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De Facto Relationships

Report No 44

Queensland Law Reform Commission

June 1993

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To: **The Hon Mr Dean Wells, M.L.A.**
Attorney-General of Queensland

In accordance with the provisions of section 15 of the *Law Reform Commission Act 1968*, I am pleased to present the Commission's report on De Facto Relationships.

Yours faithfully,

The Honourable Mr Justice R E Cooper (Chairman)



Her Honour Judge H O'Sullivan (Deputy Chairman)



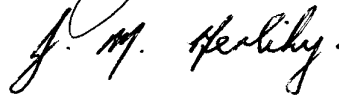
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30 June 1993

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Previous papers on this Reference: Shared Property, Queensland Law Reform Commission, Discussion Paper No 36, October, 1991.

De Facto Relationships, Queensland Law Reform Commission, Working Paper No 40, September, 1992.

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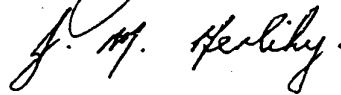
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¹ Appendix B is separately paginated.

(i)

INTRODUCTION

The 1986 census conducted by the Australian Bureau of Statistics¹ revealed that 38,736 couples² in Queensland were living in de facto relationships.³ This figure increased to approximately 59,750 couples⁴ in 1991.⁵ The increasing number of couples who choose to live in de facto relationships is also reflected in the Australia wide figures.⁶

Because of the large number of couples who do not marry, it is imperative that the law provides an adequate way to resolve financial disputes which may arise when a de facto relationship ends.

On the breakdown of a marriage, the *Family Law Act 1975 (Cwth)* provides a mechanism to resolve financial disputes which may arise. However, in Queensland there is currently no legislation equivalent to the *Family Law Act 1975 (Cwth)* to assist de facto couples in resolving property and maintenance disputes. If there is a property dispute between the parties the common law applies. This law is uncertain and is not specifically designed to take into account the different kinds of contributions made by parties during the de facto relationship.

In its Working Paper No 40 on De Facto Relationships published in September 1992, the Commission recommended the introduction of legislation to facilitate the resolution of disputes between de facto couples, regardless of the gender of each of the partners of the couple. The legislation proposed in the Working Paper also empowered courts to declare interests in property and to declare whether or not a de facto relationship existed at a particular time or during a specific period.

This Report contains the final recommendations of the Commission in this important area of the law. The Report begins with chapters discussing the need for reform and the appropriate court in which matters arising under the proposed legislation should be heard and determined.

1 1986 Census of Population and Housing: Small Area Data.

2 This represents 6.5% of couples in Queensland.

3 The census did not obtain information on couples living in same sex de facto relationships. These figures, therefore, are of heterosexual de facto relationships.

4 This represents 9.6% of couples in Queensland.

5 1991 Census of Population and Housing: ABS Catalogue No 2722.3.

6 In 1986, there were 204,946 de facto couples (5.8% of all couples) living in Australia: 1986 Census of Population and Housing: Small Area Data. This increased to approximately 292,208 de facto couples (8.1% of all couples) in 1991: 1991 Census of Population and Housing: ABS Catalogue No 2722.0.

(ii)

The remainder of the Report consists of a brief commentary on the provisions of the proposed legislation where the Commission has considered it necessary. The proposed legislation is set out in Appendix B. The legislation encompasses the recommendations of the Commission.

The Commission is grateful for the input it received through submissions and consultations. It has also had the benefit of reviewing the operation of the New South Wales *De Facto Relationships Act 1984*. The enactment of the legislation recommended in this Report will both clarify the law and facilitate a more just and equitable regime for resolving disputes which can arise on the breakdown of de facto relationships.

SUMMARY OF MAJOR RECOMMENDATIONS

Following is a summary of the major recommendations made in the Report. The recommendations should be read in the context of the Report as a whole.

1. Need for reform

One of the major problems with the existing law in Queensland concerning de facto relationships is that there is no legislation which governs property distribution between the partners if their relationship breaks down. Because of inadequacies of the common law with respect to de facto couples, there is a need to enact law to overcome injustices which would otherwise arise. The enactment of the legislation recommended in this Report will both clarify the law and facilitate a more just and equitable regime for resolving disputes which can arise on the breakdown of de facto relationships.

(Pages 1-2 of the Report)

2. Forum for resolution of disputes

The Family Court is the most suitable forum to hear and determine disputes which may arise on the breakdown of a de facto relationship. However, because of possible constitutional difficulties of a State conferring jurisdiction on a Commonwealth Court (the Family Court), the Supreme Court, District Courts and Magistrates Courts are conferred with jurisdiction to administer the legislation.

(Pages 3-5 of the Report)

3. Meaning of "de facto relationship"

For the purposes of the proposed legislation, the term "de facto relationship" means the relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.

(Pages 11-12 of the Report)

4. Cohabitation and separation agreements

- * People who are planning to enter into a de facto relationship, are in and wish to continue a de facto relationship or plan to separate may enter into a cohabitation or separation agreement (financial agreement).

(Pages 21-24 of the Report)

(iv)

- * Subject to the proposed legislation, principles of contract law apply to financial agreements.

(Page 25 of the Report)

- * Subject to the proposed legislation, a financial agreement will be binding on the parties in an application to alter interests in property or for maintenance if the agreement is in writing, signed by the partners and witnessed by a justice of the peace (qualified) or a solicitor and contains a statement of all significant property, financial resources and liabilities of each partner.

(Pages 26-30 of the Report)

- * In proceedings to alter interests in property or for maintenance, parties will not be bound by the terms of an agreement which complies with the above requirements if enforcing them would result in serious injustice between the partners or to a child of the partners, if the circumstances have changed since making the agreement and it would be impracticable for it to be enforced or if the partners have revoked a term of the agreement in writing or by conduct.

(Pages 31-35 of the Report)

5. Property and maintenance disputes

- * A court can make a property adjustment or maintenance order only if the de facto partners have lived together in a de facto relationship for at least 2 years, there is a child of the partners under 18 years of age or the applicant has made substantial contributions to property or financial resources of the partners or to family welfare and failure to make the order would result in serious injustice to the applicant.

(Pages 38-44 of the Report)

- * For the purposes of the legislation, "child" of the de facto partners includes a child who, at a time during the de facto relationship, was treated by either partner as a child of the relationship and was ordinarily a member of the partners' household.

(Pages 43-44 of the Report)

(v)

- * A court may make a property adjustment or maintenance order only if the parties disclose their financial circumstances. In certain circumstances, however, the court is given the power to make such an order if there has been insufficient or no disclosure.

(Pages 45-46 of the Report)

- * **Property disputes:**

- The court is empowered to make a property order that it considers to be just and equitable in favour of a de facto partner or a child of the de facto partners.

(Pages 55-58 of the Report)

- Before the court may make a property order, the parties must attend a compulsory conference in an attempt to settle the dispute.

(Pages 58-59 of the Report)

- The matters to be considered by the court in making a property order closely reflect the matters which may be considered by the Family Court under the *Family Law Act 1975 (Cwth)*.

(Pages 48-54 and 59-60 of the Report)

- In making a property order in favour of a child of the de facto partners, the court is directed to consider the financial and non-financial contributions of the child and the contributions to family welfare made by the child. The court may only consider the non-financial contributions and contributions to family welfare made by a child if they are substantial.

(Pages 61-63 of the Report)

- * **Spousal maintenance:**

- Before a court may make an order for spousal maintenance, in addition to the matters set out above, the court must be satisfied that a partner is unable to adequately support himself or herself.

(Pages 76-78 of the Report)

(vi)

- The inability to adequately support himself or herself must arise because that partner's earning capacity has been adversely affected by the circumstances of the de facto relationship or for another reason arising in a whole or in part from circumstances arising from the de facto relationship.

(Pages 76-78 and 80-83 of the Report)

- The matters for consideration by a court in deciding the amount (if any) of spousal maintenance closely reflect those matters which may be considered by the Family Court under the *Family Law Act 1975 (Cwth)*.

(Pages 76-78 and 85-89 of the Report)

- Spousal maintenance orders made will cease to have effect on the death of either partner or if the partner receiving the maintenance marries or enters another de facto relationship.

(Pages 89-92 of the Report)

6. Declaration of property interests

A court may declare the existing title or rights (if any) that a de facto partner or another party may have in relation to property.

(Pages 47-48 of the Report)

7. Mediation and arbitration

- * The Registrar must, on request, advise parties about mediation and arbitration facilities available in the court.

(Pages 95-96 of the Report)

- * Mediation is available to the parties before or after the proceedings have begun.

(Pages 96-97 of the Report)

- * Parties may arrange a private arbitration of a dispute or the court may order a dispute to arbitration.

(Pages 98-99 of the Report)

(vii)

- * An award made by an arbitrator may be registered and, if so, will take effect as an order of that court.

(Pages 98-99 of the Report)

- * A party to a registered award made in a court ordered arbitration may apply to a court for a review of that award. In such a review, all matters of fact and law will be decided as if for the first time.

(Page 100 of the Report)

- * A party to a registered award made in private arbitration may apply to a court for a review on questions of law.

(Pages 100-101 of the Report)

8. Declaration of existence or non-existence of a de facto relationship

- * An application may be made to the Supreme Court or District Courts for a declaration that a de facto relationship did or did not exist at a particular time or for any particular period.

(Pages 103-107 of the Report)

- * An application may be made to the court for such a declaration to be revoked.

(Pages 107-109 of the Report)

9. Courts

- * The Supreme Court, District Courts and Magistrates Courts are given jurisdiction to hear and determine matters arising under the Act according to their monetary jurisdiction.

(Pages 110-111 of the Report)

- * If the parties consent, a court may hear a matter concerning an interest in property if the value of the interest is up to twice the court's jurisdictional limit.

(Pages 111-112 of the Report)

- * The Supreme Court and District Courts alone have power to make declarations about the existence or non-existence of a de facto relationship.

(Page 104 of the Report)

- * A court is given power to allow a person leave to intervene in proceedings instituted under the legislation.

(Pages 122-123 of the Report)

- * A party to proceedings under the proposed legislation will bear that party's own costs. This is subject to a discretion given to the court to make orders as to costs.

(Pages 123-125 of the Report)

- * In administering the legislation, a court is given a number of powers which are similar to the powers given to the Family Court by the *Family Law Act 1975 (Cwth)*. These powers include the power to make orders and grant injunctions in the absence of parties in cases of urgency.

(Pages 114-122 of the Report)

- * Magistrates Courts are given power to enforce maintenance orders made by the Supreme Court or District Courts.

(Pages 129-130 of the Report)

- * Power is given to the courts exercising the jurisdiction under the legislation to enforce orders made or injunctions granted other than for the payment of money.

(Pages 130-131 of the Report)

10. Publication of proceedings

There are restrictions on publishing an account of de facto proceedings modelled on the restrictions which exist under the *Family Law Act 1975 (Cwth)*.

(Pages 125-127 of the Report)

11. Stamp duty exemptions

Stamp duty exemptions for orders made or agreements entered into under the legislation are recommended to mirror the stamp duty exemptions which are available under the *Family Law Act 1975 (Cwth)*.

(Pages 134-135 of the Report)



1. NEED FOR REFORM

In September 1990, the Queensland Law Reform Commission was asked by the Attorney-General to review the law governing de facto relationships. As part of its review, the Commission has published 2 papers - Discussion Paper No 36 on Shared Property and Working Paper No 40 on De Facto Relationships.

The Shared Property Discussion Paper examined the law affecting all people who live under the one roof in domestic relationships. As part of that review, the Discussion Paper, therefore, considered the law governing de facto relationships. As its title suggests, the De Facto Relationships Working Paper focused only on the law governing people living in de facto relationships. This Report contains the final recommendations of the Commission on the law regarding de facto relationships.⁷

In its Shared Property Discussion Paper and De Facto Relationships Working Paper, the Commission recommended the introduction of legislation to govern issues arising on the breakdown of de facto relationships. The Commission is of the view that legislation is necessary to overcome defects in the existing law.⁸

During the course of its review of the law governing de facto relationships, the Commission was advised that situations frequently arise where a partner in a de facto relationship is left in a financially insecure position on the breakdown of the relationship. The facts of the following situation highlight the injustice which can arise under the existing law on the breakdown of a de facto relationship.

Case study

Isobel⁹ (aged 57 years) lived in a de facto relationship for 33 years from 1956 until 1989. When she began living in the house of her de facto partner in 1956, she had separated from her husband and had 3 small children. There were subsequently 6 children of the de facto relationship.

The de facto husband worked as a fisherman and owned 2 prawn trawlers as well as the home in which the family lived. There was no mortgage over the home.

⁷ The Commission is, of course, aware that some legislation (such as adoption and fatal accidents legislation) which impacts on de facto couples may also need to be reviewed. This Report, however, focuses primarily on issues arising on the breakdown of a de facto relationship in circumstances other than death.

⁸ For an explanation of the defects in the existing law, see Shared Property Discussion Paper, pages 1-4. In addition to the authorities cited in the Shared Property Discussion Paper, see Kirby P in *Bryson v Bryant* (1992) 29 NSWLR 188.

⁹ To protect the identity of the person involved, the names and places used are fictitious.

In 1989 he asked Isobel to move out of the home. He gave Isobel \$500 cash, bought her a dress for \$35 and groceries worth \$90.

Isobel was advised that her chance of receiving a property order in her favour if the matter proceeded to trial was remote. Success would depend on being able to base her claim on equitable principles. These principles are complex, confusing and expensive to litigate, and were not developed for the purpose of resolving financial disputes arising on the breakdown of a de facto relationship. In particular, under existing principles Isobel could claim nothing in respect of any sacrifices she had made as a homemaker and mother of the 6 children of the relationship.¹⁰

Isobel is also not entitled to any payment of spousal maintenance under existing Queensland law. As it currently stands, the law in this regard provides no remedy against economic exploitation of the less well-off partner.

These facts are not unique. Legal practitioners are frequently being approached to advise people of their entitlements on the breakdown of de facto relationships.

The injustice illustrated by this case study is obvious. On the separation of a husband and wife, legislation exists to resolve financial disputes which can arise.¹¹ The Commission recommends that legislation be enacted to more fairly and equitably resolve financial disputes on the breakdown of a de facto relationship. Such legislation already exists in New South Wales, the Northern Territory and Victoria. Enactment of de facto relationships legislation was also recommended by the Joint Select Committee which was requested by the Commonwealth Parliament in 1991 to inquire into certain aspects of the operation and interpretation of the *Family Law Act 1975 (Cwth)*.¹²

The legislation recommended by the Commission will be examined in more detail later in this Report.

¹⁰ Isobel would have the same entitlements to receive child maintenance as she would if she were married to the father: Part VII *Family Law Act 1975 (Cwth)*.

¹¹ Part VIII *Family Law Act 1975 (Cwth)*.

¹² Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 10.72, recommendation 86.

2. FORUM FOR RESOLUTION OF DISPUTES

* *Choice of forum*

The focus of the proposed legislation is the resolution of financial disputes on the breakdown of a de facto relationship. As part of its review of the law in this area, the Commission must also comment on the most suitable court in which to hear and determine such disputes. The choice in this regard is between -

- . the Family Court; or
- . the State Courts (Supreme Court, District Courts and Magistrates Courts).

After reviewing the merits of each forum in the Working Paper,¹³ the Commission expressed the view that the Family Court is the most suitable forum to hear and determine property and maintenance disputes which may arise on the breakdown of a de facto relationship.¹⁴ The Commission has not altered its view in this regard.

* *Conferring jurisdiction on the Family Court*

The Working Paper also reviewed in some detail the possible options for the process of conferring jurisdiction in this area of the law on the Family Court.¹⁵ The problems associated with the various methods of conferring jurisdiction were also identified. The Commission concluded this review by stating that whether or not the Queensland Parliament chooses one of these options is a political decision.

One option for conferring power on the Family Court which was considered in the Working Paper is the referral of State powers relating to de facto couples to the Commonwealth.

The topic of uniform de facto relationships legislation throughout Australia was an agenda item for the Standing Committee of Attorneys-General in June this year. The issue of a referral of State power to facilitate uniform legislation was also discussed.

One of the matters considered by the Joint Select Committee was whether the *Family Law Act 1975 (Cwth)* should be amended to include the jurisdiction to decide property disputes between de facto couples. While the Committee

¹³ De Facto Relationships Working Paper, pages 15-19.

¹⁴ The Joint Select Committee also recommended that jurisdiction in the area of de facto relationships law be vested in the Family Court: Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 10.72, recommendation 87.

¹⁵ De Facto Relationships Working Paper, pages 20-22.

recommended that "there be no amendment of the *Family Law Act 1975 (Cwth)* in respect of de facto relationships",¹⁶ it did recommend that "the Commonwealth Government seek a reference of powers from the States in relation to the jurisdiction of de facto property disputes".¹⁷

If there is a referral of State power in this area, the Commission considers that the Commonwealth should confer jurisdiction on the Family Court to hear and determine matters arising under any legislation that is passed.

In the event that the Queensland Parliament decides not to refer its power to the Commonwealth and not to explore other ways of conferring jurisdiction on the Family Court that were canvassed in the Working Paper,¹⁸ the jurisdiction in this area of law will remain with the State. If this is the case, the legislation proposed would be administered by the State Courts. The Commission recommends that the jurisdiction be according to the courts' appropriate monetary jurisdiction.

