer made an application for a “Change of Assessment in special circumstances” which the Ombudsman said is a “complex, intrusive and time consuming process to rectify a simple error”.

The Committee shared this concern and at Recommendation 12 recommended an amendment to section 56(2) of the Child Support (Assessment) Act 1989 (Cth) to facilitate the Registrar’s power to take into account amended tax assessments.

This amendment to section 56 the Child Support (Assessment) Act 1989 (Cth) allows for amended tax assessments to be taken into account by the Child Support Registrar in a broader range of circumstances than previously.

Schedule 1 Part 3 – Child Support agreements

The child support legislation allows parents to reach agreement on the amount of child support to be paid. A child support agreement has to meet the requirements of the Child Support legislation and has to include matters that can be dealt with in a Child Support Agreement. Once parents have made a child support agreement, either parent can apply to the Registrar to have it accepted.

Prior to 1 July 2008, when the legislation changed, there were two types of child support agreements: binding agreements for which legal advice was required and limited agreements for which the parties were not required to receive legal advice.

Post 1 July 2008 limited agreements were transitioned by Child Support as “deemed binding agreements” even though they had not met the criterion of legal advice before execution of the agreement. Transitional child support agreements can be terminated by an agreement in writing by both parties. Or, as with binding agreements a new binding agreement that includes a provision that the previous one is terminated.

A court may set aside either a binding agreement or a transitional agreement on the application of a party only where it can be established that the agreement of one of the parties was obtained by fraud, undue influence or unconscionable conduct, or there are exceptional circumstances resulting in a party to the agreement or a child suffering hardship if the agreement is not set aside. Thus even though transitional agreements were made under different legislation when there was no requirement for legal advice the courts were given no discretion to treat them differently.

The Law Council of Australia submitted to the Committee that the reported decisions of the Family Courts illustrate that setting aside such Agreements requires the applicant “to jump a very high hurdle: there is a need to establish ‘exceptional circumstances’ and ‘consequential

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1 House Standing Committee on Social Policy and Legal Affairs Inquiry into the Child Support Program From Conflict to Cooperation at 3.99 page 73
The amendments introduce a separate and less restrictive test for courts to set aside child support agreements entered into prior to 1 July 2008 under the then rules for limited agreements where neither of the parties obtained legal advice. It allows also for all child support agreements to be set aside without having to go to court if the person who is entitled to child support under the agreement ceases to be an eligible carer of the child – that is, where the level of care falls below 35%.

Schedule 1 Part 4 Divisions 1 and 3 - Overpayments
Responding to complaints that, while child support debts by payers due to under payments or non-payment were always followed up, child support debts by recipients due to overpayments being made were almost never followed up, the Committee recommended “that the Australian Government ensure that the collection of debts relating to overpayments is given equivalent treatment to instances where underpayments are made”.

The resulting amendments align the Registrar’s ability to recover a child support overpayment from a payee with the methods for recovering a child support debt from a payer.

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2 House Standing Committee on Social Policy and Legal Affairs Inquiry into the Child Support Program From Conflict to Cooperation at 3.134 page 83
3 Ibid 4.144 at page 139