DE FACTO PROPERTY UNDER THE FAMILY LAW ACT

By the Honourable Justice Garry Watts

19 December 2008

INTRODUCTION

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 ("the Amendments") provides for the majority of heterosexual and same sex de facto couples in Australia to have property and maintenance matters dealt with, upon the breakdown of their relationship, under the *Family Law Act* 1975 ("the Act").

The Amendments do that by using three different drafting techniques:

1. A new Part VIIIAB is inserted into the Act. Many of its provisions mirror the provisions in Part VIII of the Act. I set out later in the paper a table of key mirror sections;

2. Amending Part VIIIB (superannuation splitting) to extend it to de facto couples; and

3. Inserting a new Section 90TA which, by using a schedule, replicates Part VIIIAA (orders and injunctions binding third parties) and amends it for de facto couples without setting out in full a new Part VIIIAA for de facto couples.

START DATE

At the time of writing, it seems highly probable that the start date will be **1 March 2009**.

CONSTITUTIONAL POWER

The new de facto laws rely upon the State's referring power pursuant to ss 51(xxxvii) of the Constitution. All States apart from South Australia and Western Australia have referred power. New South Wales passed legislation to

refer power to the Commonwealth as far back as 2003. The Acts by which the States have referred power have now all come into effect.

The power that has been referred by the States is the power to deal with financial matters arising out of the breakdown of a relationship (other than by reason of death). This creates a difference between marriage and de facto relationships as to when the power to make orders arises. Sections 74 and 79 of the Act are based on the marriage power (paragraph 51(xxi) of the Constitution)[1]. Technically that means that parties to a marriage can apply for a s 74 or s 79 order even if their marriage is intact. This would, of course, be subject to the exercise of discretion. Few people in an intact marriage have applied for an order under Part VIIIA of the Act.[2]

Both married and de facto couples can enter into a financial agreement, both before and during their cohabitation.

EXCLUSIVE JURISDICTION

Once the new Part VIIIAB of the Act commences, a de facto partner, covered by the new law, will not be able to institute proceedings in relation to financial matters against their estranged partner, other than under the Act (the new ss 39A(5)). The courts which will have the jurisdiction are the Family Court of Australia, the Federal Magistrates Court of Australia, the Supreme Court of the Northern Territory, and courts of summary jurisdiction in a referring jurisdiction (i.e. summary courts in all states except Western Australia and South Australia). The new law will apply in the Territories by virtue of s 122 of the Constitution.

[1] See *Russell v Russell* (1976) 134 CLR 495; *Macsok and Macsok* (1976) FLC 90-045; *Wesener v Wesener* (1979) 5 FamLR 525; *Fisher v Fisher* (1986) 161 CLR 438; *Dougherty v Dougherty* (1987) 163 CLR 278; *Australian Securities and Investments Commission v Rich* (2003) FLC 93-171

[2] For example, *Sterling & Sterling & Protective Commissioner* [2000] FamCA 1150 Full Court (Kay, Coleman & Carter JJ) but compare *Jennings v Jennings* (1997) FLC 92-773. In *Eliades and Eliades* (1981) FLC 91-022 Nygh J made a maintenance order in favour of a spouse where the couple had not separated.

DE FACTO RELATIONSHIPS

A new s 4AA will define the meaning of “de facto relationship” as follows:

(1) a person is in a de facto relationship with another person if:

(a) the persons are not legally married to each other; and

(b) the persons are not related by family; and

(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Section 4AA(2) sets out those circumstances that may mean that persons have a relationship as a couple. The list in the new legislation draws from a list originally devised by Justice Powell in *Roy v Sturgeon* [1986] 11 Fam LR 271 at 274 with the deletion of his Honour’s reference to “the procreation of children”. When the ambit of the 1984 New South Wales de facto laws was widened in 1999, s 4(2) of the new *Property (Relationships) Act* (NSW) 1984 adopted Justice Powell’s list but deleting a reference to procreation of children. In the most current Federal legislation procreation of children remains excluded and the performance of household duties is also excluded, and a new sub-section (g) relating to the registration of relationships is added. The list is:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

(h) the care and support of children;

(i) the reputation and public aspects of the relationship.

Section 4AA(3) makes it clear that no particular finding in relation to any circumstance is regarded as necessary in making a determination as to whether or not a de facto relationship exists. The court is to attach such weight to any particular matter as is appropriate in the circumstances of an individual case (s.4AA(4)).

Section 4AA(5) says that the new law encompasses both heterosexual and same-sex de facto relationships.

People are not able to be classified as living in a de facto relationship if related by family. Section 4A(6) defines that to mean a parent/child relationship, a descendant relationship or couples who have a parent in common, including adoptive parents. For example, a woman living in a relationship on a genuine domestic basis with her adopted step-brother is not living in a de facto relationship for the purposes of the new laws, and would need to rely on State legislation if their relationship broke down.

The new regime does not cover dependent domestic relationships which are not de facto relationships. Again, rights arising between those couples are to be dealt with under State law.

Section 4AA(5)(b) envisages that a de facto relationship can exist even if one of the persons in that relationship is legally married to someone else or is in another de facto relationship.

REGISTRATION OF A RELATIONSHIP

The registration of a relationship is not determinative of the fact that one exists. It is but one factor, perhaps a powerful one, that is to be taken into account if the issue as to whether or not a de facto relationship exists needs to be determined. There would need to exist additional circumstances referred to in ss 4AA(2) for there to be a conclusion that the parties were in a de facto relationship. The Parliament is not intending that registration of same sex relationships be the equivalent of a marriage (although I make some comment about possible consequences of s 90SB(d) below).

As discussed below, registration can immediately create financial obligations for a person who may not yet be in a de facto relationship, as a "step parent".

Currently only Tasmania, the ACT and Victoria provide for registration of relationships that are not marriages on a Relationships Register maintained by a State or Territory of Registry of Births Deaths & Marriages. Victoria's *Relationships Act* 2008 received assent on 4 May 2008 and commenced on 1 December 2008. See Appendix "B" for details of the scheme in each place.

TO WHICH DE FACTO MATTERS WILL THE NEW LAW APPLY?