* ***Choice of legislative model if referral***

If there is a referral of power by the States to the Commonwealth to facilitate uniform legislation throughout Australia, there must also be a decision on the appropriate legislative model to use. There is currently de facto relationships legislation in New South Wales,¹⁹ Victoria²⁰ and the Northern Territory.²¹ The Victorian and Northern Territory legislation is based largely on the New South Wales Act.²²

As part of its review of the law on de facto relationships, the Commission has examined the New South Wales legislation in some detail. The case law decided under the legislation has also been reviewed. As a result of this examination, the Commission is of the view that although the legislation is working well in some respects, nevertheless serious defects have been revealed.

¹⁶ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 10.72, recommendation 84.

¹⁷ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 10.72, recommendation 85.

¹⁸ De Facto Relationships Working Paper, pages 20-24.

¹⁹ *De Facto Relationships Act 1984*.

²⁰ *Property Law Act 1958*.

²¹ *De Facto Relationships Act 1991*.

²² The Victorian legislation, however, is limited to declaring and adjusting interests in real property. It does not deal with issues of spousal maintenance or financial agreements between de facto partners.

Should the States decide to refer their power, the Commission strongly urges that the legislation proposed in this Report be used as the model for uniform legislation not only because it seeks to address the difficulties which the case law has shown to exist in the New South Wales Act but also because it reflects the provisions of the *Family Law Act 1975 (Cwth)* more closely than the New South Wales model and is drafted in accordance with current plain English drafting principles. The Commission anticipates that the legislation proposed in this Report will result in fairer and more equitable orders being made by any court administering the Act than have been made by the New South Wales courts.

3. DRAFT LEGISLATION AND COMMENTARY

DE FACTO RELATIONSHIPS ACT

The remainder of this Report will comprise an analysis of the legislation proposed by the Commission. The legislation has been divided into 8 chapters. Each chapter will be considered in turn.

At the beginning of most chapters will be a brief summary of the content of the chapter. Any matters of policy arising out of the provisions in the chapter will also be discussed. After a discussion of the policy issues, the provisions of the chapter will be set out in full, together with any commentary that the Commission considers necessary.

There have been only minor alterations to the policy recommendations made by the Commission in its Working Paper on De Facto Relationships.²³ The format of the legislation, however, has been substantially altered. In drafting this legislation, the Commission has received, and is grateful for, the assistance of the Office of the Parliamentary Counsel. The proposed legislation reflects the current legislative drafting style used in that Office.

²³ For a summary of major recommendations made by the Commission in its Working Paper, see *De Facto Relationships Working Paper*, pages (iv)-(vi).

CHAPTER 1 - PRELIMINARY

As its title suggests, this chapter deals with preliminary matters which are a feature of most legislation. It sets out the short title and the purposes of the proposed legislation and contains the relevant definitions.

PART 1 - INTRODUCTION

1. Short title

This Act may be cited as the De Facto Relationships Act 1993.

PART 2 - PRIMARY PURPOSES OF ACT

2. Primary purposes

The primary purposes of this Act are -

- (a) to facilitate the resolution of financial matters at the end of a de facto relationship; and*
- (b) to recognise that de facto partners should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement; and*
- (c) to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the partners and, in certain cases, any child of the partners; and*
- (d) to provide for maintenance at the end of a de facto relationship by a de facto partner who is able to pay maintenance to a de facto partner who is unable to support himself or herself adequately because of circumstances arising from the relationship; and*
- (e) to provide for declaratory relief to help people ascertain their existing interests in property of de facto partners; and*
- (f) to provide for injunctive relief to help people protect their existing and adjusted interests in property of de facto partners; and*

- (g) *to provide for declaratory relief about the existence or non-existence of a de facto relationship and so help people avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more unrelated proceedings; and*
- (h) *to facilitate the resolution of matters concerning a de facto relationship by the Supreme Court, a District Court or a Magistrates Court; and*
- (i) *to encourage mediation and arbitration as ways of resolving financial matters at the end of a de facto relationship.*

3. How primary purposes are to be achieved

These purposes are primarily to be achieved by -

- (a) *providing in Chapter 2 for the resolution of financial matters by de facto partners; and*
- (b) *providing in Chapter 3 for the resolution of financial matters by courts; and*
- (c) *providing in Chapter 4 for the resolution of financial matters by mediation and arbitration; and*
- (d) *providing in Chapter 5 for declaratory relief about the existence or non-existence of de facto relationships; and*
- (e) *providing in Chapter 6 for the jurisdiction and powers of the Supreme Court, a District Court and Magistrates Court to deal with matters under this Act.*

PART 3 - INTERPRETATION

Division 1 - General

4. Definitions

In this Act -

"account of a de facto proceeding" has the meaning given by section 13 (Meaning of "account of a de facto proceeding");

"approved arbitrator" means an arbitrator approved under a regulation;

"approved mediator" means a mediator approved under a regulation;

"child" of de facto partners means -

(a) a child born because of sexual relations between the partners; or

(b) a child of the female partner whose male partner is presumed to be the father of the child under an Act, a Commonwealth Act, an Act of another State or a Territory Act; or

(c) a child adopted by the partners; or

(d) a child who, at a time during the de facto relationship, is or was -

(i) treated by either partner as a child of the relationship; and

(ii) ordinarily a member of the partners' household;

"cohabitation agreement" has the meaning given by section 9 (Meaning of "cohabitation agreement");

"court" means a court having jurisdiction under this Act;

"court document" of a proceeding means -

(a) a pleading in the proceeding; or

(b) a transcript of evidence in the proceeding; or

(c) another document used in relation to the proceeding;

"de facto partner" has the meaning given by section 6 (Meaning of "de facto partner");

"de facto relationship" has the meaning given by section 5 (Meaning of "de facto relationship");

"Family Law Act proceeding" means a proceeding under the Family Law Act 1975 of the Commonwealth;

"financial matters" has the meaning given by section 7 (Meaning of "financial matters");

"financial resources" has the meaning given by section 8 (Meaning of "financial resources");

"maintenance order" means an order for maintenance under section 63 (Court may make maintenance order);

"monetary limit" of a District Court has the meaning given in section 66 (District Courts' civil jurisdiction) of the District Courts Act 1967;

"monetary limit" of a Magistrates Court has the meaning given in section 2 of the Magistrates Courts Act 1921;

"private arbitration" means arbitration carried out by a private arbitrator other than arbitration carried out because of an order made under section 103 (Arbitration if court refers property adjustment or maintenance proceeding);

"private arbitrator" means an arbitrator prescribed by regulation;

"property adjustment order" means an order adjusting interests in property under section 40 (Court may make property adjustment order);

"publish" has the meaning given by section 12 (Meaning of "publish");

"recognised agreement" has the meaning given by section 11 (Meaning of "recognised agreement");

"separation agreement" has the meaning given by section 10 (Meaning of "separation agreement").

Division 2 - De facto relationship and partner concepts

5. **Meaning of "de facto relationship"**

A **"de facto relationship"** is the relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.

Although the clause is drafted in a different form, with one exception (discussed below), the meaning of "de facto relationship" is the same as the meaning given to the term in other de facto relationships legislation.²⁴ That is, the term covers only a person living in a "relationship like the relationship between a married couple". "De facto relationship" will, therefore, not extend to students sharing accommodation, siblings living together or friends sharing a house in a relationship unlike the relationship between a married couple.

* **Definition extends to partners of the same gender**

The definition of "de facto relationship" differs from the definition given in the New South Wales, Northern Territory and Victorian legislation.²⁵

The definition of "de facto relationship" in the proposed legislation makes it clear that the legislation governs couples living together in a relationship like the relationship between a married couple, regardless of the gender of the partners. In other words, the legislation will extend to both heterosexual and homosexual couples who live together in a relationship like the relationship between a married couple.

This reflects the Commission's recommendation in its Working Paper on De Facto Relationships. Many of the people or groups who made submissions to the Commission on its Shared Property Discussion Paper commented on whether legislation should extend to homosexual couples. The overwhelming majority were in favour of a gender neutral definition of "de facto partner". Very few comments were received on this issue in the submissions on the De Facto Relationships Working Paper. In submissions to the Commission, some respondents opposed any recognition of homosexual couples.

In recommending that the legislation should govern both homosexual and heterosexual de facto couples, the Commission has also had regard to changing

²⁴ Section 3 De Facto Relationships Act 1984 (NSW), section 3 De Facto Relationships Act 1991 (NT) and section 275 Property Law Act 1958 (Vic).

²⁵ Section 3 De Facto Relationships Act 1984 (NSW), section 3 De Facto Relationships Act 1991 (NT) and section 275 Property Law Act 1958 (Vic).

legislative attitudes concerning homosexual relationships. Sexual relationships between consenting male adults in private are no longer unlawful.²⁶ Sexual relationships between consenting adult females in private have never been unlawful.

The *Anti-Discrimination Act 1991 (Qld)* prohibits (with some exceptions) discriminating against a person on the grounds of lawful sexual activity.²⁷ It is, therefore, inappropriate to discriminate against homosexual de facto couples by denying them the benefits and responsibilities to be imposed by the proposed legislation. Furthermore, Australia has declared 'sexual preference' as a ground of discrimination for the purposes of the Discrimination (Employment and Occupation) Convention.²⁸

An important difference between heterosexual and homosexual couples is that heterosexual couples can choose not to marry. Homosexual couples cannot make this choice. The provisions of the *Family Law Act 1975 (Cwth)* in relation to resolving disputes which arise on the breakdown of a relationship cannot apply to them. It is important, therefore, that the proposed legislation extends to homosexual couples.²⁹

From consultations carried out and submissions received, the Commission is aware that legal practitioners are consulted to advise on property entitlements on the breakdown of homosexual de facto relationships. If statutory recognition is not given to homosexual couples in the proposed legislation, such couples must rely on the common law to resolve any disputes which arise on separation. While there is recent dicta to suggest that the principles which have been applied to resolve disputes between heterosexual de facto couples may also be relevant for homosexual de facto couples,³⁰ there are deficiencies with the common law in this area. These deficiencies were referred to earlier in the Report.³¹

²⁶ Section 7 *Criminal Code and Another Act Amendment Act 1990 (Qld)*.

²⁷ Section 7(1)(a).

²⁸ Human Rights and Equal Opportunities Commission Regulations proclaimed 21 December 1989, effective from 1 January 1990.

²⁹ Note also that the Queensland Law Reform Commission recently recommended in its Report on Intestacy Rules that the definition of de facto couples include homosexual couples: Report on Intestacy Rules No 42, 1993, paragraph 2.2.2.

³⁰ See comments of Pincus JA in *Harmer v Pearson* (unreported) Court of Appeal, Supreme Court of Queensland, 22 February 1993, No 147.

³¹ See footnote 8.

6. Meaning of "de facto partner"

A "de facto partner" is a person who lives or lived in a de facto relationship.

"De facto partner" is defined to mean a person who lives or lived in a de facto relationship. One aspect of this definition requires comment.

* **Aboriginal and Torres Strait Islander customary law**

The issue which needs to be addressed is whether "de facto partner" should cover a person who has entered into a relationship that is recognised as a traditional marriage by the Aboriginal or Torres Strait Islander community or group to which either person in the relationship belongs.

In the De Facto Relationships Working Paper, the Commission raised the issue of the most appropriate way to recognise Aboriginal and Torres Strait Islander customary law in the proposed legislation. As mentioned in the Working Paper, only marriages which comply with the *Marriage Act 1961 (Cwth)* are regulated by the *Family Law Act 1975 (Cwth)*. Unless a marriage recognised by Aboriginal or Torres Strait Islander customary law also complies with the *Marriage Act 1961 (Cwth)*, it will not be regulated by the *Family Law Act 1975 (Cwth)*. Aboriginal and Torres Strait Islanders who enter into traditional marriages and do not comply with the *Marriage Act 1961 (Cwth)* would not, therefore, have the option of relying on the *Family Law Act 1975 (Cwth)* to resolve financial disputes on the relationship breakdown.

In the Working Paper, the Commission suggested that the best solution to this problem may be for traditional marriages to be recognised as marriages under the *Marriage Act 1961 (Cwth)*. However, the Commission is unable to make recommendations to the Commonwealth government with respect to the reform of Commonwealth law.

In the absence of Commonwealth legislation amending the *Marriage Act 1961 (Cwth)*, the Commission tentatively recommended in the Working Paper that the proposed de facto relationships legislation be extended to people in traditional marriages.³² This would provide a person in a traditional marriage the option of seeking relief under the Act in terms of financial adjustment.

By recognising traditional marriages, the Commission would afford recognition to customary law. But by subjecting those traditional marriages to the rights and responsibilities imposed by the proposed legislation, the Commission would be

³² The proposed definition of "de facto partner" in clause 1.5 of the draft legislation extended to a person who "entered into a relationship that is recognised as a traditional marriage by the Aboriginal or Torres Strait Islander community or group to which either person in the relationship belongs".

subjecting the partners to rights and liabilities either not recognised by or dealt with differently under customary law.

The Commission invited comment on whether the recommendation made in the Working Paper was the appropriate way to recognise customary law in this area.

Unfortunately, the submissions received by the Commission did not provide specific assistance in terms of the most desirable way of incorporating Aboriginal and Torres Strait Islander customary law concerning the resolution of financial disputes in the proposed de facto relationships legislation.

The Department of Family Services and Aboriginal and Islander Affairs ("the Department") addressed this issue in general terms in its submission to the Commission. As a preliminary point, the Department commented that the issues being examined by the Commission in its review of de facto relationships law are of considerable significance to the Aboriginal and Torres Strait Islander people of Queensland. The Department advised that between 40 and 60 per cent of Aboriginal and Torres Strait Islander couples did not identify as married under Australian law.³³

The Department advised the Commission that a number of traditional marriages do exist in Queensland today. According to the Department, however, it is difficult to determine the prevalence of such marriages. This is because there is a variety of circumstances in which a relationship is conferred a traditional status. These circumstances include the length of the relationship and whether or not there are children of the relationship.

Despite the uncertainty concerning the number of traditional marriages which exist, the Department commented that a traditional marriage "generally could be expected to fit the concept of 'de facto' in the proposed legislation".

In its submission, the Department briefly addressed whether there was a need for legislation to provide for property distribution or the payment of maintenance on the breakdown of a traditional marriage. The Department quoted from the 1986 Report of the Australian Law Reform Commission on The Recognition of Aboriginal Customary Law.³⁴ The Australian Law Reform Commission expressed the view that any financial problems that do arise on the breakdown of a traditional marriage are resolved informally without the need for legal intervention.³⁵ The Australian Law Reform Commission commented that "economic security ... has to be re-established in each case by remarriage, sharing within the extended family,

³³ The Department was quoting from the 1986 Census data compiled by the Australian Bureau of Statistics.

³⁴ Australian Law Reform Commission Report No 31, 1986.

³⁵ *Id.*, Volume 1, paragraph 289.

employment (where available) or reliance on the social security system, or some combination of these".³⁶

While the Department considered the comments of the Australian Law Reform Commission to be cogent, it recognised that circumstances could arise in which there would be a need for statute to impose certain duties on parties to the relationship on the relationship breakdown. In other words, legislation may be necessary if the needs of traditional spouses are not being met by family and community support networks.

The Department also expressed concern about the effect of imposing a legislative regime which could be relied upon by a traditional spouse on the breakdown of the relationship. As stated in its submission, the Department "is influenced by arguments that external intervention in questions of property distribution upon the collapse of traditional marriages would result in the attenuation of the cultural dynamics which would normally operate in those situations". The Department appeared to be persuaded by the following views expressed by the Australian Law Reform Commission:

*Imposing an obligation on former traditional spouses with respect to property and maintenance would involve at least a partial shifting of responsibility from these forms of support to former Aboriginal spouses. Not only is it very doubtful whether this could be made to work, but it seems the wrong direction for the law, concerned as it is with providing effective economic security for persons in need, to be moving. This is particularly so given that there is no indication that such a change would be an expression, or development, of existing Aboriginal norms, traditions or demands.*³⁷

Responses received by the Commission have caused it to approach the issue of recognising traditional law in the de facto relationships context with great caution and to refrain from recommending legislative recognition of traditional laws in this context, at least at this time. The Commission is particularly concerned by the following matters.

- (1) The Commission understands that on the breakdown of a traditional marriage, the needs of a spouse are generally met by the family and community support network. More importantly, however, knowledge of Aboriginal and Torres Strait Islander customary law is incomplete and fragmented. For example, as pointed out by the Department, it can be difficult to determine precisely when a union can be described as a traditional marriage.

³⁶ Australian Law Reform Commission Report No 31, 1986, Volume 1, paragraph 289.

³⁷ Ibid.

The Commission has neither the resources nor the brief to make sufficient enquiries about existing customary law to bring it to the point where it could make reasoned, substantive recommendations.

- (2) Even if a great deal more were known about Aboriginal and Torres Strait Islander customary law, it would still be necessary for the Commission to consult widely with representatives of Aboriginal and Torres Strait Islander groups. The Commission has neither the resources nor the brief to initiate and carry through wide consultations.

The problems outlined above are not limited to the Commission's reference on the law on *de facto* relationships. Similar difficulties were encountered in the Commission's review of the intestacy rules,³⁸ and will also impact on other reviews being conducted by the Commission.