Division 2 of Part 2 of the Amendments provides that the new Part VIIIAB and the amended Part VIIIB of the new Act, containing provisions relating to de facto relationship matters, do not extend to a de facto relationship that has broken down before the commencement of the new laws, unless both parties opt into the new de facto laws (opting in is discussed below).

In some States, for example New South Wales, there is a significant difference between the property and maintenance rights currently provided under State legislation to de facto couples and those that will be provided under the Act. In some jurisdictions consideration of contributions has focused particular emphasis on financial contributions and less emphasis on the myriad of other contributions made during cohabitation. More importantly the new laws do not just look at past

contributions but require a consideration as to whether there should be a capital adjustment for prospective factors. This means that some results are likely to be significantly different and the parties will have vested interests in ensuring that State laws apply to them, or that the Act is otherwise excluded by agreement.

This might mean that:

1. There will be a number of separations that take place in de facto relationships just before the scheduled time for the commencement of the operation of the Act.

2. Separations under the one roof will be alleged to have taken place just before the operation of the new laws.

3. A de facto spouse may seek between now and the introduction of the new laws to enter into a binding financial agreement.

OPTING IN

For couples whose relationship has broken down before 1 March 2009, s 86A allows them to "opt in" and have their dispute determined under the new de facto laws.

The choice to use the new legislation once made is unconditional and irrevocable (s 86A(2)). Couples cannot "opt in" if their dispute has been dealt with under State or Territory law by final orders or by written financial agreement between the parties (that has not been revoked).

The choice to opt in needs to be in writing, signed by <u>both</u> parties to the relationship, with each party obtaining independent legal advice from a legal practitioner regarding the advantages and disadvantages in making the choice and with the legal practitioner providing a signed statement that the necessary advice was given (s 86A(5)).

The Court may set aside a choice to opt in on the basis of what is just and equitable having regard to the circumstances in which the choice was made and make orders restoring one de facto spouse to the position he/she was in prior to signing the document opting in.

As mentioned above, in some places there is a considerable difference in the rights conferred by existing and new laws. In those places, opting in will not be common, given both parties have to agree to it.

What if a de facto couple marries?

Section 90SC(1) says that the new laws cease to apply if the parties to a de facto relationship later marry one another. In those circumstances, the more familiar provisions of the Act would govern the now married couple's relationship.

GATEWAY REQUIREMENTS

In addition to satisfying the Court that a de facto relationship exists, an applicant must also satisfy the Court that one of four possible gateway requirements are satisfied. Section 90SB sets them out as follows:

(a) that the period, or the total of the periods, of the de facto relationship is **at least 2 years**; or

(b) that there is a **child of the de facto relationship**; or

(c) that:

(i) the party to the de facto relationship who applies for the order or declaration made **substantial contributions** of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and

(ii) a failure to make the order or declaration would result in **serious injustice** to the applicant; or

(d) that the relationship is or was **registered** under a prescribed law of a State or Territory.

Section 90SB(d) allows the Federal prescription of State and Territory registration laws.

The effect of s 90SB(d) is that, if a de facto relationship exists, the registration of certain relationships that are not marriages may create legal rights and obligations that are very similar to marriages. Same sex couples who are able and do register their relationship in a State or Territory will be in virtually the same position as couples who marry in the event that their relationship breaks down and there needs to be an alteration of property or a consideration of the payment of maintenance.

For example, a rich and a poor man meet, commence to live together on a genuine domestic basis and register their relationship on a Relationships Register. A month later the men separate. The poor man makes a property claim relying upon prospective factors and a maintenance claim based on his needs. In this example, the registration of the relationship creates rights and obligations in the same way as a marriage does.

MEANING OF "CHILD OF THE DE FACTO RELATIONSHIP"

A child is "a child of a de facto relationship" if the child is a child of both the parties to a de facto relationship.[3] To determine whether or not a person is the parent of a child, the definitions in Part VII of the Act have been substantially amended.

Before the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 went to the Senate, there was a difference between which persons would be considered parents of a child in parenting and financial cases. In financial cases, a child conceived as a result of an artificial conception procedure to same sex couples was treated the same as a child conceived to a

heterosexual couple[4]. That amendment had not been made for parenting cases, where a same sex partner, who was not the biological parent of a child conceived as a result of an artificial conception procedure, was not considered to be a parent. That partner could only make a Part VII application under ss 65C(c) of the Act as a person concerned with the care, welfare or development of the child.

There have been controversies around the definition of "artificial conception procedure"[5]. A communiqué from the Standing Committee of Attorneys-General dated 25 July 2008 said that State and Territory Ministers requested that the Commonwealth consider amending section 60H of the Act to allow children of same sex relationships to be recognised as a child of the relationship for the purposes of this section.

As a result of the amendments now introduced, the existing s 60H(1) and s 60H(4) which dealt with children born through artificial conception has been repealed and new sections introduced.

The changes mean that both parties to a marriage or a de facto relationship will be parents under the Act of:-

- A child of whom each of the parties are the biological parents[6].
- A child adopted by the parties or either of them with the consent of the other[7].
- A child born through artificial conception procedures where one of the parties is the birth mother and the donor of the genetic material has consented to its use[8]. This change gives the status of "parent" to the non birth mother in a lesbian relationship.

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[3] Section 90RB(1)
[4] See s.90RB(1)(c); s.90RB(3); the former s.60H(1) and the former s.60H(4).
[5] See Brown J in *Re Mark* (2003) 31 Fam LR 162 and compare Guest J in *Re Patrick* (2002) FLC 93-096.
[6] Section 60HA(1)(a)
[7] Section 60HA(1)(b)
[8] Section 60H(1)

- A child born as part of a surrogacy arrangement where a Court has made an order under a prescribed law of a State or Territory regarding a child's parentage[9]. This potentially could cover a child born as a result of a surrogacy arrangement involving a gay couple. Presently the ACT is the only place in Australia that allows same sex couples to enter surrogacy agreements.[10]

Child Support for same sex couples

From 1 July 2009 a parent of a child in a same sex relationship, which has broken down, can apply for child support from the other parent.

Step parent

The definition of "step-parent" under s 4(1) of the Act has also been amended. Previously, "step-parent" only covered someone who was married or had been married to a parent of the child. A non biological parent in a de facto relationship had no financial obligations to the child under the *Child Support (Assessment) Act* 1989 or the *Family Law Act* (but may have been subject to some equitable claim).

The new s 60EA provides that a relationship of step-parent is created immediately, if a relationship between a person and another person (whether of the same sex or a different sex) is registered under a new prescribed law of a State or Territory. This relationship is immediately created whether or not the person would otherwise satisfy the definition of being in a de facto relationship with the biological parent of the child. A step-parent may have a duty to maintain a step-child if an order is made under s 66M of the Act.

From 1 July 2008 a step-child can be treated as a resident child, for the purposes of assessment of child support, if no one else can financially support that step-child (s 117(10) of the *Child Support (Assessment) Act*).

[9] Section 60HB
[10] See ACT Parentage Act 2004

GEOGRAPHICAL CONNECTION

For persons living in South Australia and Western Australia (or who have substantially lived in those States during their relationship), there may be a further problem in attracting jurisdiction under the Act. Section 90SD (for maintenance) and s 90SK (for property) establish a geographical requirement.

There are three ways the geographical requirement can be satisfied.

Parties to the de facto relationship need to be:

- Ordinarily resident in a referring State during at least one-third of their de facto relationship; or
- The applicant for the order must have made substantial contributions of a direct or indirect nature, either financial or non-financial, to the acquisition, conservation or improvement of property, or substantial contributions in the role of homemaker and parent in a referring State; or.
- The parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.

The Act explicitly makes it clear (in s 90RC(3)) that Parliament did not intend to apply the de facto financial provisions of the new amendments to the exclusion of the law of a non-referring State, if a geographical connection does not exist.

Two examples are actually contained in the Amendments as part of s 90RC(3) and are as follows:

> Example 1: Abbey and Bob are parties to a de facto relationship that has broken down, and have never been ordinarily resident in a participating jurisdiction. Sub section 90RC(3) has the effect that State law will govern financial matters arising out of the breakdown of their relationship.

Example 2: Cleo and Dan are parties to a de facto relationship that has broken down after the commencement of this section. Early in their relationship, they made a financial agreement under the law of a non-referring State, but later spent most of their relationship in a participating jurisdiction. Cleo and Dan now have a sufficient geographical link with a participating jurisdiction for either of them to apply for an order under this Part in relation to financial matters arising out of the breakdown of their relationship. This means that subsection (3) will not apply and that their financial agreement will not be enforceable under State law because of subsection (2).

LIMITATION PERIOD

The Basic Rule

The new s 44(5) provides that a financial application can only be brought in a de facto matter if the application is made within **two years** after the end of the de facto relationship.

Exception

Subsection 44(6) provides two exceptions:

(a) hardship would be caused to the party or a child if leave were not granted; or

(b) for maintenance applications – the parties' circumstances were at the end of the standard application period, such that he or she would have been unable to support himself or herself without an income tested pension, allowance or benefit.

I note in passing that the exception relating to hardship to a child in s 44(6) is not confined to a child who is a child of the de facto relationship. Say, for example, on separation a woman leaves and a child that she had from another relationship

stays with the child's step-father. If that child suffered hardship it may be sufficient to overcome the two year limitation requirement in s 44(5).

Once a breakdown happens after the commencement of the Federal law, the Act covers the field. If the limitation period expires, current rights under de facto legislation do not revive. Property would be dealt with in State courts according to the legal and equitable title in which property is held. Arguments could still take place such as those canvassed in *Baumgartner and Baumgartner* (1987) 164 CLR 137 and *Muschinski v Dodds* (1985) 62 ALR 429.

DECLARATIONS

In the same way as a party to a marriage can apply for a declaration of validity of the marriage, the new s 90RD is introduced to facilitate early determination of gateway issues.

It is envisaged that there will be bifurcated hearings. The Western Australian Family Court has been dealing with de facto (including same sex) law since 1 December 2002. A common experience in the West has been a preliminary (and sometimes very hard fought) hearing about jurisdictional issues.

A declaration under s 90RD(2) can be made in relation to:

- The period, or periods, of the de facto relationship;
- Whether there is a child of the de facto relationship. In that regard, it should be noted that the parentage testing provisions of Part VII apply to all proceedings under the Act and parentage testing could be ordered in connection with an application for a declaration under s 90RD(2)(b);
- Whether one of the parties to a de facto relationship has made substantial contributions;
- When the de facto relationship ended; and

- Where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

A declaration can't be made in a vacuum. There has to be some substantive relief sought for which a declaration is necessary to establish jurisdiction.

MIRROR PROVISIONS

Definition of "property"

"Property" in s 4(1) will be extended so that the definition provided for parties to a de facto relationship is the same as that provided for parties to a marriage.

Table of Key Mirror Sections		
Topic	**Marriages**	**De Facto Relationships**
Cause	Matrimonial Cause	De Facto Financial Cause
Binding Financial Agreements exclude the jurisdiction	s 71A	s 90SA(1)
Spousal Maintenance	s 74	s 90SE
Matters to take into account in maintenance proceedings	s 75(2)	s 90SF(3)
Urgent maintenance	s 77	s 90SG
Declarations of interests in property	s 78	s 90SL
Alteration of property interests	s 79	s 90SM
Just & Equitable	s 79(2)	s 90SM(3)
Matters to take into account	s 79(4)	s 90SM(4)
Varying and setting aside orders altering property	s 79A	s 90SN
General Powers	s 80	s 90SS(1)

Table of Key Mirror Sections		
Topic	**Marriages**	**De Facto Relationships**
Duty to end financial relationships	s 81	s 90ST
Modification of maintenance orders	s 83	s 90SI
Stamp Duty	s 90	s 90WA
Binding Financial Agreements (BFAs)	Pt VIIIA	Div 4 Pt VIIIAB
BFAs before marriage/cohabitation	s 90B	s 90UB
BFAs during marriage/cohabitation	s 90C	s 90UC
BFAs after divorce/breakdown	s 90D	s 90UD
Formal requirements of BFAs	s 90G(1)	s 90UJ(1)
Setting aside BFAs	s 90K	s 90UM
Validity, enforceability and effect of BFAs	s 90KA	s 90UN
Orders and injunctions binding third parties	Pt VIIIAA	Div 3 Pt VIIIAB

FINANCIAL AGREEMENTS

Financial agreements for de facto parties are covered in the new Div 4 Part VIIIAB. That division is very similar in its terms to Part VIIIA (financial agreements for married people).