For this reason, the Commission urges the Government to establish a task force to conduct extensive consultations throughout Queensland in an attempt to establish an accessible record of Aboriginal and Torres Strait Islander customary law. It is only when a law reform body has access to such material that it can make recommendations which are both appropriate and capable of being implemented in practice.

For the purposes of this reference, in view of the difficulties which have been described, the Commission has deleted references to traditional marriages and customary law from its draft legislation.

This does not mean to say that partners in a traditional marriage which breaks down cannot have the benefit of the recommendations made by the Commission in this Report. The legislation proposed in this Report will, of course, apply to people living in a traditional marriage provided the prerequisites set out in the legislation are satisfied.³⁹ To this extent, the Commission notes the observations of the Department that "traditional or customary marriages generally could be expected to fit the concept of 'de facto' in the proposed legislation". The result is that people living in traditional marriages have an option. They can have recourse to traditional law or, provided the prerequisites of the legislation have been satisfied, can seek a remedy under the proposed legislation.

³⁸ Report on Intestacy Rules No 42, 1993, paragraph 1.13.

³⁹ See the definition of 'de facto relationship' in clause 5 and the 'type of de facto relationship' described in clause 28 of the proposed legislation.

Division 3 - Financial matters and financial resources concepts

7. **Meaning of "financial matters"**

De facto partners' "financial matters" are matters about the property, maintenance or financial resources of either or both of them.

8. **Meaning of "financial resources"**

A person's "financial resources" include the following -

- (a) a prospective claim or entitlement under a scheme, fund or arrangement under which superannuation, resignation, termination, retirement or similar benefits are provided to, or in relation to, the person;*
- (b) property that, under a discretionary trust, may become vested in, or applied to, the benefit of the person;*
- (c) property the disposition of which is (wholly or partly) under the control of the person and that may be used or applied by or on behalf of the person for the person's benefit; and*
- (d) any other valuable benefit of the person.*

Division 4 - Cohabitation, separation and recognised agreement concepts

The terms "cohabitation agreement", "separation agreement" and "recognised agreement" are relevant to Chapter 2 of the proposed legislation. Chapter 2 deals with the resolution of financial matters by de facto partners through the use of cohabitation and separation agreements. The meaning of the terms defined in Division 4 are discussed in context in the commentary to Chapter 2.⁴⁰

9. **Meaning of "cohabitation agreement"**

- (1) A **"cohabitation agreement"** is an agreement that -
- (a) is made by de facto partners -
 - (i) in contemplation of starting their de facto relationship; or
 - (ii) during their de facto relationship; and
 - (b) deals with all or some of the partners' financial matters.
- (2) A **"cohabitation agreement"** includes an agreement that varies a cohabitation agreement.
- (3) It does not matter whether -
- (a) there are other parties to a cohabitation agreement; or
 - (b) a cohabitation agreement is made before, on or after the commencement of this Act; or
 - (c) a cohabitation agreement deals with other matters.

10. **Meaning of "separation agreement"**

- (1) A **"separation agreement"** is an agreement that -
- (a) is made by de facto partners -
 - (i) in contemplation of ending their de facto relationship; or
 - (ii) after their de facto relationship has ended; and
 - (b) deals with all or some of the partners' financial matters.
- (2) A **"separation agreement"** includes an agreement that varies a cohabitation agreement or separation agreement.

- (3) *It does not matter whether -*
- (a) *there are other parties to a separation agreement; or*
 - (b) *a separation agreement is made before, on or after the commencement of this Act; or*
 - (c) *a separation agreement deals with other matters.*

11. Meaning of "recognised agreement"

- (1) *A "recognised agreement" of de facto partners is a cohabitation or separation agreement of the partners that -*
- (a) *is a written agreement; and*
 - (b) *is signed by the 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 partner when the partner signs the agreement.*
- (2) *Whether all significant property, financial resources and liabilities of a partner are stated depends on whether the value of a property, financial resource or liability of the partner that is not stated is significant given the aggregate value of the partner's stated property, financial resources and liabilities.*

Division 5 - Publication and account of a de facto proceeding concepts

Division 5 defines the terms "publish" and "account of a de facto proceeding". These meanings are relevant to Chapter 6 Part 3 Division 3 of the proposed legislation which deals with publication of proceedings commenced under the Act.

12. Meaning of "publish"

A person **"publishes"** something if the person disseminates the thing to the public or a section of the public, including, for example, by publishing the thing in a -

- (a) newspaper or periodical; or
- (b) radio or television broadcast.

13. Meaning of "account of a de facto proceeding"

An **"account of a de facto proceeding"** is an account of the whole or a part of a proceeding under this Act.

PART 4 - OPERATION OF ACT

14. Application of Act

- (1) This Act applies to all de facto relationships other than relationships that ended before the commencement of this Act.
- (2) It does not matter whether a de facto relationship started before or after the commencement of this Act.

15. Other rights not affected

Nothing in this Act affects a right of a de facto partner to apply for a remedy or relief under another law.

CHAPTER 2 - RESOLUTION OF FINANCIAL MATTERS BY DE FACTO PARTNERS

Chapter 2 of the Bill deals with financial agreements which may be entered into by the de facto partners. A financial agreement is an agreement made between de facto partners either before, during or at the end of a relationship which makes provision for financial matters. For example, the agreement could provide that if the parties separate, each partner should retain the property he or she had when the relationship began and any property accumulated since the beginning of the relationship should be shared equally between the partners. The agreement could also provide that neither party should be entitled to claim maintenance from the other party on separation.

The de facto relationships legislation of New South Wales and the Northern Territory specifically allows de facto partners to enter into financial agreements either before or during their relationship (cohabitation agreements) or at the end of their relationship (separation agreements).⁴¹ The legislation in those jurisdictions removes any argument that such agreements may be void on public policy grounds.⁴² Under the New South Wales and Northern Territory legislation, the agreements are otherwise subject to the ordinary rules of contract.

On the breakdown of a de facto relationship, one of the partners may wish to apply for an order to adjust interests in property or for an order for maintenance. If the parties have entered into a financial agreement which satisfies the requirements set out in the legislation, the court will be unable to make an order adjusting interests in property or for maintenance which is inconsistent with the terms of the financial agreement.⁴³

In the De Facto Relationships Working Paper, the Commission examined the arguments for and against de facto relationships legislation allowing parties to enter into binding financial agreements. The following were listed as arguments in favour of allowing de facto partners to enter into binding agreements -

- (i) De facto couples would have freedom to regulate their own financial arrangements rather than having to be regulated by legislation;

⁴¹ For an examination of the differing kinds of financial agreements which are available under the *Family Law Act 1975 (Cwth)*, the *De Facto Relationships Act 1984 (NSW)* and the *De Facto Relationships Act 1991 (NT)*, see *De Facto Relationships Working Paper*, pages 59-71.

⁴² For an explanation of the public policy grounds, see *Shared Property Discussion Paper*, page 76.

⁴³ However, clause 25 of the proposed legislation allows the court to vary the provisions of the agreement if enforcing them would result in serious injustice or because of circumstances that have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out. Note also clause 24 which allows the court to ignore a provision that the partners have in writing or by their conduct revoked. Note also the New South Wales and Northern Territory legislation allows the court to make an order inconsistent with the agreement in certain circumstances: section 49 *De Facto Relationships Act 1984 (NSW)* and section 46 *De Facto Relationships Act 1991 (NT)*.

- (ii) De facto couples would be able to plan their financial future with a degree of certainty;
- (iii) Because the agreement will contain terms governing the partners' financial relationship, fewer disputes should arise and litigation would be less likely.⁴⁴

The Working Paper also listed the following arguments against allowing de facto partners to enter binding cohabitation and separation agreements -

- (i) Hardship and injustice could result if one de facto partner signs an unfair agreement because of pressure applied by the other de facto partner or because of inequality of bargaining power;
- (ii) If the partners enter into an agreement at the beginning of the relationship, the agreement may not be appropriate some years later when the nature of or the circumstances surrounding the relationship have substantially altered;
- (iii) It is inappropriate for de facto couples to be regulated by a formal contract because this indicates a lack of trust between the partners which could ultimately undermine the relationship;
- (iv) Cohabitation and separation agreements are less likely to be used by socially or economically disadvantaged members of the community.⁴⁵

One of the matters considered by the Joint Select Committee inquiring into certain aspects of the *Family Law Act 1975 (Cwth)* was "the desirability of the wider use of financial agreements in areas where such agreements might be useful".⁴⁶

The Committee reviewed the submissions it had received on the topic and extracted the perceived advantages and disadvantages of allowing people to use financial agreements in the context of marriage. The Report listed the following reasons for people favouring the use of financial agreements -

- (i) The increased certainty the existence of such contracts would bring to the property division;
- (ii) The ability to protect any assets owned prior to the marriage and acquired either through an inheritance or through their individual endeavours;

⁴⁴ De Facto Relationships Working Paper, pages 56-57.

⁴⁵ De Facto Relationships Working Paper, page 57.

⁴⁶ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.1.

- (iii) The speedier resolution of property settlements through the courts;
- (iv) The social mores of other cultures, whereby the use of financial agreements on marriage was widespread and acceptable.⁴⁷

The Report then noted that financial agreements, particularly pre-marital agreements, were considered by some people to have the following disadvantages -

- (i) The existence of such agreements is not conducive to marital stability;
- (ii) Women are disadvantaged given that they are generally in a less powerful bargaining position than men;
- (iii) It is not possible to foresee all possible developments which could affect the future financial position of both parties.⁴⁸

After reviewing the relevant material, the Committee expressed its view that "the very process of discussing matters to be included in a financial agreement may help to establish a positive basis for a marriage. The ability to raise and discuss such issues of importance as 'family finances' could be fundamental to the establishment of a partnership that will work in the long term. The Committee concludes that the wider use of financial agreements should be encouraged."⁴⁹

The Committee therefore recommended that financial agreements be legally recognised and enforceable in the courts under the *Family Law Act 1975 (Cwth)*.⁵⁰

The views of the Commission expressed in the De Facto Relationships Working Paper on allowing de facto partners to enter into financial agreements which can be binding on the parties in an application under the proposed legislation have not changed. The arguments for allowing parties to enter into binding financial agreements outweigh the arguments against. It is important that de facto couples be able to plan their financial future with some certainty and to elect not to be

⁴⁷ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraphs 12.7.1-12.7.4.

⁴⁸ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraphs 12.8.1-12.8.3.

⁴⁹ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.24.

⁵⁰ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.27, recommendation 90.

regulated by the legislation proposed by the Commission.⁵¹ Also relevant to the Commission's decision are: the support in the submissions on the Shared Property Discussion Paper and De Facto Relationships Working Paper for the ability of de facto partners to enter into financial agreements; the fact that the New South Wales and Northern Territory legislation provides for financial agreements to be entered into;⁵² and, the recent recommendations of the Joint Select Committee on financial agreements in the context of marriage.

* ***Meaning of "cohabitation agreement" and "separation agreement"***

For the purposes of the proposed legislation, the terms "cohabitation agreement" and "separation agreement" are defined in clauses 9 and 10 respectively.⁵³

It is clear from the wording of clauses 9(3) and 10(3), that the provisions of Chapter 2 may apply even if the cohabitation or separation agreement were entered into before the legislation commenced operation. Provided the de facto relationship had not already ceased when the Act commenced, the provisions of Chapter 2 will apply to a cohabitation or separation agreement entered into between the parties.⁵⁴

PART 1 - GENERAL

Division 1 - Purpose and how it is to be achieved

16. Purpose - self regulation

The purpose of this Chapter is to allow de facto partners to plan their financial future and resolve financial matters at the end of their relationship.

⁵¹ The court will be unable to make a property or maintenance order contrary to the terms of the agreement if the agreement complies with clause 11 of the proposed legislation. Note, however, the power of the court under clauses 24 and 25: see footnote 43.

⁵² See Part IV *De Facto Relationships Act 1984 (NSW)* and Part 3 *De Facto Relationships Act 1991 (NT)*.

⁵³ See pages 18-19 of the Report.

⁵⁴ Clauses 9, 10 and 14 of the draft legislation.

17. Purpose achieved by permitting cohabitation and separation agreements

This purpose is achieved by permitting de facto partners to make cohabitation and separation agreements that, in certain circumstances, exclusively regulate the resolution of financial matters at the end of their relationship.

Division 2 - Use of cohabitation and separation agreements

18. Cohabitation and separation agreements are valid

De facto partners may make cohabitation and separation agreements.

19. Court's jurisdiction may not be excluded

A provision in a cohabitation or separation agreement that purports to exclude the jurisdiction of a court is invalid, but its invalidity does not affect the validity of the rest of the agreement.

20. Law of contract applies

A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this Act.

As cohabitation and separation agreements are contracts, they may be enforced or set aside under accepted principles of contract law.⁵⁵

21. Effect on periodic maintenance of partner's death

(1) If a de facto partner who is required to pay periodic maintenance under a cohabitation or separation agreement dies, the provisions of the agreement relating to the payment of periodic maintenance by the partner cease to have effect unless the agreement expressly provides otherwise.

⁵⁵

This is subject to the power of the court under clauses 24 and 25: see footnote 43.

- (2) *If a de facto partner who is entitled to receive periodic maintenance under a cohabitation or separation agreement dies, the provisions of the agreement relating to the payment of periodic maintenance to the partner cease to have effect.*
- (3) *Subsections (1) and (2) do not affect the right of a person to recover arrears of periodic maintenance that are payable under a cohabitation or separation agreement at the time of a partner's death.*

22. Effect on property adjustment and lump sum payment of partner's death

If a de facto partner dies before the provisions of a cohabitation or separation agreement relating to property and lump sum payments have been carried out, the provisions may be enforced on behalf of or against the estate of the deceased partner unless the agreement expressly provides otherwise.

PART 2 - RELATIONSHIP BETWEEN AGREEMENTS AND PROCEEDINGS

In the introductory comments to Chapter 2, the meaning of "financial agreement" was explained.⁵⁶ The interaction between such agreements and the ability of the court to make property and maintenance orders was also discussed.⁵⁷ If the parties have entered into a financial agreement which satisfies the requirements of the legislation,⁵⁸ it will be relatively difficult for the court to make an order adjusting an interest in property or for maintenance which is inconsistent with the terms of the financial agreement.⁵⁹

Clause 11 of the draft legislation sets out the requirements which the agreement must satisfy before it will be binding on the parties in proceedings to alter interests in property or for maintenance. An agreement which satisfies these requirements is referred to in the legislation as a "recognised agreement". "Recognised agreements" are dealt with in Division 1 of this Part. Agreements which do not comply with clause 11 are called "other agreements" and are dealt with in Division 2 of this Part.

⁵⁶ See page 21 of the Report.

⁵⁷ Ibid.

⁵⁸ Clause 11 of the draft legislation.

⁵⁹ Note, however, the power of the court under clauses 24 and 25: see footnote 43.

Division 1 - Recognised agreements

Clause 11 sets out the requirements which the financial agreement must satisfy before it will be enforceable by a court in proceedings to alter interests in property or for maintenance.⁶⁰ Once the agreement satisfies these requirements, it will be relatively difficult for the provisions of the agreement to be varied or set aside.

The agreement could be set aside on accepted contractual law principles such as fraud or unconscionability.⁶¹ In addition to these grounds, the legislation allows the court to intervene if to enforce the agreement would result in serious injustice to one of the de facto partners or a child of the partners⁶² or if, because of circumstances that arose since the agreement was made, it would be impracticable for the agreement to be carried out.⁶³

The Commission considered at some length the desirable formality and extent of disclosure which is appropriate for financial agreements entered into between de facto partners. On one hand, the legislation could provide that few requirements need to be satisfied before the agreement will be binding on the parties in proceedings under the proposed legislation. To protect the parties entering into the agreement, however, the court would need fairly wide powers to vary or set aside the agreement. In contrast, the legislation could impose very onerous requirements before the agreement will be binding. These requirements could, for example, require that each party receive independent legal advice before entering into the agreement.⁶⁴ If this were the case, the rights of the parties would be better protected and the court would need only limited power to vary or set aside the financial agreement.

The Commission considers that it has reached a proper balance between the requirements necessary for the agreement to be binding on the parties in an action under the proposed legislation and the ability of the court to vary or set aside that agreement. To be a recognised agreement and, therefore, binding on the parties, it must be in writing, signed by the partners and witnessed by a justice of the peace (qualified) or a solicitor. It must also contain a statement of the property, financial resources and liabilities of each partner at the date the agreement was signed. If these requirements are satisfied, the court can only vary or set it aside if to enforce it would lead to serious injustice or, in the circumstances that have

⁶⁰ Clause 11 is set out in full on page 19 of the Report.

⁶¹ Clause 20 of the draft legislation.

⁶² "Child" of de facto partners is defined in clause 4 of the draft legislation.

⁶³ Clause 25 of the draft legislation.

⁶⁴ See, for example, the requirements of section 47 *De Facto Relationships Act 1984 (NSW)*.

arisen since the agreement was entered into, it would be impracticable for the agreement to be carried out.⁶⁵

Because of the requirements set out in clause 11, not all de facto partners may want to enter into financial agreements. If, for example, either or both de facto partners is not prepared to disclose all of their significant property, financial resources and liabilities, the legislation does not provide for them to enter into an agreement which will be binding on them if there is a later application to alter interests in property or for maintenance.

* ***Signing and witnessing of agreement***

Clause 11 is substantially different from section 47 of the *De Facto Relationships Act 1984* which is the corresponding section in the New South Wales legislation. Section 47 sets out very detailed certification requirements which must be satisfied before the financial agreement will be binding on the parties in proceedings under the Act. Section 47 requires a solicitor to advise the de facto partner in relation to the following matters -

- (i) The effect of the agreement on the rights of the partners to apply to the court for an order for maintenance or to alter interests in property;
- (ii) Whether or not, at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement;
- (iii) Whether or not, at that time, it was prudent for that partner to enter into the agreement; and
- (iv) Whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.⁶⁶

In submissions received on its Shared Property Discussion Paper, strong opposition was expressed to the onerous nature of the duties imposed on a solicitor in complying with the New South Wales provision. The following is a summary of the concerns which were expressed in those submissions -

- (i) It may be difficult for the solicitor to predict the likely order of the court as the solicitor may not have all the evidence which would be available to a court;
- (ii) It would be expensive for the client to obtain a certified agreement because it would be necessary to retain a solicitor;

⁶⁵ Clause 25 of the draft legislation.

⁶⁶ Section 47(1)(d) *De Facto Relationships Act 1984 (NSW)*.

- (iii) There may not be consistency in the approach adopted by solicitors in the certification process;
- (iv) There may be a risk of solicitors being sued for negligence because of perceived inadequacies of advice. This could mean that solicitors will not be prepared to certify agreements;
- (v) It is preferable for the court which has heard both parties to be satisfied that the arrangements will be fair for the parties;
- (vi) The legislation imposes too onerous a duty upon solicitors;
- (vii) It may be difficult for the solicitor to advise on the "fairness" of the agreement because of the wide possible meaning of that word.

The Commission has considered these submissions carefully. It remains of the view expressed in its De Facto Relationships Working Paper that the certification requirements of the New South Wales legislation are too onerous. The Commission is concerned that these requirements will place financial agreements out of the financial reach of many de facto couples. Moreover, some of the duties imposed on solicitors such as advising the client on whether it is "prudent" for that person to enter into the agreement⁶⁷ place solicitors in a difficult position. "Prudence" covers a wide range of factors, not necessarily limited to financial considerations.

Under the Northern Territory model, all that is required for an agreement to be binding is for it to be in writing and signed by the de facto partner against whom the application to alter an interest in property or for maintenance is brought.

The requirements of clause 11 that the agreement be in writing, signed by both parties, and witnessed by a justice of the peace (qualified) or a solicitor therefore more closely reflect the Northern Territory legislation than the New South Wales Act. These requirements also closely reflect the recommendations of the Joint Select Committee relating to financial agreements in the marriage context.⁶⁸

* ***Disclosure requirement***

Under the model recommended by the Commission, before the financial agreement will be binding on the parties in an application under the proposed legislation, the agreement must contain a statement of each partner's significant property, financial

⁶⁷ Section 47(1)(d)(iii) *De Facto Relationships Act 1984 (NSW)*.

⁶⁸ The Joint Select Committee recommended that the agreement be in writing, signed by both parties and witnessed by independent persons: Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.27, recommendation 91.

resources and liabilities.⁶⁹ Such a requirement is not a feature of the New South Wales or Northern Territory legislation.

In its De Facto Relationships Working Paper, the Commission expressed concern that this requirement to disclose would make the agreement more complicated and discourage couples from entering into it. It would be an undesirable situation if people did not feel confident about entering into such an agreement without the assistance of a solicitor, making financial agreements less accessible to de facto couples.

On the other hand, the Commission believes that a cohabitation or separation agreement can fairly provide for property or maintenance matters only if both partners are fully informed of the property, financial resources and liabilities of the other.

In an attempt to overcome the difficulties associated with the disclosure requirement, the Commission has drafted the legislation so that a failure to disclose will not necessarily mean that the agreement will not be a "recognised agreement". The duty to disclose extends only to "significant" property, financial resources and liabilities of a partner. Clause 11(2) gives assistance on what is meant by "significant". To determine what is "significant", the value of the property, financial resources or liabilities not stated must be compared with the value of the partner's stated property, financial resources and liabilities. It is not intended to permit a party to deliberately conceal the existence of any property. However, it is recognised that some people may inadvertently overlook property of insignificant value.

The advantages of de facto partners' being able to draw up an agreement with knowledge of each other's property, financial resources and liabilities outweigh the disadvantages of requiring the partners to disclose. This is particularly the case if the partners are required to disclose only their "significant" property, financial resources and liabilities.

23. No property adjustment or maintenance order inconsistent with recognised agreement

(1) If a court is satisfied that there is a recognised agreement, the court must not make a property adjustment or maintenance order that is inconsistent with the agreement's provisions on financial matters.

⁶⁹ Compare recommendation 92 of the Joint Select Committee in its Report on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.27. The Committee recommended that pre- and post-marital financial agreements be able to provide for registration of assets and liabilities of both parties.

(2) Subsection (1) is subject to -

- section 24 (Court to ignore revoked provision); and
- section 25 (Court may vary recognised agreement if serious injustice or impracticable).

24. Court to ignore revoked provision

For the purpose of section 23 (No property adjustment or maintenance order inconsistent with recognised agreement), a court must ignore a provision that the de facto partners have, in writing or by their conduct, revoked or consented to its revocation.

Clause 24 differs from the clause proposed in the draft legislation in the De Facto Relationships Working Paper⁷⁰ and the equivalent sections in the de facto relationships legislation in New South Wales and Northern Territory.⁷¹ In the clause proposed in the Working Paper, the court was not required to give effect to the terms of a financial agreement if the court were satisfied -

- "(a) *that the de facto partners have, by their words or conduct, revoked or consented to the revocation of the agreement; or*
- (b) *that the agreement has otherwise ceased to have effect.*"

Before a financial agreement will be binding on the parties in proceedings under the proposed legislation, it must satisfy the requirements of clause 11. The agreement must be in writing, signed by the parties, witnessed by a justice of the peace (qualified) or solicitor and contain a statement of all significant property, financial resources and liabilities of the parties. Given the degree of formality imposed by clause 11, it would be illogical to allow one or more terms of the agreement to cease to have effect by words alone.

Clause 24 directs the court, however, to ignore a provision which the parties have in writing or by conduct revoked.

The Commission also recommends deleting paragraph (b) as set out above. A court cannot be bound by a clause in an agreement which "has otherwise ceased to have effect". It is unnecessary for the legislation to specifically state this to be the case.

⁷⁰ Clause 6.4 of the draft legislation in the Working Paper.

⁷¹ Section 50 *De Facto Relationships Act 1984 (NSW)* and section 47 *De Facto Relationships Act 1991 (NT)*.

25. Court may vary recognised agreement if serious injustice or impracticable

- (1) *If, on an application for a property adjustment or maintenance order, the court is satisfied that -*
- (a) *enforcement of a recognised agreement of the de facto partners would result in serious injustice for a party to the agreement or a child of the partners; or*
 - (b) *because of circumstances that have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out;*

the court may vary all or any of the provisions of the agreement.

- (2) *It does not matter whether the serious injustice would happen on the application before the court or on another application for a remedy or relief under another law.*
- (3) *It does not matter whether the agreement purports to prevent a variation of all or any of the agreement's provisions.*
- (4) *If the court varies a provision of the agreement, section 23 (No property adjustment or maintenance order inconsistent with recognised agreement) applies to the agreement as varied.*
- (5) *This section does not affect any other right a person may have to have the agreement varied.*
- (6) *In this section -*

"law" includes a law of the Commonwealth, another State or a Territory;

"vary" includes set aside.

One of the arguments against allowing de facto couples to enter into binding financial agreements is that hardship could result if the de facto partners sign an agreement which is or becomes unfair to one of them. This could occur, for example, if there is pressure applied by the other de facto partner, if there is inequality of bargaining power or if there is a significant change in the financial circumstances of the parties since entering into the agreement.

A legislative safeguard to ensure hardship does not result in these circumstances is to give the court power to vary or set aside one or more provisions in the agreement.⁷²

The New South Wales legislation contains onerous requirements before a cohabitation or separation agreement will be binding on the parties in an application to alter interests in property or for maintenance. Once these requirements have been met, it is difficult for the provisions of the agreement to be varied or set aside. There is no provision in the legislation for varying or setting aside a separation agreement. A cohabitation agreement can only be varied or set aside if the circumstances of the partners have so changed since the agreement was entered into that it would lead to serious injustice to enforce the agreement.⁷³

In its Report, the Joint Select Committee recommended that the *Family Law Act 1975 (Cwth)* be altered so that financial agreements be legally recognised and enforceable in the courts.⁷⁴ The Committee also recommended that the court be given a residual discretion to intervene even though the parties have entered a financial agreement.⁷⁵ The grounds upon which the Committee suggests the court be entitled to intervene reflect those grounds in the New South Wales legislation.⁷⁶

The Northern Territory legislation allows the court to set aside both cohabitation and separation agreements. The grounds are easier to satisfy than under the New South Wales legislation. The court must be satisfied that enforcement of the agreement would lead to serious injustice between the partners or that circumstances have arisen since the time the agreement was made making it impracticable for it to be carried out.⁷⁷

In the De Facto Relationships Working Paper, the Commission tentatively recommended that the court only need be satisfied that enforcement of the agreement would result in "injustice".⁷⁸ The Commission invited submissions on

⁷² For an examination of the grounds for varying or setting aside financial agreements under the *Family Law Act 1975 (Cwth)*, the *De Facto Relationships Act 1984 (NSW)* and the *De Facto Relationships Act 1991 (NT)*, see De Facto Relationships Working Paper, pages 145-148.

⁷³ Section 49(1) *De Facto Relationships Act 1984 (NSW)*.

⁷⁴ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.27, recommendation 90.

⁷⁵ Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, paragraph 12.27, recommendation 97.

⁷⁶ *Ibid.*

⁷⁷ Section 46 *De Facto Relationships Act 1991 (NT)*.

⁷⁸ Clause 6.3 of the legislation proposed in the Working Paper.

whether this ground was too wide. Unfortunately, very few submissions were received on this point.

In determining the appropriate test to allow a court to vary or set aside the terms of a financial agreement, the Commission has sought to safeguard the position of partners who enter into financial agreements and to minimise the chance of a partner suffering hardship as a result of entering unfair agreements. This clause, however, is not the only clause which safeguards the position of de facto partners. Clause 11 imposes requirements which are aimed to ensure that de facto partners do not lightly enter into financial agreements. A certain degree of formality is required. Moreover, each partner is required to disclose his or her significant property, financial resources and liabilities.

Because the legislation imposes requirements to be met before a financial agreement will be binding on the parties in an application under the proposed legislation, the Commission anticipates that financial agreements will be entered into only after the partners have thought carefully about entering into such agreements. Accordingly, those partners will not want that agreement to be easily disregarded.

Clause 25 has been drafted to take these matters into consideration.

To ensure that the agreement cannot be easily varied or set aside, the Commission recommends that the court may vary or set aside the agreement if to enforce it would lead to serious injustice. The "serious injustice" test has the advantage of being the test used in the New South Wales and Northern Territory provisions.

As the "serious injustice" test is more difficult to satisfy than the "injustice" test inserted in the provision in the Working Paper,⁷⁹ the Commission recommends inserting a second ground enabling a court to vary or set aside the agreement where circumstances have arisen since the time the agreement was entered into making it impracticable for its provisions, or any of them, to be carried out. The grounds for setting aside the agreement recommended by the Commission therefore now reflect the grounds under the Northern Territory legislation.

* ***Serious injustice to partners or child of partners***

In some cases, enforcing the agreement may lead to serious injustice to a child. This would occur if, for example, the child has made substantial contributions of a kind referred to in clauses 43 or 44 which would entitle him or her to an interest in property.⁸⁰ If the financial agreement does not make provision for such a child,

⁷⁹ Clause 6.3 of the legislation proposed in the Working Paper.

⁸⁰ The legislation proposed by the Commission in this Report allows the court in an application to alter property interests to make a property order for the benefit of a child of the partners as well as the partners themselves. See pages 56-58 of this Report for a more detailed explanation of this issue.

the court may find that enforcing the agreement would result in serious injustice to that child.

The Commission therefore recommends that the court be able to vary or set aside provisions of an agreement which would result in serious injustice to a child of the partners.

Division 2 - Other agreements

26. Other cohabitation or separation agreements may be considered

If, on an application for a property adjustment or maintenance order, a court -

- (a) is satisfied that there is a cohabitation or separation agreement of the de facto partners; but*
- (b) is not satisfied that it is a recognised agreement;*

the court -

- (d) may make any order that it could have made if there were no cohabitation or separation agreement; but*
- (e) in making its order, may consider the agreement's provisions on financial matters, in addition to the matters the court is required to consider under Part 3 (Adjustment of property interests) or 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court).*

27. Court to ignore revoked provision

For the purpose of section 26 (Other cohabitation or separation agreements may be considered), a court must ignore a provision that the de facto partners have, in writing or by their conduct, revoked or consented to its revocation.

CHAPTER 3 - RESOLUTION OF FINANCIAL MATTERS BY COURT

In this chapter the Commission recommends the enactment of legislation to overcome defects in the common law in altering interests in property and the payment of maintenance. Parts 3 and 4 of Chapter 3 deal with the alteration of interests in property and maintenance entitlements respectively.

The Commission also recommends legislation which departs from the de facto relationships legislation in other jurisdictions in important respects. The limitations the Commission has identified in the New South Wales, Northern Territory and Victorian legislation are discussed in detail under the relevant Parts in this chapter.

Before the court is entitled under the proposed legislation to order an alteration of interests in property or the payment of spousal maintenance, the de facto relationship must be one which may be regulated by the legislation. Not all de facto relationships are automatically covered by the proposed legislation. Part 1 of this Chapter of the legislation sets out the prerequisites which must be satisfied before the court may make an order under Parts 3 or 4.

Part 2 of this chapter enables the court to declare existing property rights. Existing property rights mean property rights existing at common law or in equity without regard to any entitlement a person may have under the proposed legislation.

PART 1 - PREREQUISITE FOR PROPERTY ADJUSTMENT AND MAINTENANCE PROCEEDINGS

Before a court can make an order altering interests in property or for the payment of maintenance, the matters set out in Part 1 must be satisfied. Firstly, the de facto relationship must be of the kind described in clause 28. Secondly, the application to alter interests in property or for maintenance must be made within 2 years from the day on which the relationship ended or the other matter set out in clause 29 exists. Finally, the court may only make an order if the partners have disclosed their financial circumstances as required by clause 30.

* *Queensland connection*

In New South Wales, the Northern Territory and Victoria, there are provisions which set out the connection with the respective State or Territory which must be satisfied before an order altering interests in property or for maintenance may be made by the Court.⁸¹

⁸¹ Section 15 *De Facto Relationships Act 1984 (NSW)*, section 15 *De Facto Relationships Act 1991 (NT)* and section 280 *Property Law Act 1958 (Vic)*.

For example, section 15 of the New South Wales Act provides for residency on the day of the application and for both parties being resident within New South Wales for a substantial period of their de facto relationship or substantial contributions having been made in New South Wales by the applicant. "Substantial period" is defined in that section.

Clause 3.1 of the Bill included in the Working Paper of the Commission set out prerequisites for making an order under Part 3, namely, one or both partners having lived in Queensland on the day of the application and one or both partners having lived together in Queensland for at least one year, substantial contributions of the kind referred to in clause 3.8(1)⁸² having been made in Queensland by the applicant or a substantial part of the partners' assets or a substantial asset being situated in Queensland.

The discussion of clause 3.1 in the Working Paper included examples which highlight the difficulties in formulating an appropriate clause.⁸³

A submission received by the Commission on the De Facto Relationships Working Paper suggested that clause 3.1 be deleted. The reasons provided for deleting clause 3.1 were persuasive. Firstly, it was suggested that inserting this clause would mean that the legislation would not fully utilise the legislative power of Queensland. Secondly, it was suggested that the failure to utilise that power fully could, in particular cases, cause injustice. That is, clause 3.1 may have the practical result of limiting the jurisdiction otherwise available at common law. For example, itinerant workers who move from State to State may satisfy the common law test, but not satisfy the provisions of clause 3.1. The third argument was that the need to prove those matters listed in clause 3.1 added unnecessary threshold issues to any proceedings commenced under the proposed legislation.

If the respondent objects to the court's jurisdiction then the court must be satisfied that it has jurisdiction. "In deciding whether to proceed with a matter or to stay it, the court is less likely to proceed where there is only a slight connection with the forum than where there is a substantial connection with it."⁸⁴

Historically, the common law concerning the convenient forum has not been easy to state. However, there is a recent important re-formulation of the test to be applied in the judgment of the High Court in Voth v Manildra Flour Mills Pty Ltd,⁸⁵ namely, the "clearly inappropriate forum" test.

⁸² Clause 3.8(1) of the draft legislation in the De Facto Relationships Working Paper.

⁸³ De Facto Relationships Working Paper, pages 89-90.

⁸⁴ Cairns B C *Australian Civil Procedure* (3rd edition), 1992, page 76.

⁸⁵ (1990) 171 CLR 538.

This case also makes it clear that in applications for a stay the court's power is discretionary and involves a subjective balancing process, to be exercised only in a clear case.