Many of the sections mirror the key sections in Part VIIIA as the above table indicates. Section 90UJ(1) sets out the formal requirements for entering into an agreement. They are the same as the requirements in s 90G(1).

New grounds to set aside financial agreements

Sub-section 90K(1)(aa) creates a new ground which aims to stop a married person from defrauding or defeating a claim of a de facto partner by a sweetheart deal with a new or old spouse.

The de facto partner needs to show that the married person:

- had a purpose to defraud; or
- had a purpose to defeat the de facto's interest; or
- had reckless disregard for the de facto's interest.

The test is higher than the test in s 106B to set aside dispositions, which is a test that looks at effect rather than purpose or recklessness.

There is a mirror provision if a de facto couple enters into an agreement with the intent of defrauding or defeating a claim of a party who was once married to one of the persons of that de facto couple (s 90UM(1)(d)).

Prior State agreements recognised

Agreements validly entered into under State law will be recognised, notwithstanding that the strict requirements of s 90UJ(1) have not been met.

Part 2 Division 3 and Division 4 (Transitional provisions) provides that in certain circumstances the new laws will:

- recognise prior valid State agreements as being effective to exclude jurisdiction;
- enforce prior valid State agreements; and
- if there is a ground, set aside prior valid State agreements.

To qualify, the old State agreement has to:

- deal with how property or financial resources are to be distributed; deal with maintenance or deal with matters which are incidental and/or ancillary;

- be validly made under State law so a State court (ignoring any power to vary or set aside the agreement) could not make an order inconsistent with the terms of the agreement.

This means that old State agreements that do not meet the formal requirements of a binding financial agreement under the new legislation, but which meet the requirements under old State law, will be recognised as being able to exclude jurisdiction, and will be able to be set aside and to be enforced under the new laws.

Section 90UE recognises agreements entered into under State law in non referring States if parties have otherwise established a geographical connection with a referring State. For example, parties entering into a de facto agreement in Western Australia who then move to New South Wales for most of their relationship, can have their Western Australian agreement recognised as binding.

Appendix C sets out details of the current provisions in relation to entering agreements in Australian States and Territories.

The following table sets out the provisions of current State law that will attract the provisions of Part 2 Division 3 and 4 for referring States and s 90UE for non referring States:

Referring States	**Section**	**State Legislation**
NSW	s.47	Property (Relationships) Act 1984 (NSW)
Queensland	s.274(1)	Property Law Act 1974 (Qld)
Victoria	s.59	Relationships Act 2008

Tasmania	s.62(1)	Relationships Act 2003 (Tas)
Northern Territory	s.45(2)	De facto Relationships Act 1991 (NT)
ACT	s.33(1)	Domestic Relationships Act 1994 (ACT)
Non referring States		
South Australia	s.11(2)	Domestic Partners Property Act 1996 (SA)
Western Australia	s.205ZS	Family Court Act 1997 (WA)

Section 90UM(1)(k) - New ground to set aside old State agreements

There is an important new addition to the grounds upon which a State de facto agreement can be set aside. As will be seen below, this new ground will allow a retrospective challenge to the effect of otherwise valid agreements in Queensland, the Northern Territory and possibly South Australia if injustice and inequity are found.

Section 90UM(1)(k) and s 90UM(5) provide that a State agreement can be set aside:

- if at least one of the spouse parties to the agreement was not provided with independent legal advice from a legal practitioner before signing the agreement, about the effect of the agreement and the rights of the parties and the advantages and disadvantages at the time the advice was provided to the party making the agreement; or

- if such advice was provided but there wasn't a certificate signed by the lawyer included in or attached to the agreement or given to the party;

AND

- it would be unjust and inequitable not to set the agreement aside.

The following table indicates whether or not the provisions of s 90UM(1)(k) is likely to be attracted because the State law does not require the specified advice and a certificate:-

NSW	Not likely to be affected
Queensland	Likely to be affected. Queensland agreements do not require legal advice or a certificate.
Victoria	Has not had provision for agreements but will have from December 2008. Any agreements entered into in Victoria between December 2008 and the commencement of the Federal Law are not likely to be affected.
Tasmania	Not likely to be affected.
Northern Territory	The Act does not require independent legal advice and the provisions of the section are likely to be attracted.
ACT	Arguably not likely to be affected although the wording of the certificate is the same as the original wording of s.90G in 2000 and so does not directly deal with "disadvantages".
South Australia	Likely to be affected. The South Australian legislation requires lawyers to have "explained the legal implications". This falls short of the provisions in s.90UM(1)(k).
Western Australia	Financial agreements under the Family Law Act after 1 December 2002 are not likely to be affected. Former financial agreements (common law agreements) entered into prior to 1 December 2002 are likely to be affected.

A TRAP FOR THE FUTURE

On the face of the Amendments it looks like s 90UM(1)(k) is limited to financial agreements made only in non referring States (those covered by s 90UE). Parliament intends old agreements from referring States to also be covered by s 90UM(1)(k).

This has been achieved by placing the provision in the transitional parts of the Amendments (which traditionally do not form part of the Act as it is printed).

At the end of s 90UE(1), the following note appears:-

> NOTE 2: Part 2 of Schedule 1 of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* deems certain agreements, made under a law of a State that is or becomes a participating jurisdiction, or made under a law of a Territory, to be Part VIIIAB financial agreements.

The note doesn't tell you which Division of Part 2 of Schedule 1 is applicable. It might be useful for future reference to know that it is Division 5 of Part 2 of Schedule 1 that you are looking for. Item 93(1)(f) provides that s 90UM(5) applies to financial agreements from participating States, but will anybody ever be able to find it?

The following example demonstrates the type of situation where it might be important:-

> On 2 February 2009 a de facto couple living in Brisbane enter into an agreement under Queensland Law. Their relationship breaks down in 2020. The financial agreement was signed without independent legal advice but was valid under Queensland de facto relationships law. Heather wants the agreement enforced to oust the jurisdiction of the *Family Law Act*. Bob would like to be able to rely on the provisions of s 90UM(5) but is unable to work out what Note 2 to s 90UE(1) means. He employs a lawyer who remembers they once read this paper.