The practical difficulties of proof and possible attendant delay and additional costs associated with the proposed clause 3.1 outweigh the uncertainties which prevail in the common law in applying the inappropriate forum test.

If there is no objection to jurisdiction by a respondent, then the issue may still be raised by the court if it thinks it appropriate, by virtue of its inherent jurisdiction to prevent abuse of process.

Accordingly, no equivalent of clause 3.1 appears in the legislation proposed in this Report.⁸⁶

*** Non-Queensland and pre-commencement matters**

In the draft legislation in the De Facto Relationships Working Paper, clause 3.2 provided as follows -

If a court is satisfied about the matters specified in section 3.1, it may make or refuse to make an order because of facts and circumstances even if those facts and circumstances, or some of them, occurred before the commencement of this Act or outside Queensland.

This clause would be relevant if the legislation contained clause 3.1 requiring there to be a Queensland connection. Clause 3.2 ensured that the court consider a matter although it occurred outside Queensland or before the commencement of the Act.

As the Commission recommends the deletion of clause 3.1 and matters set out in clause 3.2 can be considered by a court in any event, there is no need for a clause to specifically direct the court in this regard. The legislation proposed in this Report, therefore, does not contain an equivalent of clause 3.2.

28. Type of de facto relationship

A court may make a property adjustment or maintenance order only if it is satisfied that -

- (a) the de facto partners have lived together in a de facto relationship for at least 2 years; or*

⁸⁶ If there is a referral of powers concerning de facto relationships by the States to the Commonwealth, the issue of a jurisdictional connection will, of course, no longer be relevant.

- (b) *there is a child of the de facto partners under 18; or*
- (c) *the de facto partner who applied for the order has made substantial contributions of the kind mentioned in section 43 (Contributions to property or financial resources) or 44 (Contributions to family welfare) and that failure to make the order would result in serious injustice to the de facto partner.*

Not all people living in de facto relationships will be covered by the proposed legislation. Before the court will be able to alter interests in property or order the payment of spousal maintenance, it must be satisfied of one of the following things -

- (i) the partners have lived in a de facto relationship for at least 2 years;
- (ii) there is a child of the partners who is less than 18 years; or
- (iii) the applicant has made substantial contributions of the kind mentioned in clause 43 (contributions to property or financial resources) or clause 44 (contributions to family welfare) and failure to make the orders would result in serious injustice to that de facto partner.

Clause 28 sets out the first hurdle which must be satisfied before a court may make a property adjustment or maintenance order. There are other hurdles a person must satisfy before the court will make a property order in his or her favour. For example, where a de facto partner applies for an order altering interests in property, the court will not make such an order unless it considers the order to be just and equitable.⁸⁷ In determining whether the order is just and equitable, the court considers the contributions referred to in clauses 43 and 44.

Similarly, before a court will make a maintenance order, it is not enough for the court to be satisfied of one of the matters set out in clause 28. The de facto partner must be unable to support himself or herself adequately and the reason for this inability must arise from the circumstances of the de facto relationship.⁸⁸ Furthermore, in determining whether maintenance should be ordered and, if so, the extent of the maintenance, the court must consider a number of factors set out in the proposed legislation.⁸⁹

⁸⁷ Clause 40 of the draft legislation.

⁸⁸ Clause 64 of the draft legislation.

⁸⁹ Clauses 68-82 of the draft legislation.

In some important respects, clause 28 differs from the equivalent clause recommended in the De Facto Relationships Working Paper⁹⁰ and equivalent clauses in the de facto relationships legislation in New South Wales, Northern Territory and Victoria.⁹¹ The 3 paragraphs of clause 28 are considered below.

(a) two year period

Under paragraph (a) of clause 28, a court is entitled to make a property adjustment or maintenance order if the de facto partners have lived together in a de facto relationship for 2 years or more. This is the same time period as is required under the New South Wales, Northern Territory and Victorian legislation.⁹²

The Commission has considered arguments supporting a 2 year, 3 year and 5 year period. In its review of the law on de facto relationships, the New South Wales Law Reform Commission also examined what would be the appropriate period in this context. Members of the New South Wales Commission differed on whether the period should be 2 years or 3 years.

Two members were in favour of a 2 year period for the following reasons -

- * The period is sufficient to demonstrate that the relationship has been substantially more than transitory or casual;
- * The major purpose of this basic requirements is to avoid the danger of trivial or unmeritorious claims coming before the court. This purpose would be achieved by a requirement of a 2 year period;
- * A longer period increases the likelihood that meritorious claims will not reach the court. The case studies carried out by the New South Wales Commission suggested that de facto relationships of this duration involve substantial intermingling of finances, joint purchases of property and other assets, and non-financial contributions in the form of housework or improvements to household property.⁹³

⁹⁰ Clause 3.3 of the draft legislation in the De Facto Relationships Working Paper.

⁹¹ Section 17 *De Facto Relationships Act 1984 (NSW)*, section 16 *De Facto Relationships Act 1991 (NT)* and section 281 *Property Law Act 1958 (Vic)*.

⁹² Section 17 *De Facto Relationships Act 1984 (NSW)*, section 16 *De Facto Relationships Act 1991 (NT)* and section 281 *Property Law Act 1958 (Vic)*.

⁹³ Report No 36 on De Facto Relationships, New South Wales Law Reform Commission, 1983, paragraph 9.8.

Three members of the New South Wales Commission were in favour of a 3 year period for the following reasons -

- * Whether the period is 2 or 3 years, cases of serious hardship will be avoided by the provision allowing a partner who has made a substantial contribution, or who will suffer serious injustice if an order is not made, to apply notwithstanding that the relevant period has not expired;⁹⁴
- * A 3 year period will serve to limit access to the court of those members of the de facto population who have clearly demonstrated that theirs is not a transient relationship;
- * A 3 year period will highlight, to a greater degree than a 2 year period, that the law is concerned to maintain a real difference between marriage and de facto relationships.⁹⁵

The Queensland Commission was divided on the appropriate period for the purpose of clause 28(a). The majority considers the 2 year period to be the preferable choice. In addition to the matters set out above, the majority was persuaded by the following arguments -

- * The 2 year period applies in the de facto relationships legislation in the other jurisdictions;⁹⁶
- * The 2 year period which is the relevant period in the New South Wales, Northern Territory and Victorian legislation⁹⁷ appears to be working satisfactorily. The Commission is not aware of any criticism of the 2 year period used in the legislation, nor has it been suggested in any of the published material that the 2 year period has led to the institution of unmeritorious claims;
- * If the period were different in Queensland from the existing de facto relationships legislation in other jurisdictions, parties would be encouraged to forum shop. If a person could not satisfy the requirements of the Queensland legislation, he or she may attempt to bring the action in New South Wales, the Northern Territory or Victoria;

⁹⁴ See clause 28(c) for the equivalent clause in the draft legislation.

⁹⁵ Report No 36 on De Facto Relationships, New South Wales Law Reform Commission, 1983, paragraph 9.9.

⁹⁶ Section 17 *De Facto Relationships Act 1984 (NSW)*, section 16 *De Facto Relationships Act 1991 (NT)* and section 281 *Property Law Act 1958 (Vic)*.

⁹⁷ Section 17 *De Facto Relationships Act 1984 (NSW)*, section 16 *De Facto Relationships Act 1991 (NT)* and section 281 *Property Law Act 1958 (Vic)*.

- * If the requisite period were 5 years, people who were living in de facto relationships for 2 to 5 years may not have access to the legislation. The benefits of the proposed legislation would, therefore, be available to fewer people in the community. Such people would be restricted to their rights at common law which, on the breakdown of a de facto relationship, are inadequate;
- * An argument used in support of a 5 year period is that this is the period now used in Part IV - Family Provision, of the *Succession Act 1981 (Qld)*, and that uniformity in legislation should be maintained. While uniformity of legislation is certainly a desirable objective, uniformity on this point does not currently exist in the legislation in Queensland. Under the *Workers Compensation Act 1990 (Qld)*, for example, the relevant period to satisfy the term "spouse" is 1 year;⁹⁸
- * Although the 2 year period will allow a person to claim an interest in property or maintenance, the court will take into account the length of the relationship in deciding whether or not to make a property or maintenance order.⁹⁹

One Commissioner, Mr Herlihy, dissents from the majority of the Commission in setting a 2 year cohabitation period as a pre-requisite to allowing an application to be made to the courts for an order for property adjustment or maintenance.

He points out that the proposed Queensland legislation is completely novel (in Australia and the rest of the common law world) in that it seeks to cover both heterosexual and homosexual couples. Experience in other jurisdictions having such legislation is therefore of limited relevance.

Heterosexual couples may have made a deliberate choice not to marry under the *Marriage Act 1961 (Cwth)*, while homosexual couples are not permitted to marry under that Federal Act. Mr Herlihy believes that such couples should only have rights and obligations imposed upon them by the State by a law acceptable to them and to society at large and which is workable in practice.

Mr Herlihy would support a 5 year cohabitation period for the following reasons -

- * A 5 year period highlights, to a greater degree than a 2 year period, that the law is concerned to maintain a real difference between marriage and all de facto relationships. This is particularly so in the case where the proposed legislation applies to homosexual relationships, as such couples are already discriminated against by Commonwealth law, and the State should be

⁹⁸ Section 2.1 *Worker's Compensation Act 1990 (Qld)*.

⁹⁹ See clauses 46 and 47 of the draft legislation.

circumspect in interfering in their relationships other than to permit enforcement of their own contracts;

- * A 5 year period will serve to limit access to the courts to those members of the de facto population (heterosexual and homosexual) who have clearly demonstrated that theirs is not a transient relationship. "Gold-digging" type relationships should then not pose a problem;
- * Whether the period is 2 or 5 years, cases of serious injustice are avoided by the provision allowing a partner, who has made substantial contributions and who will suffer serious injustice if an order is not made, to apply under the Bill, notwithstanding that the relevant period has not expired;¹⁰⁰
- * A 5 year period is the period now used in Part IV - Family Provision, of the *Succession Act 1981 (Qld)*. Those provisions allow a de facto partner to make an application for provision from the estate of his or her former partner if he or she is not adequately provided for from the estate. Some uniformity should be maintained;
- * After 2 years only, it will be extremely difficult to prove the relationship;¹⁰¹
- * A 2 year period could lead to unmeritorious applications being made to the courts thereby causing wastage of court time and public money.

(b) child of the partners

This paragraph differs from the equivalent paragraph in existing de facto relationships legislation.¹⁰² "Child" of de facto partners is defined in clause 4 for all purposes in the Act. Clause 4 defines "child" of de facto partners to mean -

- "(a) a child born because of sexual relations between the partners; or
- (b) a child of the female partner whose male partner is presumed to be the father of the child under an Act, a Commonwealth Act, an Act of another State or a Territory Act; or
- (c) a child adopted by the partners; or

¹⁰⁰ See clause 28 paragraph (c) of the draft legislation.

¹⁰¹ See *McKenzie v Falconer-Brown* (1990) 3 WAR 438.

¹⁰² Section 17 *De Facto Relationships Act 1984 (NSW)*, section 16 *De Facto Relationships Act 1991 (NT)* and section 281 *Property Law Act 1958 (Vic)*.

- (d) *a child who, at a time during the de facto relationship, is or was -*
- (i) *treated by either partner as a child of the relationship; and*
 - (ii) *ordinarily a member of the partners' household;"*

The term "child" of the de facto partners as defined above is different from the meaning in the New South Wales, Northern Territory and Victorian legislation because, in these jurisdictions, the term covers only paragraphs (a) - (c) in the proposed legislation.

The Commission believes that it should not be necessary for a child to fall within paragraphs (a) - (c) before the partners can access the legislation under this limb of clause 28. Not differentiating between a child who falls within paragraphs (a) - (c) of the definition in clause 4 and a child within paragraph (d) has the advantage of recognising the reality of modern families where many children do not live with both their natural parents who are married to each other.

Using the wide meaning of child (that is, paragraphs (a) - (d)) also recognises that duties may arise where there are children for whom adults are responsible. If a child lives in the household of the de facto partners, he or she is likely to be emotionally or financially dependent on one or both of the de facto partners. The child's needs do not cease when the de facto relationship ceases.

If a de facto partner can satisfy this limb of clause 28, it does not necessarily mean that a claim to alter interests in property or for maintenance will be successful. To succeed in such claims other matters set out in the legislation must be shown to exist.¹⁰³

A member of the Commission dissented on the definition of "child" and considered that in clause 28 and all relevant clauses in Parts 3 and 4 of the proposed legislation the definition ought to be limited to paragraphs (a) - (c) of the definition of "child" of the de facto partners.

(c) *substantial contributions made by applicant*

The third condition set out in clause 28 is that the applicant has made substantial contributions of the kind referred to in clauses 43 or 44 and failure to make the order would result in serious injustice to that de facto partner. This paragraph reflects the equivalent provision in the New South Wales, Northern Territory and Victorian legislation.¹⁰⁴

¹⁰³ In an application to alter interests in property, there must have been contributions of the kinds described in clauses 43 or 44. A court may only order spousal maintenance if the applicant is unable to adequately support himself or herself and this inability has arisen from the circumstances of the relationship: clause 64.

¹⁰⁴ Section 17(2) *De Facto Relationships Act 1984 (NSW)*, section 16(2) *De Facto Relationships Act 1991 (NT)* and section 281(2) *Property Law Act 1958 (Vic)*.

29. Time limit for making application

- (1) *A court may make a property adjustment or maintenance order only if -*
 - (a) *the application was made within 2 years after the day on which the de facto relationship ended; or*
 - (b) *the court has granted the applicant leave to apply.*
- (2) *The court may grant leave only if it is satisfied that hardship would result to 1 of the de facto partners or a child of the partners if leave were not granted.*

30. Disclosure of financial circumstances

- (1) *A party to a proceeding for a property adjustment or maintenance order must disclose the party's financial circumstances in the way prescribed by the rules of the relevant court.*
- (2) *If a party to a proceeding does not comply with subsection (1), the court deciding the proceeding may order the party to comply.*
- (3) *A court may make a property adjustment or maintenance order in favour of a party only if the party has complied with subsection (1).*
- (4) *Nothing in this section affects a court's power to make an interim order.*

In its De Facto Relationships Working Paper, the Commission recommended that before a court could make an order altering interests in property or for the payment of maintenance, the parties must disclose their financial circumstances.¹⁰⁵ Such disclosure must be made in a contested application to alter interests in property or for maintenance under the *Family Law Act 1975 (Cwth)*.¹⁰⁶

Under the *Family Law Act 1975 (Cwth)*, if the parties to a dispute consent to the order being made, there is no requirement to produce a statement or affidavit of

¹⁰⁵ Clause 3.4 of the legislation proposed in the De Facto Relationships Working Paper.

¹⁰⁶ Order 17 *Family Court Rules*.

financial circumstances.¹⁰⁷ However, the fact that the parties agree to the order being made by the court does not relieve the court from its duty to ensure that the order is just and equitable in the circumstances.¹⁰⁸

There is no such disclosure requirement in the de facto relationships legislation in the other jurisdictions.

By requiring disclosure of financial circumstances where parties agree to the order being made, the litigation process may be longer and therefore, more costly. This is of particular concern where the parties have resolved their dispute as a result of mediation and the parties wish to formalise the agreement by obtaining a consent order. It is the view of the Commission, however, that only if each party fully discloses their financial situation can the court be certain that a just and equitable order will be made. For this reason, the Commission recommends that the duty to disclose should extend to both contested and non-contested property and maintenance proceedings.

Clause 30 has been drafted in a different form from the equivalent provision in the De Facto Relationships Working Paper.¹⁰⁹ Clause 30 has the following elements.

Firstly, a statutory duty is imposed on the parties to disclose their financial circumstances in the manner prescribed by the rules.

Secondly, the court is empowered to make orders to enforce disclosure.

Thirdly, the court is empowered to make a property adjustment or maintenance order in favour of a party only if that party has disclosed. This means that the court will be able to make such an order even if there has been insufficient disclosure or no disclosure at all by the other party. This power is necessary if, for example, the other party has been served with the relevant documents but refuses to comply with the disclosure requirements or evades service of the documents.

Finally, clause 30 preserves the right of a court to make interim orders. The court may be requested to make an order in the absence of the other party in cases of emergency.¹¹⁰ In such cases, there may not have been disclosure of financial circumstances in the manner prescribed by the rules.

¹⁰⁷ Order 17 rule 4 Family Court Rules.

¹⁰⁸ See comments of the High Court in Harris v Caladine (1991) 172 CLR 84. Contrast, however, the earlier comments of the Family Court in Smith and Smith (1984) FLC 91-512.

¹⁰⁹ Clause 3.4 of the draft legislation in the Working Paper.

¹¹⁰ Clause 133 of the draft legislation.

PART 2 - DECLARATION OF PROPERTY INTERESTS

If there are proceedings on foot between de facto partners concerning their existing title or rights to property, Part 2 allows the court to make a declaration as to title or rights. Where such proceedings are on foot between de facto partners, Part 2 also allows the court to declare the interests of third parties in the property of the de facto partners.

A third party may wish to have his or her interests in the property of the de facto partners declared in the following context.

Example

Susan and Scott live in a de facto relationship. They buy a house which they register in Susan's name. Scott and his mother each contribute 30% of the purchase price, Susan contributing the remaining 40%. A dispute arises between Susan and Scott concerning ownership of the property and Scott seeks a declaration of his interest in the property.

In this example, it is likely that the mother will want to be a party to the proceedings and obtain a declaration of her interest in the property.

Division 1 - Purpose and how it is to be achieved

31. Purpose - ascertain existing interest

The purpose of this Part is to help people ascertain their existing rights in property of de facto partners.

32. Purpose achieved by declaration of property interests

This purpose is achieved by allowing a court to declare the title or rights of parties to a proceeding in property of de facto partners without regard to any adjustment in rights under Part 3 (Adjustment of property interests).

Division 2 - Declaration**33. Court may declare property interests**

- (1) *In a proceeding between de facto partners about existing title or rights in property, a court may declare the title or rights (if any) that a partner or another party to the proceeding has in the property.*
- (2) *It does not matter whether the de facto relationship has ended.*

34. Court may give effect to declaration

A court may make orders to give effect to a declaration under this Division.

PART 3 - ADJUSTMENT OF PROPERTY INTERESTS

One of the major problems with the existing law in Queensland concerning de facto relationships is that there is no legislation which governs property distribution between the partners if their relationship breaks down.¹¹¹ The de facto relationships legislation in New South Wales, the Northern Territory and Victoria goes a long way towards overcoming the difficulties arising out of the common law. Provided the requirements of the respective Acts are met, the court is empowered to alter interests in property after considering the contributions made by or on behalf of the de facto partners. In those jurisdictions, claims need no longer be couched in terms of equitable causes of action which were not designed to provide relief in these kinds of circumstances.

The New South Wales legislation was passed in 1984 as a result of an exhaustive review of this area of the law by the New South Wales Law Reform Commission.¹¹² The legislation proposed by the New South Wales Commission was extremely progressive for that time. Indeed, from the research conducted by the Queensland Commission, it appears that there is no comparable de facto relationships legislation in other common law countries.

The Queensland Commission is of the view, however, that the New South Wales legislation can now be improved upon. As the *De Facto Relationships Act 1984* (NSW) has been in operation for a number of years, a substantial body of case law has accumulated. The Commission is of the view that under the existing de facto

¹¹¹ For a review of the law in other jurisdictions with respect to property entitlements on the breakdown of de facto relationships, see *De Facto Relationships Working Paper*, pages 34-38.

¹¹² Report No 36 on *De Facto Relationships*, New South Wales Law Reform Commission, 1983.

relationships legislation, property orders made by the courts in New South Wales result in less favourable orders being made for the person who assumes the homemaking and parenting role when compared with orders made in similar circumstances under the *Family Law Act 1975 (Cwth)*.¹¹³

There are differences in the drafting of the equivalent provisions in existing de facto relationships legislation and the *Family Law Act 1975 (Cwth)*. In *D v McA*¹¹⁴ Powell J discussed the differences in wording between the *De Facto Relationships Act 1984 (NSW)* and the *Family Law Act 1975 (Cwth)*. He stated that "it is ... clear that, although legislating to remedy the injustices which might arise out of a de facto relationship, the Parliament did not intend to equate the position of de facto partners to that of partners of a marriage". Similarly, in *Wilcock v Sain*¹¹⁵ Young J commented that the Supreme Court of New South Wales "has never once accepted the submissions that the effect of the *De Facto Relationships Act 1984 (NSW)* is to give equivalence to the de facto relationship and the married state".

Under the New South Wales legislation, on the breakdown of a de facto relationship a partner is entitled to apply for an adjustment of interests in property in certain circumstances. This right is, however, more limited than the right of a married person under the *Family Law Act 1975 (Cwth)*. It is more limited because the courts administering the New South Wales legislation are not entitled to take into account as many factors as the Family Court.¹¹⁶

However, the recent decisions of the New South Wales Court of Appeal, *Black v Black*¹¹⁷ and *Dwyer v Kaljo*,¹¹⁸ illustrate the willingness of the court to take into consideration matters which are not contained in the legislation when altering interests in property. If this more expansive interpretation of the de facto relationships legislation continues, it is likely that property orders made in favour of the homemaking or parenting partner will improve.

¹¹³ For a comparison of orders for property distribution under the *Family Law Act 1975 (Cwth)* and the *De Facto Relationships Act 1984 (NSW)* refer to Appendix D of the De Facto Relationships Working Paper.

¹¹⁴ (1986) DFC 95-030 at 75,356.

¹¹⁵ (1986) DFC 95-040 at 75,449.

¹¹⁶ Compare section 79(4) *Family Law Act 1975 (Cwth)* with section 20 *De Facto Relationships Act 1984 (NSW)*.

¹¹⁷ (1991) 15 FamLR 109.

¹¹⁸ (1992) 27 NSWLR 728.

* ***Arguments for and against conferring on de facto couples similar property rights and responsibilities as married couples***

In its De Facto Relationships Working Paper, the Commission reviewed the arguments for conferring similar property rights on de facto couples as exist for married couples on the breakdown of their respective relationships. The following is a summary of the arguments in favour of conferring similar property rights.

- (i) The similar nature of the de facto and married relationships logically requires that there be largely the same consequences on the breakdown of the relationships. There is no necessary difference between the nature, length and quality of a marriage and of a de facto relationship.

De Facto partners have already been given rights under legislation other than with respect to property rights on separation in both Queensland and other jurisdictions. For example, in Queensland where a couple has been living in a de facto relationship and one partner dies, the other may be entitled to make a claim against the estate provided the relationship was sufficiently long and dependency can be proved.¹¹⁹ A surviving de facto partner may make a similar application against the estate of a deceased partner in New South Wales, the Northern Territory, Western Australia and South Australia.¹²⁰

Financial rights and obligations in marriage no longer depend solely on concepts of automatic dependence, but are based on the actual circumstances of the parties, their ability to support themselves, their contributions and their responsibilities towards children. Actual circumstances of these kinds arise in the same way for de facto couples.¹²¹

- (ii) Failure to give a de facto couple the same rights and responsibilities as a married couple may lead to inequitable results on the breakdown of the de facto relationship, particularly for women who are more likely to have undertaken the traditional homemaking role.

As a result of a review conducted by the Commission of cases decided under the *De Facto Relationships Act 1984 (NSW)*, on the breakdown of a de facto relationship, a de facto spouse who has foregone income earning

¹¹⁹ Section 41 *Succession Act 1981 (Qld)*. In Queensland, a de facto partner also has rights in certain circumstances to claim compensation where his or her partner is killed in an accident which occurred at work: Part V *Workers' Compensation Act 1990 (Qld)*.

¹²⁰ Section 7 *Family Provision Act 1982 (NSW)*, section 7 *Family Provision Act 1970 (NT)*, section 6 *Inheritance (Family and Dependents Provision) Act 1972 (WA)* and section 7 *Inheritance (Family Provision) Act 1972 (SA)*.

¹²¹ This represents one of the arguments considered by the Australian Law Reform Commission in its Discussion Paper No 46 on Multiculturalism: Family Law, 1991, paragraph 3.47.

to be a homemaker, whether to bear children or for other reasons, is not in as favourable a position as his or her married counterpart.

(iii) As de facto relationships are gaining acceptance, de facto partners should be treated the same as married partners on the relationship breakdown.¹²² The community is ready to accept the same property entitlements being given to de facto couples on the breakdown of the relationship.

(iv) The current trend is that more couples than previously are tending to live in de facto relationships rather than marry.¹²³

If living in a de facto relationship is being treated by many as similar to marriage, it is arguable that the same law should apply on the breakdown of both kinds of relationships.

(v) Religious reasons for distinguishing between marriage and de facto relationships should not impact on the law.

For some people, the failure of de facto partners to go through a marriage ceremony is a violation of religious values conscientiously held. Persons practising those values will not be affected by the proposed legislation. It does not follow, however, that because adherents of some religions believe that marriage alone should be given legal recognition, persons who do not share or practise those religious beliefs should be exempted from financial obligation towards their partners. It is now an almost universally held belief that parents have financial obligations to their children whether or not the parents are married at the time of the birth of the child. It may also be argued that to the extent that the law imposes greater financial obligations upon married partners than it does upon de facto couples, it could be seen as discouraging a partner from taking the formal step of marrying his or her partner.

(vi) People in a long-term de facto relationship perceive their relationship to be a "common law marriage".¹²⁴

¹²² Section 7(1)(b) *Anti-Discrimination Act 1991 (Qld)* prohibits discrimination against people on the basis of their marital status.

¹²³ In Queensland in 1986, 38,736 couples (6.5% of all couples) were living in de facto relationships: 1986 Census of Population and Housing: Small Area Data. In 1991, approximately 59,750 couples (9.6% of all couples) were living in de facto relationships: 1991 Census of Population & Housing: ABS Catalogue No's 2722.0 and 2722.3.

¹²⁴ In an Alberta survey conducted by the Albertan Institute of Law Research in 1983, 57% of non-married cohabitants described their living arrangements as a "common law marriage". There was a tendency to select the term "common law marriage" to describe their relationship as the duration of their relationship increased. The results of the survey indicated that as the length of the de facto relationship increased, the perception of the parties was that their relationship had the same indicia as marriage.

- (vii) Possible economic inequality of partners may require that de facto partners need legal protection.

In some cases, one partner to a de facto relationship may dominate the other partner economically. It is possible that one or both partners in a de facto relationship do not appreciate or accept the economic consequences of the relationship and their legal position on its termination. They should be entitled to a wider range of legal remedies than is presently available at common law.

The following are arguments for conferring only limited property rights on de facto couples on the breakdown of the relationship. Only limited property rights are conferred by the New South Wales, Northern Territory and Victorian legislation.

- (i) Giving the same property rights to de facto couples on the breakdown of their relationships might erode the institution of marriage and operate as a disincentive for parties to marry.

It has been argued that if fewer parties marry, this may lead to relationships of a shorter duration because divorce discourages hasty break-up of marriage which is not the case for de facto relationships.

Another argument which has been raised is that if a de facto partner is given rights to property on the breakdown of a relationship, this may leave less property for distribution to an earlier married spouse where there has not yet been a divorce and property settlement.¹²⁵

- (ii) Imposing legislation on heterosexual couples who enter into de facto relationships to avoid being regulated by the *Family Law Act 1975 (Cwth)* erodes the freedom of choice and autonomy of those partners.

The concept of marriage involves a public commitment and an interdependence which are not a necessary part of a de facto relationship. It cannot be assumed that all cohabiting couples wish to be subject to the legal regime that applies to married persons. If people choose not to marry, their freedom and autonomy should not be eroded by equating their relationship with marriage.

The ability of the Family Court to distribute property on the breakdown of a marriage is very wide. Couples may specifically choose not to be subject to this regime. Giving de facto couples the same property rights as married couples on the breakdown of a relationship denies the de facto couple the right to choose not to be so regulated.

¹²⁵ Report No 12 of Tasmanian Law Reform Commission on Obligations Arising from De Facto Relationships, 1977, page 4. It should be noted, however, that this is an argument against giving de facto couples any property rights at all rather than against giving the de facto couples the same property rights on a breakdown as married couples.

In a similar vein, the proposed legislation imposes rights and obligations on homosexual partners on the breakdown of their relationship who are currently not subject to a regulatory regime such as the *Family Law Act 1975 (Cwth)*. Some may prefer not to be subject to regulation by the proposed legislation.

- (iii) Some people consider there to be a qualitative difference between a de facto and married relationship which should be reflected in differing legislation governing the relationships.
- (iv) While de facto relationships are becoming increasingly accepted by society, there has been research to indicate that society may not be as accepting of a de facto union as it is of a marital union.¹²⁶ If this is the case, it may be argued that there are grounds for differing legislation governing the relationships.
- (v) It has been argued that people who encourage financial dependence by entering into a de facto relationship must also undertake appropriate obligations and responsibilities.¹²⁷ If partners do not come to their own financial arrangements on entering a de facto relationship, they should not have arrangements imposed on them by legislation.
- (vi) As there are differing kinds of de facto relationships, the law should provide reasonable flexibility in making provisions for these relationships. This could not be achieved by conferring the same property rights as exist for married couples.¹²⁸

* ***Recommendation of the Commission***

Having regard to the existing common law, it cannot be doubted that legislation must be enacted to ensure a just and equitable property distribution on the breakdown of a de facto relationship. If only limited property rights are conferred on de facto couples as is the case in New South Wales, the Northern Territory and Victoria, the Commission is concerned that on the breakdown of the relationship the de facto partner who has assumed the homemaking and child bearing role may be severely disadvantaged.

¹²⁶ Research paper of Professor Davies published as part of Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987, page 41.

¹²⁷ Submission made to the Tasmanian Law Reform Commission during a review on the law governing de facto relationships.

¹²⁸ Report of the Working Group on Matrimonial Property and Family Protection established by the New Zealand Government in March 1988.

Having said this, the Commission notes the two recent decisions of the New South Wales Court of Appeal, Black v Black¹²⁹ and Dwyer v Kaljo.¹³⁰ These cases illustrate the willingness of the court to take into consideration matters which are not contained in the legislation when altering interests in property. If this more expansive interpretation of the de facto relationships legislation continues, it is likely that property orders will better reflect the contribution of the homemaking or parenting partner.

The legislation proposed in this Report makes explicit this trend in case law and embodies it in statute. The Commission is of the view that the actual wording of de facto relationships legislation should reflect more closely the wording of the *Family Law Act 1975 (Cwth)* so that orders made under the proposed legislation will reflect more closely orders made under the *Family Law Act 1975 (Cwth)* where similar circumstances exist.

For these reasons, the Commission recommends that de facto partners who are eligible to be considered under the proposed legislation¹³¹ should have, as far as it is practicable, the same property rights and responsibilities as married partners on the dissolution of their relationship. It is pointed out that the eligibility of de facto partners must be established. It is not automatic as rights arising from marriage are.

The legislation in Part 3 reflects this recommendation of the Commission.

Division 1 - Purpose and how it is to be achieved

35. Purpose - just and equitable property distribution

The purpose of this Part is to ensure a just and equitable property distribution at the end of a de facto relationship.

¹²⁹ (1991) 15 FamLR 109.

¹³⁰ (1992) 27 NSWLR 728.

¹³¹ Clause 28 of the draft legislation.

36. Purpose achieved by conferring property rights and obligations

This purpose is achieved by -

- (a) *providing that de facto partners who satisfy the prerequisites set out in Part 1 (Prerequisites for property adjustment and maintenance proceedings) should have, as far as practicable, the same property rights and obligations as married partners have at the end of their marriage; and*
- (b) *allowing applications to a court for an adjustment of interests in property.*

Division 2 - Application

37. Partner may apply

After a de facto relationship has ended, a de facto partner may apply to a court for an order adjusting interests in the property of either or both of the de facto partners.

Clause 37 enables a de facto partner to apply to the court for an order altering interests in property. Equivalent provisions exist in the New South Wales, Northern Territory and Victorian legislation.¹³²

38. Partners or child may benefit from adjustment

The application may be for the benefit of either or both of the de facto partners or a child of the partners.

Clause 38 provides that the application referred to in clause 37 can be made for the benefit of the de facto partners or a child. The definition of "child" for this purpose is discussed in the commentary to clause 28.¹³³

¹³² Section 20 De Facto Relationships Act 1984 (NSW), section 13 De Facto Relationships Act 1991 (NT) and section 279 Property Law Act 1958 (Vic).

¹³³ See pages 43-44 of the Report.

39. Not affected by other rights

- (1) *An application may be made under this Division whether an application for another remedy or relief has been made, or may be made, under this Act or another law.*
- (2) *In this section -*
- "law" includes a law of the Commonwealth, another State or a Territory.*

Clause 39 makes it clear that an application under clause 37 to alter an interest in property does not affect any other rights, for example, under the common law, that the applicant may have.

Division 3 - Order adjusting property interests

40. Court may make property adjustment order

- (1) *A court may make any order that it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the partners or a child of the partners in the property.*
- (2) *It does not matter whether the court has declared the title or rights in the property.*

This provision empowers the court to alter interests in property in favour of either a de facto partner or a child.

Where parties to a marriage have separated, proceedings may be commenced under the *Family Law Act 1975 (Cwth)* to resolve any property disputes between the parties. A child of the marriage is entitled to intervene in those property proceedings.¹³⁴ The Family Court has power to alter property interests in favour of the child who intervenes.¹³⁵

The paucity of case law on this point indicates that it is rare for a child to intervene in property proceedings of the parents and to ask that a property order be made

¹³⁴ Section 92 *Family Law Act 1975 (Cwth)*. See, for example, *Krotofil and Krotofil* (1980) 6 FamLR 725.

¹³⁵ Section 79(1) *Family Law Act 1975 (Cwth)*. See, for example, *Dougherty v Dougherty* (1987) 163 CLR 278.

in his or her favour. In some cases, however, a child of a marriage may have strong moral grounds for claiming an interest in matrimonial property. The following example illustrates one such case.

Example

Phillip and Robyn own and live on a farm. There is one son of the marriage. The son had always lived on the farm and, since finishing grade 12, worked on the farm on a full-time basis. After the son left school, the parents bought a second farm. At the request of his parents, the son worked on the farm for no wages assuming that, in time, the second farm would be his. When the son was 31 years, the parents separated.

The above fact situation could occur in a de facto relationship. Nevertheless, the de facto relationships legislation in New South Wales, the Northern Territory and Victoria do not allow a child to intervene in property proceedings nor for the court to make a property order in favour of the child.