SUPERANNUATION

The new laws will allow superannuation interests of de facto parties to be split.

That will now be reflected in the Object section of Part VIIIB of the Act (s 90MA). A new sub-section 90MC(2) will provide that a superannuation interest of a party

is to be treated as property for the purposes of paragraph (c) of the definition of "de facto financial cause". The new section, however, replicates the wording of the old section (s 90C which will become s 90MC(1)) in relation to married parties and consequently the comments made by the Full Court in *Coghlan & Coghlan* (2005) FLC 93-220 will be equally applicable to the new section).

Superannuation agreements will be able to exclude the Court's jurisdiction in relation to its superannuation between de facto couples (as they can exclude the Court's jurisdiction in relation to married couples).

Section 90MS will be amended to provide that the Court, in proceedings under the new s 90SM for alteration of property interests of de facto parties, may make orders in accordance with Part VIIIB in relation to superannuation interests of a de facto couple. The Court will not be able to make an order under s 90SM in relation to the superannuation interests of a de facto couple, except in accordance with the new property regime.

The neatest fit of all the amendments is the insertion of the reference to the new s 90SM in the old s 90MS.

Having changed definitions and the operative sections of Part VIIIB the core operating splitting section, s 90MT of the Act does not need to be changed. A splitting order can be made by allocating a base amount to the non-member de facto spouse or by ordering that a non-member de facto spouse is entitled to be paid a specified percentage.

PART VII DIV 12A

Just as parties can consent to the provisions of Part VII Div 12A applying to the hearing of an application to alter property of married people, de facto couples can consent to a de facto financial cause being dealt with by Div 12A. This has been achieved by an amendment which extends the operation of sub-section 69ZM(3).

MULTIPLE RELATIONSHIPS

The legislative focus on multiple relationships in family law started in 2002 when Part VIIIB was introduced. Multiple relationships receive some attention in the new legislation.

Sub section 90MX(3) now has this imaginative example embedded into the legislation, which deals with multiple splitting orders from multiple sequential relationships:

> W has a superannuation interest that is subject to 3 payment splits in respect of W's de facto relationship with X, W's marriage to Y and W's de facto relationship with Z (in that order). The operative time 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 $100.00. The final payment entitlements are as follows:
>
> > X gets $50.00, Y gets $25.00, Z gets $12.50. W gets the remaining $12.50.

The new legislation takes the consideration of multiple relationships to new heights.

New s 75(2) and s 90SF(3) matters

There are new s 75(2) matters which are replicated in the new s 90SF(3) for de facto couples.

Section 75(2)(naa) provides that one of the things the Court needs to take into account under s 75(2) is the terms of any order or declaration made, or proposed to be made under the new Part VIIIAB, in relation to a person who is a party to a de facto relationship, or a party to a marriage, or the property of a person covered by such an order or declaration. A new s 75(2)(q) provides that the terms of any de facto financial agreement that is binding on a party to a marriage

should also be taken into account. There are mirror provisions in de facto matters.

Sub section 90SF(3)(o) mirrors s 75(2)(naa) and requires orders and declarations made or proposed to be made under the Act (primarily under s 79 between a married couple), be taken into account when one of the parties to that marriage is also a party to a de facto relationship property dispute.

Like s 75(2)(q), the new s 90SF(3)(s) requires the Court, when dealing with the alteration of property interests between a de facto couple, to take into account the terms of any binding financial agreement that one of the de facto partners has with a current or former marriage partner.

Notices

The new laws do not just deal with the interaction of multiple relationships by using s 75(2) and s 90SF(3). It is also envisaged that cases may be consolidated in circumstances where there are extant claims against the one person by multiple partners. To facilitate this, a new s 79(10)(aa) and (ab) allows de factos to join into a s 79 application for the purposes of seeking relief under Part VIIIAB. Section 90SM(10)(d) and (e) are mirror provisions for a married person who wants to join into a de facto action to assert rights under Part VIII of the Act.

A new note after s 79F provides that Rules of Court may specify the circumstances in which an applicant or a party to Part VIII proceedings is to notify a person who is not a party to the proceedings of the application. Similar notice provisions are contained in s 90SO for de facto matters. At the time of writing, it is proposed that those Rules will be made so that they come into effect contemporaneously with the commencement of the operation of the new law.

PROTECTING MARRIAGES

Since the commencement of the Act, s 43 of the Act has set out the principles that the Court should apply when exercising jurisdiction under the Act. The first principle in s 43(a) has always been the "need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life".

Section 43(2) is to be amended so that s 43(1)(a) does not apply in relation to the Court's exercise of jurisdiction in relation to de facto financial causes. The Court is not required to protect the institution of marriage when two people have chosen not to enter into one. One wonders as to whether or not anybody will argue s 43(2) in litigation involving multiple simultaneous relationships.

DEATH

The new law makes it clear that death is not to be taken as a breakdown of a relationship (sub-section 4(1): definition of "breakdown"). The State legislation which referred power specifically excluded a breakdown of the de facto relationship by reason of death. If a relationship breaks down before the death of a party and an application has been instituted prior to the death of the party, the Court has jurisdiction to finalise that application (s 90SM(8)).

VARYING A CURRENT MAINTENANCE ORDER

Section 83 is the section under which maintenance orders can be modified. Included in this section will be a new category of "a change of circumstance" which will be satisfied if the person who is receiving the maintenance order has entered into a stable and continuing de facto relationship. A mirror cause has been added in s 90SR(3) (i.e. remarriage to another person will be a changed circumstance relevant to the setting aside of a maintenance order between a de facto couple).

WHAT OTHER LAWS STILL APPLY?

Close personal relationships

Laws relating to people who have a close personal relationship, one of whom provides the other with domestic support and care are not covered by the new law. Not all relationships that are registered, for example, under the *Relationships Act 2003* (Tasmania), qualify as de facto relationships.

Persons who have failed to make a claim in time

As mentioned above, if the two year limitation period from breakdown expires and a de facto party is unable to get an extension of time, the de facto couple would be relying upon State property law (the explanatory memorandum at page 24 refers, for example, to s 42 of the *Real Property Act 1900 (NSW)* which deals with indefeasibility of title) and possibly equitable principles. State legislation allowing alteration of property interests between de facto couples could not be relied upon.