Departure from the *Family Law Act 1975 (Cwth)* in terms of allowing a court to make a property order in favour of a child is not justified. The Commission, therefore, recommends that in an application by a de facto partner to alter interests in property, the proposed legislation should allow the court to make a property order in favour of both the de facto partners or a child. Clauses 38 and 40 reflect this recommendation.

* ***Definition of "child" in whose favour a property order may be made***

In the De Facto Relationships Working Paper, the Commission invited comment on how to define "child" for the purposes of this clause. In other words, in proceedings under the proposed legislation, what should be the nexus between the child and the de facto partners before a court is able to make a property order in favour of that child? Unfortunately, very few submissions were received in this regard.

Under section 79 (1) of the *Family Law Act 1975 (Cwth)*, the court is empowered to make a property order only in favour of a child of the marriage. In the following example, the Family Court would be unable to make a property order in favour of the child.

Example

Peter and Karen are married. They own and live on a farm. At the time of their marriage, Karen had a son, Joseph, of a former relationship who was 12 months old. Joseph was accepted by Peter as his own and the couple had no children of their own. Since Peter and Karen's marriage, Joseph had always lived on the farm and, since finishing grade 12, worked on the farm on a full-time basis. After Joseph left school, Peter and Karen bought a

second farm. At the request of Peter and Karen, Joseph worked on the farm for no wages assuming that, in time, the second farm would be his. When Joseph 31 was years, Peter and Karen separated.

The meaning of "child" of the de facto partners in the context of clause 28 was discussed earlier.¹³⁶ The Commission considered in some detail the appropriateness of a range of possible definitions for the purpose of clause 40. Having considered this range of possible definitions, the Commission concluded that the meaning of "child" of de facto partners as defined in clause 4 is also appropriate in the context of clause 40.

If Peter and Karen were not married in the above example, this definition of "child" would be sufficiently wide to enable Joseph to have a property order made in his favour.

While the Commission is aware that this definition is relatively wide, if a person attempts to claim an interest in property under the proposed legislation and there is no merit in the claim, the court will of course not make a property order in that person's favour.

41. Additional prerequisite - compulsory conference

- (1) *A court may make a property adjustment order only if -*
- (a) *the parties to the proceeding have attended a conference about the matters in dispute with an officer appointed by the court (a "compulsory conference"); or*
 - (b) *the court considers that, because the order must be made urgently or because of some other special circumstance, it is appropriate to make the order although the parties to the proceeding have not attended a compulsory conference; or*
 - (c) *the court considers that it is not practicable to require the parties to the proceeding to attend a compulsory conference.*
- (2) *Subsection (1) does not apply to -*
- (a) *an order until further order; or*
 - (b) *an order made with the consent of all parties to the proceeding.*

¹³⁶ See pages 43-44 of this Report.

The legislation recommended in the De Facto Relationships Working Paper provided that a court could only make an order altering interests in property if the parties first attended a compulsory conference.¹³⁷ This provision was modelled on section 79(9) of the *Family Law Act 1975 (Cwth)*. Compulsory conferences are not, however, a feature in the existing de facto relationships legislation in other jurisdictions.

The Commission recommends that the legislation contain a clause to facilitate a speedy resolution of property disputes in non-marital situations. A compulsory conference may assist in the resolution of matters before they proceed to trial, thus saving legal costs.

Division 4 - Matters for consideration in deciding what is just and equitable

On page 54 of this Report, the Commission has recommended that de facto partners who are eligible to be considered under the proposed legislation should have, as far as it is practicable, the same property rights as a married couple on the dissolution of their relationship. To achieve this, the provisions in the proposed legislation setting out the matters that the court may take into account in altering interests in property¹³⁸ are modelled closely on the equivalent provisions in the *Family Law Act 1975 (Cwth)*.¹³⁹

In this regard, the legislation proposed by the Commission differs from the existing de facto relationships legislation in other jurisdictions.

Under the legislation proposed by the Commission and under the *Family Law Act 1975 (Cwth)*,¹⁴⁰ the court may take into account the following matters in altering interests in property -

- * Financial and non-financial contributions;
- * Homemaking and parenting contributions;
- * Financial circumstances of each of the parties; and
- * Financial needs of each of the parties.

¹³⁷ Clause 3.8(3) of the draft legislation in the De Facto Relationships Working Paper.

¹³⁸ Clauses 43-48 of the draft legislation.

¹³⁹ Section 79(4).

¹⁴⁰ Ibid.

In contrast, under the de facto relationships legislation in New South Wales, Northern Territory and Victoria, the court is only entitled to have regard to the following matters when altering interests in property -

- * Financial and non-financial contributions; and
- * Homemaking and parenting contributions.¹⁴¹

Although there is case law which suggests that the court is entitled to have regard to such matters as the financial circumstances and financial needs of the parties,¹⁴² the Commission reiterates its view that it would be preferable for legislation to specifically require the court to take into account such matters.

For the reasons outlined above, the provisions in Division 4 closely reflect the equivalent provisions in the *Family Law Act 1975 (Cwth)*.

42. Matters for consideration by court

In deciding what is just and equitable under section 40 (Court may make property adjustment order), a court must consider the matters set out in this Division.

¹⁴¹ Section 20(1) *De Facto Relationships Act 1984 (NSW)*, section 18 *De Facto Relationships Act 1991 (NT)* and section 285(1) *Property Law Act 1958 (Vic)*. Note, however, that under the Victorian legislation, the court is also entitled to have regard to any written agreement entered into by the de facto partners: section 285(1)(c) *Property Law Act 1958 (Vic)*.

¹⁴² See, for example, comments of Hodgson J at first instance in *Dwyer v Kallo* (1987) DFC 95-053 at 75,600 that "the needs and means of the parties will have general relevance, as subsidiary factors, to the question of what is just and equitable having regard to the plaintiff's contributions". See also comments of the New South Wales Court of Appeal in *Black v Black* (1991) DFC 19-113 at 76,429.

43. Contributions to property or financial resources

- (1) *The court must consider the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners or a child of the partners to -*
- (a) *the acquisition, conservation or improvement of any of the property of either or both of the partners; and*
- (b) *the financial resources of either or both of the partners.*
- (2) *However, the non-financial contributions of a child of the partners must be considered only if the child's contributions are substantial.*
- (3) *It does not matter whether the property or financial resources mentioned in subsection (1) still belong to either or both of the partners when the court is considering the contributions made.*

Clause 43 allows the court to look at the financial and non-financial contributions by or on behalf of the de facto partners or a child. With one important exception, the clause reflects the clause in existing de facto relationships legislation and section 79(4)(a) and (b) of the Family Law Act 1975 (Cwth). That exception relates to contributions made by or on behalf of a "child".

Under existing de facto relationships legislation, the court is not empowered to look at the contributions made by or on behalf of a child. Presumably the reason for this is that the court is unable to make a property order in favour of a child.

Section 79(4)(a) and (b) enables the court to look at the contributions made in this regard by a "child" of the marriage. Such a provision is necessary because the court is entitled to make a property order in favour of a child of the marriage.

As the legislation proposed by the Commission in this Report enables the court to make a property order in favour of a child, clause 43 directs the court to consider the contributions made by or on behalf of that child.

* **Non-financial contributions to be substantial**

The Commission does not intend that a child should be entitled to an interest in property on the basis of any non-financial contribution having been made by the child. For example, if a child of the de facto partners assists with the maintenance of the home by mowing the lawn or helping to replace a rotten gutter, this would not be enough for the court to make a property order in the child's favour. There must be a non-financial contribution which is considered by the court to be "substantial".

44. Contributions to family welfare

- (1) *The court must consider the contributions, including any homemaking or parenting contributions, made by either of the de facto partners or a child of the partners to the welfare of -*
- (a) *the partners; or*
 - (b) *the family constituted by the partners and 1 or more of the following -*
 - (i) *a child of the partners;*
 - (ii) *a person who is -*
 - (A) *accepted by either of the partners into the household of the partners; and*
 - (B) *dependent on either of the partners.*
- (2) *However, the contributions of a child of the partners must be considered only if the child's contributions are substantial.*

Example -

A de facto couple own and live on a farm. They have twins, a boy and a girl. The twins always lived on the farm. After the twins left school, the parents bought 2 additional farms. The son then worked on the farms for no wages assuming that, in time, 1 of the farms would be his. The daughter looked after the family's home for no wages assuming that, in time, 1 of the farms would be hers. In both cases, the children did much more than the household chores (such as mowing the lawn and doing the dishes) that a family might normally expect of family members. When the children were 31 years, the parents separated.

The son's contributions are substantial and would be considered under section 43 (Contributions to property or financial resources). The daughter's contributions are also substantial and would be considered under section 44 (Contributions to family welfare).

Clause 44 directs the court to look at the homemaking and parenting contributions made by the de facto partners or a child.

Once again, this clause differs from the existing de facto relationships legislation in other jurisdictions in that it directs the court to look at the homemaking or parenting contributions of the child. The existing legislation does not refer to the contributions made by a child because the court cannot make an order in favour of the child.

Although the *Family Law Act 1975 (Cwth)*¹⁴³ directs the court to look at the financial and non-financial contributions made by or on behalf of a child of the marriage, the legislation does not direct the court to consider any homemaking or parenting contributions made by a child of the marriage. The Commission has been unable to determine why these contributions are treated differently under the Commonwealth legislation.

The Commission is of the view that because the court is entitled to consider the financial and non-financial contributions of a child under clause 43, it should similarly be able to consider the homemaking or parenting contributions made by a child under clause 44. The example given in the legislation illustrates the point.

In addition to the contributions of the daughter referred to in the example, it is possible that she may have been responsible for caring for younger children of the de facto partners over an extended period. These "parenting" contributions can also be considered by the court under clause 44.

It is inappropriate that the son's contributions could be considered under clause 43 while the daughter's contributions could not be considered under clause 44. For that reason, the Commission recommends that the court should be able to consider homemaking and parenting contributions made by a child.

* ***Homemaking and parenting contributions to be substantial***

The Commission stresses that it is not all homemaking or parenting contributions of a child which would allow a court to make a property order in his or her favour. It is only those contributions which can be described as "substantial"¹⁴⁴ which would justify a court making a property order in favour of the child. Families frequently encourage and expect children to perform certain duties around the home. These duties may include making their own beds and doing their own ironing. Such duties would not automatically entitle a child to an interest in property should the parents separate. The reference in this Division to homemaking and parenting contributions of the child are only references to "substantial" contributions in this regard.

¹⁴³ Section 79(4)(a) and (b).

¹⁴⁴ Clause 44(2) of the draft legislation.

45. Effect on future earning capacity

The court must consider the effect of any proposed order on the earning capacity of either de facto partner.

46. Maintenance matters

The court must consider the matters mentioned in Division 4 (Matters for consideration by court in deciding amount of maintenance) of Part 4 (Maintenance) as far as they are relevant.

Clause 46 enables the court in altering interests in property to consider all the matters that the court may consider in an application for spousal maintenance under the proposed legislation. This reflects the equivalent provisions of the *Family Law Act 1975 (Cwth)*.¹⁴⁵

If the orders made under the proposed legislation are to be similar to those made under the *Family Law Act 1975 (Cwth)* in similar circumstances, the court must be able to consider the matters which are relevant in determining the amount of spousal maintenance. As can be seen from the provisions of Division 4 of Part 4 of Chapter 3, these matters relate to the financial needs and obligations of the parties. The family law cases suggest that the maintenance component can represent a substantial proportion of a property order in favour of a spouse.¹⁴⁶

The existing de facto relationships legislation in other jurisdictions does not contain sections equivalent to clause 46.

47. Child support

The court must consider any child support under the Child Support (Assessment) Act 1989 of the Commonwealth that a de facto partner has provided, or is to provide, for a child of the de facto partners.

¹⁴⁵ Sections 79(4)(e) and 75(2).

¹⁴⁶ See, for example, the property orders made by the Family Court in Dein and Dein (1989) FLC 92-014, Turnbull and Turnbull (1991) FLC 92-258 and Goodwin and Goodwin (1991) FLC 92-192.

48. Other orders

The court must consider any other order affecting a de facto partner or a child of the de facto partners made under any of the following -

- (a) this Act;*
- (b) the Family Law Act 1975 of the Commonwealth;*
- (c) the De Facto Relationships Act 1984 of New South Wales;*
- (d) Part 9 of the Property Law Act 1958 of Victoria;*
- (e) the De Facto Relationships Act 1991 of the Northern Territory;*
- (f) another law of a State or Territory concerning de facto relationships that the court considers should be taken into account.*

Division 5 - Adjournment because of likely change in financial circumstances

Division 5 facilitates the adjournment of an application for property adjustment if there is likely to be a significant change in the financial circumstances of one or both of the de facto partners. The provisions in this Division reflect the position under the *Family Law Act 1975 (Cwth)*¹⁴⁷ and under existing de facto relationships legislation in other jurisdictions.¹⁴⁸ It is unnecessary to specifically regulate the courts' powers in relation to adjournments. The normal rules of practice will apply.

49. Likelihood of significant change in financial circumstances

A court may adjourn an application to adjust interests in the property of either or both of the de facto partners, if the court considers that -

- (a) there is likely to be a significant change in the financial circumstances of either or both of the partners and that it is reasonable to adjourn the application having regard to the time when the change is likely to happen; and*

¹⁴⁷ Section 79(5).

¹⁴⁸ Section 21 *De Facto Relationships Act 1984 (NSW)*, section 19 *De Facto Relationships Act 1991 (NT)* and section 286 *Property Law Act 1958 (Vic)*.

- (b) *an order that the court could make about the property if the change happens is more likely to do justice between the parties than an order that the court could make immediately.*

50. Matters for consideration by court

In considering whether there is likely to be a significant change in the financial circumstances of either of the de facto partners, the matters a court may consider include any change in the financial circumstances of the partner that may happen because of -

- (a) *the vesting of a financial resource in the partner; or*
 (b) *the use or application of a financial resource for the partner's benefit.*

51. Orders may be made before adjournment

Before a court adjourns an application to adjust interests in property, it may make any order that it considers appropriate about the property.

52. Adjournments on other grounds not affected

Nothing in this Division limits the power of the court to grant an adjournment in a proceeding before it.

Division 6 - Stay because of Family Law Act proceeding

This Division gives the court hearing an application for property adjustment discretion to adjourn proceedings if there is a dispute concerning property of one or both of the partners in the Family Court. There are equivalent provisions in the New South Wales, Northern Territory and Victorian legislation.¹⁴⁹

¹⁴⁹ Section 22 *De Facto Relationships Act 1984 (NSW)*, section 20 *De Facto Relationships Act 1991 (NT)* and section 287 *Property Law Act 1958 (Vic)*.

53. Family Law Act proceeding

- (1) *If a Family Law Act proceeding about the property of either of the de facto partners is started at any time before a court has made a final order in a proceeding under this Part to adjust interests in the property of either of the partners, the court may stay the proceeding under this Part.*
- (2) *Either of the partners or another party to the Family Law Act proceeding may apply for the stay.*

54. Delay in Family Law Act proceeding

If -

- (a) *a proceeding is stayed under section 53 (Family Law Act proceeding); and*
- (b) *there is a delay in the relevant Family Law Act proceeding;*

a party to the stayed proceeding may apply for the stayed proceeding to be continued.

Division 7 - Change in circumstances

55. Delayed operation of order

If the court considers that a de facto partner is likely, within a short time, to become entitled to property that may be applied in satisfaction of an order made under section 40 (Court may make property adjustment order), the court may delay the operation of the order until a date, or the happening of an event, specified in the order.

Clause 55 allows a court to defer operation of an order adjusting property entitlements if the court is satisfied that a de facto partner will become entitled to property within a short period. An order to defer would enable this property to be applied later to satisfy the order made. There are equivalent provisions in the New South Wales, Northern Territory and Victorian legislation.¹⁵⁰

¹⁵⁰ Section 23 *De Facto Relationships Act 1984 (NSW)*, section 21 *De Facto Relationships Act 1991 (NT)* and section 288 *Property Law Act 1958 (Vic)*.

56. Effect on proceeding of death of party

- (1) *If a party to a proceeding for a property adjustment order dies before a final order has been made, the proceeding may be continued by or against the personal representative of the deceased party.*
- (2) *A court may make an order if it considers that -*
 - (a) *it would have adjusted interests in property if the deceased party had not died; and*
 - (b) *it is still appropriate to adjust the interests despite the death of the deceased party.*
- (3) *The order may be enforced on behalf of or against the estate of the deceased party.*

Provided an application has commenced for an adjustment of property rights, clause 56 allows the application to be continued notwithstanding the death of either of the parties. If the court makes an order altering interests in property, clause 56(3) allows that order to be enforced on behalf of, or against, the estate of the deceased person. There are equivalent provisions in the New South Wales, Northern Territory and Victorian legislation.¹⁵¹

57. Effect on order of death of party

If a party to a proceeding for a property adjustment order dies after a final order is made in favour of, or against, that party, the order may be enforced on behalf of or against the estate of the deceased party.

If a de facto partner dies after an order has been made in his or her favour, clause 57 allows the estate to enforce the order. Similarly, if the partner against whom the order has been made dies after the order is made, the order can be enforced against that person's estate. There are equivalent provisions in the New South Wales, Northern Territory and Victorian legislation.¹⁵²

¹⁵¹ Section 24 *De Facto Relationships Act 1984 (NSW)*, section 22 *De Facto Relationships Act 1991 (NT)*, and section 289 *Property Law Act 1958 (Vic)*.