Intact Relationships

Although persons in intact relationships will be able to enter into financial agreements under the new law, that law does not have any effect until a relationship breaks down. State property laws therefore still govern arrangements for people living in intact de facto relationships (there is, of course, unlikely to be litigation between people living in intact relationships).

INJUNCTIONS

The injunctive powers in the new laws for de facto couples are injunctions that can be made in support of orders for substantial financial relief.

The powers referred to the Commonwealth did not specifically refer to injunctive powers. Injunctions are not a de facto financial cause in their own right. They fall under de facto financial cause:

(g) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process), in relation to concurrent, pending or completed proceedings of a kind referred to in any of the preceding paragraphs.

Section 90SS(1)(k) provides a general power to grant injunctions as necessary to do justice.

Section 90SS(5)(a)(i) gives power to make interlocutory injunctions and (ii) power to make injunctive orders in aide of enforcement. Section 90SS(5)(b) allows injunctions to be made unconditionally or on terms and conditions as the Court considers appropriate.

The Court would have power to make an injunction in relation to the property of a party to a de facto relationship. The Court would not have power to make an injunction for the personal protection of a party to the de facto relationship or an injunction for the protection of the de facto relationship. The Court would not have power to make an order relieving a party to a de facto relationship from any obligation to perform services within the relationship or to render conjugal rights. I have yet to have an application by a married spouse, under s 114(2) of the Act, to relieve him or her of the obligation to render conjugal rights.

EXCLUSIVE OCCUPANCY ORDERS

Before the legislation went to the Senate, there was a grey area as to whether or not the Court would have power to order an injunction relating to the use or occupancy of the premises which the parties have made their home, to the exclusion of the other party, and to injunct a party from entering into, or remaining in, that home. There was no specific power to make occupancy orders. Representations were made to make those powers clear.

A new s 114(2A) has now been placed into the Act which gives the Court the power to make orders or grant an injunction with respect to property held by both or either of the de facto parties (s 114(2A)(c)) or in regard to occupancy or use of

a specific residence that is held by both or either of them (s 114(2A)(a)). If an order is made or an injunction granted under s 114(2A)(a) the Court may also make an injunction restraining the other party from continuing to reside in the subject property, restraining them from entering the property or coming into the area upon which the property is located. This new provision seeks to mirror s 114(1) that provides power for making such orders or injunctions for married couples.

In *Mullane v Mullane* (1983) 158 CLR 436 at p445 the High Court considered the nature of an order for exclusive occupancy. The High Court held at p297 that s 79 refers "….only to orders which work an alteration of legal or equitable interests in the property of the parties or either of them…An order which merely excludes one spouse from the enjoyment of property, albeit for many years, in order to permit its better enjoyment by the other does not alter an interest in that property…." This decision effectively overturned the decision of the Full Court of the Family Court in *King and King* (1977) FLC 90-299 (and called into question subsequent decisions in cases such as *Prindable and Prindable* (1978) FLC 90-484, which relied on *King*).

The States have referred de facto powers in relation to "financial matters". The definition of "financial matters" in the referring legislation includes "the distribution of any other financial resources....including....other valuable benefits". Whilst a right to enjoy property might be a personal rather than property right, it is a "valuable benefit".

APPENDIX "A" - CASE STUDIES

(a) Case Study 1

The parties lived together for one year and ten months. The woman moves out of the unit they rent; she needs space and time to think about the future of the relationship. They meet over dinner for their two year anniversary and have a pleasant intimate night. They agree they should resume life together and spend another month together at their unit before the woman leaves for good. Is jurisdiction attracted?

(b) Case Study 2

The parties lived together for one year and ten months. The mother had a child shortly after cohabitation to another man and the de facto husband is the child's psychological father. Is jurisdiction attracted?

(c) Case Study 3

The parties lived together for one year and ten months. The wealthy female partner contributed $60,000.00 to the purchase of a property in the male partner's name for $655,000.00. Is jurisdiction attracted?

(d) Case Study 4

Assume the new legislation starts 1 July 2009. On 30 June 2009 a party files an application in the Supreme Court of New South Wales. He tells his de facto wife the next morning that it is all over. Does she have any recourse to the new legislation?

(e) Case Study 5

The Act commences on 1 July 2009. On 2 October 2011 a party makes an application for leave. What principles apply? Can a party go back to the State courts?

(f) Case Study 6

The parties live 68% of their relationship in South Australia. They sell up and move to Melbourne using most of the capital to purchase a new home in Melbourne. Is jurisdiction attracted?

(g) Case Study 7

The parties have a de facto relationship agreement under State law. The certificate is similar but not the same as under the Federal law. The de facto wife, who has now had three children, does not want it oust the new jurisdiction. In what circumstances might she be successful?

(h) Case Study 8

A man's de facto relationship breaks down. The de facto partner makes an application. Is his wife going to find out?

(i) Case Study 9

The husband makes a s 79 application against the wife who has formed a new de facto relationship. Does the husband have to give notice of the s 79 application to her new de facto partner?

APPENDIX "B" - REGISTRATION OF RELATIONSHIPS IN STATES AND TERRITORIES

Tasmania

Tasmania has a registry system under the *Relationships Act* 2003 (Tas) which commenced 1 January 2004. Under Tasmanian law, intending partners sign a certificate that is witnessed by a state official and then sent to the Registrar of Births, Deaths and Marriages to be validated. This is known as a "Deed of Relationship". The *Relationships Act* covers a broad range of relationships including heterosexual and same sex partners living as a "significant relationship". (The Act also provides for the registration of "caring relationships" that can be between family members and is not relevant for the purposes of this paper). By the parties registering their relationship agreement they attract the provisions of the Act without having to continually prove the existence of the relationship.

Section 11(1) outlines the requirements to be met by the parties before their relationship can be registered; these are: the parties are two adult persons who are domiciled or ordinarily resident in Tasmania, neither party is married or a party to another deed of relationship and they are in a significant relationship. Section 11(2) provides that the application is to be accompanied by the following;

> (a) a statutory declaration from each of the applicants verifying that the person who is the subject of the application –
>
> (i) consents to the registration; and
>
> (ii) is not married; and
>
> (iii) is not a party to a deed of relationship or in another personal relationship; and
>
> (b) evidence of the identity and age of each applicant (as provided for in the form of application); and
>
> ….

(d) the fee prescribed under section 30(1)(a); and (e) any other document or information that the Registrar requires.

The Australian Capital Territory

The *Civil Partnership Act 2008* (ACT) commenced on 19 May 2008. Under the Act same sex and de facto couples can register their relationships as a "civil partnership", thereby having their relationship legally recognised (s 5(1)). The civil partnership terminates by death, marriage, notice by parties or court order (s 5(2) and s 9). When a couple registers their relationship under the Act they are automatically regarded as being in a domestic partnership for the purposes of ACT law (s 5(3)). Section 6 outlines the eligibility criteria, namely that neither of the parties are to be married or already part of a civil relationship, the relationship is not a prohibited relationship by virtue of familial lineage and that the person or the person's proposed civil partner or both of them, live in the ACT. Pursuant to s 7 if the couple meets the criteria of s 6 they can apply for registration of their relationship. The application must be accompanied by a statutory declaration of each person stating that they wish to enter the partnership, they are not married/already in a civil partnership, that the relationship is not prohibited by the Act, indicate where the couple lives and provide evidence of their age and identity (s 7).

Victoria

In Victoria the *Relationships Act* 2008 (Vic) was assented on 4 May 2008. It will repeal part IX of the *Property Law Act 1958*. One of its purposes is to overcome the issue of having to prove the existence of the relationship. It provides for state wide registration of de facto and same sex relationships from the 1 December 2008 known as "registrable relationships". Section 5 defines a registrable relationship as the following;

> "registrable relationship" means a relationship (other than a registered relationship) between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof,

but does not include a relationship in which a person provides domestic support and personal care to the other person—

(a) for fee or reward; or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

Under s 6 the parties who are in a registrable relationship may apply for registration of the relationship if each person is domiciled or ordinarily resident in the State, not married or in a registered relationship, and not in another relationship that could be registered. Under s 7 the application made pursuant to s 6 must include a statutory declaration from each party verifying that the party consents to the registration, is not married or in a registered relationship/ is not in another relationship that could be registered under this Part of the Act and provides evidence of their identity and age.

Other States and the Northern Territory

Other States and the Northern Territory appear more reluctant to implement a registry system, with no intention from them to implement such as system at the present time. The City of Sydney adopted the City of Sydney Relationships Declaration program which provides that couples can register their relationships at their nearest Sydney council location but registration does not confer any legal rights and does not qualify as registration of the relationship under the new federal laws (see City of Sydney Website at http://www.cityofsydney.nsw.gov.au/Community/ServicesAndPrograms/RelationshipsDeclarationProgram.asp).

APPENDIX "C" - CURRENT PROVISIONS IN RELATION TO ENTERING AGREEMENTS IN AUSTRALIAN STATES AND TERRITORIES

Referring States and Territories

NEW SOUTH WALES - Property (Relationships) Act 1994 (NSW)

Section 47 of Part IV of the *Property (Relationships) Act* deals with certified domestic relationship agreements and provides as follows;

> 47 Effect of agreements in certain proceedings
>
> (1) Where, on an application by a party to a domestic relationship for an order under Part 3, a court is satisfied:
>
> (a) that there is a domestic relationship agreement or termination agreement between the parties to the relationship,
>
> (b) that the agreement is in writing,
>
> (c) that the agreement is signed by the party against whom it is sought to be enforced,
>
> (d) that each party to the relationship was, before the time at which the agreement was signed by him or her, as the case may be, furnished with a certificate in or to the effect of the prescribed form by a solicitor which states that, before that time, the solicitor provided legal advice to that party, independently of the other party to the relationship, as to the following matters:
>
> (i) the effect of the agreement on the rights of the parties to apply for an order under Part 3, and
>
> (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement, and

(e) that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement,

the court shall not, except as provided by sections 49 and 50, make an order under Part 3 in so far as the order would be inconsistent with the terms of the agreement.

(2) Where, on an application by a party to a domestic relationship for an order under Part 3, a court is satisfied that there is a domestic relationship agreement or termination agreement between the parties to the relationship, but the court is not satisfied as to any one or more of the matters referred to in subsection (1) (b), (c), (d) or (e), the court may make such order as it could have made if there were no domestic relationship agreement or termination agreement between the parties, but in making its order, the court, in addition to the matters to which it is required to have regard under Part 3, may have regard to the terms of the domestic relationship agreement or termination agreement.

(3) A court may make an order referred to in subsection (2) notwithstanding that the domestic relationship agreement or termination agreement purports to exclude the jurisdiction of the court to make that order.

- Sections 49 and 50 deal with setting aside and varying the agreement.

VICTORIA – RELATIONSHIPS ACT 2008 (Vic)

Under the current Property Law Act 1958 there are no such provisions regarding formal requirements of a binding financial agreement, nor provision for the terms to be binding on the Court.

Section 59 Relationships Act 2008 (which commences in December 2008) requires:

s.59(1)…

(a) the agreement is in writing; and

(b) the agreement is signed by the partner against whom it is sought to be enforced; and

(c) each partner was given a legal practitioner's certificate before the time at which the partner signed the agreement; and

(d) each legal practitioner's certificate is endorsed on, annexed to or otherwise accompanies the agreement.

(2) A legal practitioner's certificate -

(a) must be signed by the legal practitioner giving it; and

(b) must state that the legal practitioner provided legal advice to the party to whom the certificate was given, independently of the other party to the domestic relationship, as to the following matters -

(i) the effect of the agreement on the powers of a court under this Part;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.

QUEENSLAND – PROPERTY LAW ACT 1974 (Qld)

Under the Queensland *Property Law Act* the requirements for a "recognised agreement" are set out in s 266;

266 Meaning of recognised agreement

(1) A recognised agreement of de facto partners is cohabitation or separation agreement of the de facto partners that--

(a) is a written agreement; and

(b) is signed by the de facto partners and witnessed by a justice of the peace (qualified) or solicitor; and

(c) contains a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner signs the agreement.

(2) Whether all significant property, financial resources and liabilities of a de facto partner are stated depends on whether the value of a property, financial resource or liability of the de facto partner that is not stated is significant given the total value of the de facto partner's stated property, financial resources and liabilities.

Under s 274(1) a recognised agreement that satisfies the court that it is compliant with the s 266 requirements set out above is binding, thereby restricting a court from making a property adjustment order inconsistent with the agreement's provisions on financial matters, and is subject to:

- s 272: regarding the application of the law of contract (ie fraud, duress or undue influence);
- s 275: when provisions are revoked by written agreement or conduct by the de facto partner; and
- s276: when provisions are varied or agreements are set aside by the court (ie on grounds of serious injustice or being impracticable).

NORTHERN TERRITORY – DE FACTO RELATIONSHIPS ACT (1991) (NT)

Part 3 of the *De Facto Relationships Act* 1991 (NT) provides the principles regarding cohabitation and separation agreements in the Northern Territory. Under s 45 when a de facto partner applies to a court for an order under Division 3 or 5 of Part 2 of the Act and the court is satisfied that:

- there is a cohabitation or separation agreement between that partner and the other partner; and
- the agreement is in writing; and
- the agreement is signed by the other de facto partner;

then the court may make an order under Division 3 or 5 of Part 2 even if the agreement purports to exclude its jurisdiction to do so, but except in the case of variation or setting aside the agreement, shall not make an order which is in any respect inconsistent with the terms of the agreement (s 45(1) and (2)).

AUSTRALIAN CAPITAL TERRITORY - Domestic Relationships Act 1994 (ACT)

The *Domestic Relationships Act* provides that parties may enter into a domestic relationship or termination agreement. Section 32(1) provides that subject to the Act, such agreements are subject to and enforceable in accordance with the law of contract.

Section 33 outlines the formal requirements for, and effect of, a binding agreement;

> Effect of agreements in proceedings under Part III
>
> 33(1) In proceedings under Part III, where a court is satisfied that—
>
> (a) there is an agreement between the parties to a domestic relationship;
>
> (b) the agreement is in writing;
>
> (c) the agreement is signed by the party against whom it is sought to be enforced;
>
> (c) before the agreement was so signed each party was furnished with a certificate by a solicitor to the effect that the solicitor had advised that party, independently of the other party, as to the following matters:
>
> (i) the effect of the agreement on the rights of the parties under this Act;
>
> (ii) if it was advantageous, financially or otherwise, for that party to enter into the agreement;
>
> (iii) if it was prudent for that party to enter into the agreement;
>
> (iv) if the agreement was fair and reasonable in the light of the circumstances that were reasonably foreseeable then; and

(e) the certificates referred to in paragraph (d) are endorsed on or accompany the agreement;

the court shall not (except as provided by sections 34 and 35) make an order under Part III that would be inconsistent with the terms of the agreement.

(2) In proceedings under Part III, where a court is satisfied that there is an agreement between the parties to a domestic relationship, but is not satisfied as to any one or more of the matters referred to in paragraph (1) (b), (c), (d) or (e), the court may nevertheless have regard to the terms of the agreement in making any order under that Part.

- Sections 34 and 35 cover setting aside an agreement or variation of the agreement.

Tasmania

Section 62(1) of the *Relationships Act* 2003 (Tas) provides:

62(1) [Court not to make order inconsistent with agreement] If, on an application by a partner for an order, a court is satisfied that –

(a) There is a personal relationship agreement or separation agreement between the partners; and

(b) the agreement is in writing; and

(c) the agreement is signed by the partner against whom it is sought to be enforced; and

(d) each party to the relationship was, before the time at which the agreement was signed by him or her, given by a solicitor of the Supreme Court of Tasmania a certificate in a form approved by the Minister which states that, before that time, the solicitor provided legal advice to that party,

independently of the other party to the relationship, as to the following matters:

(i) the effect of the agreement on the rights of the parties to apply for an order under Part 5;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement, and

(e) the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement –

the court is not to make an order that is inconsistent with the terms of the agreement.

Non referring States

SOUTH AUSTRALIA – DOMESTIC PARTNERS PROPERTY ACT (1996) (SA)

Part 2 of the *Domestic Partners Property Act* 1996 (SA) enables de facto partners to make domestic partnership agreements about the division of property on the termination of the de facto relationship or other related financial matters related to the partnership (s 5(1) and s 3). Under s 5(2) the domestic partnership agreement must be in writing and signed by the de facto partners to the agreement. A domestic partnership agreement can be a certified domestic partnership agreement under s3(2) of the Act provided that the following requirements are met: first, the “warranty of asset disclosure'' whereby each de facto partner warrants that he or she has disclosed all relevant assets to the other partner (s 3(2)(a)). Secondly, it is required that the signature of each party to the agreement needs to be attested to by a lawyer's certificate and each lawyer’s certificate is to be given by a different lawyer (s 3(2)(b)).

Under s 3(1) a ``lawyer's certificate'' is a certificate which is signed by the lawyer and requires their endorsement regarding three issues:

a) that the lawyer explained the legal implications of the agreement to the party to the agreement that is named in the certificate without the other de facto partner being present;

b) that the party gave the lawyer apparently credible assurances that the party to the agreement named in the certificate was not acting under coercion or undue influence;

c) that the lawyer saw the party sign the agreement in their presence.

Under the s 6 of the Act such agreements are subject to and enforceable under the law of contract. Pursuant to s 11(1)(c) if a de facto partner applies to a court for a property division order under Part 3 the court is required to have regard to the terms of any relevant domestic partnership agreement. If the domestic partnership agreement is a certified domestic partnership agreement and provides that the court's power to set aside or vary the agreement is excluded, then the order for the division of the property must be consistent with the terms of the agreement (s 11(2)).

WESTERN AUSTRALIA – FAMILY COURT ACT 1997 (WA)

Section 205ZS of the Act mirrors s 90G of the Act except the WA Act takes account of "former financial agreements" that were in place prior to 1 December 2002 the date of the commencement of Part 5A of the WA Act in 2002.

Western Australia did not have any de facto relationship legislation prior to 2002. "Former financial agreements" as referred to in s 206ZS are common law agreements which are binding on the parties if and only if the agreement is signed by both parties and the agreement has not been terminated and not set aside by the court. These have to be agreements entered into by de facto parties which deal with how, in the event of the breakdown of the de facto relationship, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time before the breakdown of the relationship, are to be dealt with.