¹⁵² Section 25 *De Facto Relationships Act 1984 (NSW)*, section 23 *De Facto Relationships Act 1991 (NT)* and section 290 *Property Law Act 1958 (Vic)*.

PART 4 - MAINTENANCE

On the breakdown of a de facto relationship, an adjustment of property interests may not be the only matter which needs to be resolved. If one partner is unable to support himself or herself adequately at the end of the de facto relationship, issues concerning the other partner's ability to financially assist him or her arise.

The *Family Law Act 1975 (Cwth)*¹⁵³ deals with maintenance claims on the breakdown of a marriage. The de facto relationships legislation in New South Wales and the Northern Territory provides for maintenance claims to be made on the breakdown of a de facto relationship.¹⁵⁴ The Commission's De Facto Relationships Working Paper raised two crucial issues. Firstly, whether it is appropriate for de facto relationships legislation to confer maintenance entitlements. Secondly, if legislation should provide for maintenance claims to be made, in what circumstances should a person be entitled to make an application and what should the court be entitled to consider in determining such an application?¹⁵⁵

* ***Should de facto relationships legislation confer maintenance entitlements?***¹⁵⁶

In arriving at its final recommendation concerning whether de facto relationships legislation should entitle a person to claim maintenance on the breakdown of a relationship, the Commission reconsidered the matters raised on this point in its De Facto Relationships Working Paper¹⁵⁷ and reviewed the submissions received.

The Commission is concerned that unless legislation provides for maintenance payments to be made, serious injustice could result. The following example illustrates the injustice which could occur in the absence of legislation.

¹⁵³ Sections 72, 74, 75, 77 and 77A.

¹⁵⁴ Part III Division 3 *De Facto Relationships Act 1984 (NSW)* and Part 2 Division 5 *De Facto Relationships Act 1991 (NT)*.

¹⁵⁵ The terms of reference of the Joint Select Committee in relation to de facto relationships law were to consider 'the proper resolution of family law disputes, including the question whether it is desirable that the *Family Law Act 1975 (Cwth)* be extended to property disputes arising out of de facto relationships'. As the Committee's brief was limited to the resolution of property disputes between de facto couples, no recommendations were made concerning whether legislation should confer maintenance entitlements on the breakdown of a de facto relationship.

¹⁵⁶ For a review of the law on maintenance entitlements for de facto couples in other jurisdictions, see De Facto Relationships Working Paper, pages 43-45.

¹⁵⁷ De Facto Relationships Working Paper, pages 41-43.

Example

Peter and Nicky lived in a de facto relationship for 30 years. They agreed that Nicky would remain at home to have the children of the relationship and to support Peter in his business career. There are 2 children of the relationship. Peter was successful in his career and has substantial earning capacity, but owns few assets. At the time of separation, both children of the relationship are adults. On separation, Nicky has few assets and is not equipped to earn an income given the time spent out of the workforce.

This is a clear example where it is just that the de facto husband be obliged to support his former partner. If the de facto husband in this example was not required to pay spousal maintenance, the community would probably have to support the de facto wife by Social Security payments.

The following arguments against conferring maintenance entitlements on de facto partners have been canvassed.

- (i) Unlike married couples, de facto partners do not give a public commitment to mutual support during a lifelong relationship. The commitment made by married couples impliedly recognises that on marriage breakdown, one partner may have to provide support to the other. As no such public commitment is given by de facto partners, arguably maintenance rights and obligations should not be imposed on them.
- (ii) By choosing not to marry, some heterosexual de facto couples make a conscious decision not to be regulated by legal obligations which apply to married couples. For some couples, a partner would like to marry but that person's partner is unwilling. Some couples may be unable to marry for religious reasons.

In contrast, homosexual couples cannot marry. These couples are, therefore, not currently subject to a regulatory regime which imposes maintenance rights and obligations. These couples may prefer not to be subject to regulation by the proposed legislation.

- (iii) There is currently a trend away from orders for long-term spousal maintenance on the breakdown of marriages. It would be contrary to this trend for legislation to confer maintenance rights and obligations on de facto couples.

The Commission is concerned that under the existing law, serious injustice can arise on the breakdown of a de facto relationship if one spouse is not entitled to claim maintenance from the other. The example given above illustrates the Commission's concern. Injustice is particularly likely to occur if, during the de facto relationship, one partner has assumed the homemaking role and is, therefore, unable to support himself or herself on the breakdown of the relationship. In

contrast, during the term of the de facto relationship, the other partner may have advanced considerably in his or her career.

The Commission therefore recommends that de facto relationships legislation should confer maintenance rights and obligations on de facto partners on the breakdown of a relationship in appropriate cases.

Spousal maintenance orders will not be made on the breakdown of every de facto relationship.

Example

Michael and Helen lived in a de facto relationship for five years. Both partners remained in employment. There is no child of the relationship. Neither partner made substantial financial sacrifices nor suffered financial detriment arising from the relationship.

In this situation, the Commission is of the view that there should be no case for a successful maintenance claim.

*** Nature of maintenance entitlements for de facto couples**

Having recommended that de facto relationships legislation allow for maintenance claims to be made, it is necessary to decide on the appropriate nature of those maintenance entitlements.

In its De Facto Relationships Working Paper, the Commission identified and considered the following three options.

(i) Option 1 - Family Law Act 1975 (Cwth) model

A de facto partner's entitlement to maintenance should be the same as a married partner's entitlement on the breakdown of their respective relationships.¹⁵⁸

(ii) Option 2 - Model conferring limited maintenance entitlements

A de facto partner's entitlement to maintenance should mirror the limited entitlements which exist under the de facto relationships legislation in New South Wales and the Northern Territory.

(iii) Option 3 - Modified Family Law Act 1975 (Cwth) model

A de facto partner's entitlement to maintenance should be the same as a married partner's on the breakdown of their respective relationships provided the partner

¹⁵⁸ In this case, the proposed legislation would reflect as closely as possible the relevant provisions in the Family Law Act 1975 (Cwth).

can show an inability to support himself or herself adequately resulted from that partner's commitment to the relationship.

The merits and difficulties of these options are considered below.

(i) Option 1 - Family Law Act 1975 (Cwth) model

Earlier in this Report,¹⁵⁹ the Commission recommended that provided a de facto couple is eligible to be considered under the proposed legislation, the parties to the relationship should have, as far as it is possible, the same property rights as parties to a married couple on the dissolution of their relationship. In other words, the Commission recommended that the legislation allowing a court to alter interests in property should as closely as possible reflect the equivalent provisions of the *Family Law Act 1975 (Cwth)*.

It does not follow, however, that spousal maintenance entitlements on the breakdown of a de facto relationship should be the same as for married partners under the *Family Law Act 1975 (Cwth)*. While the Commission considers it appropriate that property rights of de facto couples who qualify under the proposed legislation and married couples be the same on the dissolution of the respective relationships, different issues arise when considering maintenance claims.

Applications to alter interests in property are "one-off" actions. The decision of the court would generally settle all claims and put an end to financial relations. The dispute concerns existing property of the parties. In deciding how to adjust the interests in property, while the court is required under the proposed legislation to consider matters relevant to the parties' financial needs and obligations in the future, the primary focus of the court is on financial and non-financial contributions made by each party in the past. The court makes an order which is just and equitable in those circumstances.

Orders for spousal maintenance are of a different nature. They require one party to support the other for a certain period of time. The obligation of future support is not necessarily contemplated nor expected by de facto partners when they enter into a de facto relationship. In contrast, when couples marry, they make a public commitment to mutual support during a life long relationship.

*** Conclusion on Option 1**

The Commission considers that the right of a de facto partner to maintenance should be more limited than for a married partner. The Commission therefore does not recommend imposing on de facto couples the same rights and obligations for future support in terms of maintenance as are imposed on a married couple under the *Family Law Act 1975 (Cwth)*.

¹⁵⁹ See page 54 of the Report.

(ii) **Option 2 - Model conferring limited maintenance entitlements**

The New South Wales and Northern Territory legislation confers only limited maintenance entitlements. The Commission is of the view that they do not provide sufficient entitlements on the breakdown of a relationship. The De Facto Relationships Working Paper identified three areas where the existing de facto relationships legislation in other jurisdictions differs from the maintenance provisions under the *Family Law Act 1975 (Cwth)*.¹⁶⁰

A. The grounds on which a maintenance order may be made in New South Wales and the Northern Territory are narrower than under the Family Law Act 1975 (Cwth).

Under the *Family Law Act 1975 (Cwth)*, a person claiming maintenance must prove both inability to support himself or herself adequately and that the spouse paying the maintenance has the financial ability to pay.¹⁶¹ Under the New South Wales and Northern Territory legislation, a court can only make an order for spousal maintenance if either of the following is satisfied -

- (a) the partner cannot support himself or herself adequately because he or she has the care and control of the child of the relationship or child of the other partner;¹⁶² or
- (b) the partner cannot support himself or herself adequately and the order would increase the applicant's earning capacity by enabling him or her to undertake a course or program of training or education and the court considers it reasonable to make the maintenance order.¹⁶³

The Commission is of the view that those conditions are too severe. There are situations where a de facto partner should be entitled to make a claim for maintenance but would not satisfy the hurdles set out in the New South Wales and Northern Territory legislation. The example of Peter and Nicky given at the beginning of the commentary on maintenance is such a case. In the circumstances of that case, the Commission considers it appropriate that Nicky be entitled to claim maintenance from Peter. However, there are serious doubts about whether Nicky would be able to satisfy either of the two conditions outlined in the New South Wales and Northern Territory legislation. Nicky and Peter's children are

¹⁶⁰ De Facto Relationships Working Paper, pages 50-53.

¹⁶¹ Section 72 *Family Law Act 1975 (Cwth)*.

¹⁶² Section 27(1)(a) *De Facto Relationships Act 1984 (NSW)* and section 26(1)(a) *De Facto Relationships Act 1991 (NT)*.

¹⁶³ Section 27(1)(b) *De Facto Relationships Act 1984 (NSW)* and section 26(1)(b) *De Facto Relationships Act 1991 (NT)*.

adults so the first ground would not be satisfied. If Nicky is in her sixties, she is unlikely to be able to obtain employment even if a course or program of training or education were undertaken. It is, therefore, unlikely that she would be able to satisfy the second requirement of the legislation.

B. In awarding maintenance, fewer matters can be considered by the court under the New South Wales and Northern Territory legislation than by the Family Court under the Family Law Act 1975 (Cwth).

The *Family Law Act 1975 (Cwth)* and the New South Wales and Northern Territory legislation set out the matters which the court may consider in deciding the amount of maintenance to order.¹⁶⁴

The *Family Law Act 1975 (Cwth)* 1975 allows the court to consider more matters in a maintenance application than a court may consider under the equivalent New South Wales and Northern Territory provisions. The matters which may be considered under the *Family Law Act 1975 (Cwth)* but not the de facto relationships legislation include the following -

- * the age and state of health of each of the parties;¹⁶⁵
- * the care and control of a child of the [marriage] under 18 years;¹⁶⁶
- * a standard of living that in all the circumstances of separation is reasonable;¹⁶⁷
- * the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party;¹⁶⁸
- * the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;¹⁶⁹

¹⁶⁴ Section 75(2) *Family Law Act 1975 (Cwth)*, section 27(2) *De Facto Relationships Act 1984 (NSW)* and section 26(2) *De Facto Relationships Act 1991 (NT)*.

¹⁶⁵ Section 75(2)(a) *Family Law Act 1975 (Cwth)*.

¹⁶⁶ Section 75(2)(c) *Family Law Act 1975 (Cwth)*.

¹⁶⁷ Section 75(2)(g) *Family Law Act 1975 (Cwth)*.

¹⁶⁸ Section 75(2)(h) *Family Law Act 1975 (Cwth)*.

¹⁶⁹ Section 75(2)(j) *Family Law Act 1975 (Cwth)*.

- * the duration of the relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;¹⁷⁰
- * the need to protect the party who wishes to continue that party's role as parent;¹⁷¹
- * if either party has begun cohabiting with another person after separation, the financial circumstances relating to the cohabitation;¹⁷²
- * any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.¹⁷³

Because the court is unable to consider all the circumstances, an order for maintenance under existing de facto relationships legislation is less likely to be fair than an order under the *Family Law Act 1975 (Cwth)*.

Provided the necessary conditions for claiming maintenance have been satisfied,¹⁷⁴ the Commission does not consider there to be any policy reason why a court may consider fewer matters in determining the maintenance entitlement of a de facto partner than the maintenance entitlement of a married partner.

C. *There are limited time periods for which a court can order maintenance under the New South Wales and Northern Territory legislation.*

Under the *Family Law Act 1975 (Cwth)*, there is no restriction on the period for which the court can order spousal maintenance to be paid. In contrast, the New South Wales and Northern Territory de facto relationships legislation imposes limitations on the duration of maintenance orders. The maximum length of the order depends on the reasons for which maintenance is being ordered. If maintenance is ordered because the partner has the care and control of the child of the relationship or child of the other partner, in New South Wales the maintenance order may last only until the child reaches 12 years or, if the child is

¹⁷⁰ Section 75(2)(k) *Family Law Act 1975 (Cwth)*.

¹⁷¹ Section 75(2)(l) *Family Law Act 1975 (Cwth)*.

¹⁷² Section 75(2)(m) *Family Law Act 1975 (Cwth)*.

¹⁷³ Section 75(2)(o) *Family Law Act 1975 (Cwth)*.

¹⁷⁴ Under the proposed legislation, a court is entitled to order maintenance only if satisfied of one of the conditions set out in clause 64. In contrast, there are no equivalent provisions of which the Family Court must be satisfied under the *Family Law Act 1975 (Cwth)*.

physically or mentally handicapped, 16 years.¹⁷⁵ The Northern Territory legislation allows the maintenance order to last until the child reaches 18 years.¹⁷⁶

The court can also order maintenance under the de facto relationships legislation to enable the partner to undertake a course or program of training or education if that would be likely to increase his or her earning capacity. The maintenance order made in these circumstances may last until three years after the order is made or four years after the relationship ended, whichever period is shorter.¹⁷⁷

Even if the de facto relationships legislation gave a court power to make a long-term spousal maintenance order, it is likely that such orders would be made only rarely. Nevertheless, the Commission considers it important that the courts have the power to make a long-term order if such an order is required to prevent injustice.

* **Conclusion on Option 2**

The Commission is concerned that the departures from the *Family Law Act 1975 (Cwth)* described above could result in injustice. For this reason, the Commission does not recommend that the restricted maintenance rights currently existing in New South Wales and the Northern Territory be adopted.

(iii) **Option 3 - Modified *Family Law Act 1975 (Cwth)* model**

Under this option, provided the de facto partner is unable to adequately support himself or herself financially and this inability has resulted from the circumstances of the relationship, the partner is entitled to claim maintenance. In determining the amount of maintenance which may be ordered, the court is entitled to consider basically the same matters as the Family Court may consider in ordering maintenance on the breakdown of a marriage.

This maintenance regime was the one tentatively recommended by the Commission in its Working Paper. Clause 3.15 was the relevant clause and it provided as follows -

- (1) *A court may make an order for periodic or other maintenance if it is satisfied that the de facto partner applying for the order is unable to support himself or herself adequately whether -*

¹⁷⁵ Section 30(1) *De Facto Relationships Act 1984 (NSW)*.

¹⁷⁶ Section 32(1) *De Facto Relationships Act 1991 (NT)*.

¹⁷⁷ Section 30(2) *De Facto Relationships Act 1984 (NSW)* and section 32(2) *De Facto Relationships Act 1991 (NT)*.

- (a) *by reason of having the care and control of a child of the de facto partners or a child of the other partner, who has not attained the age of 18 years on the day on which the application is made;*
- (b) *by reason that the partner's earning capacity has been adversely affected by the circumstances of the de facto relationship; or*
- (c) *for any other adequate reason arising from the circumstances of the de facto relationship.*

In its Working Paper, the Commission expressed concern that this regime may not solve all injustices which may arise on the breakdown of a de facto relationship.¹⁷⁸ The following example was given to illustrate one of the Commission's concerns.

Example

Ms A and Mr B have lived in a de facto relationship for 40 years. Before Ms A moved in with Mr B, Ms A lived with her parents and was unemployed. Ms A and Mr B have had four children who are now all adults. Throughout the relationship, Ms A was the homemaker and supported Mr B as he advanced in his career. During his successful career, Mr B accumulated substantial wealth.

On separation, it is unlikely that Ms A will be able to find employment. In other words, she will be unable to support herself adequately. However, because she was unemployed at the beginning of the relationship, it may be argued that her inability to support herself is not a result of the de facto relationship. The Commission expressed concern that Ms A may not be able to claim maintenance against Mr B in these circumstances.

The Commission believes its concerns would be addressed if a person could claim maintenance where the inability to adequately support himself or herself arose "in whole or in part" from the circumstances of the de facto relationship.¹⁷⁹ If this alteration were made, Ms A would clearly be able to claim maintenance in the above example. "Part" of the reason for Ms A's inability to find employment would be the mutual decision of Ms A and Mr B for Ms A to stay at home to have the children and support Mr B as he advanced in his career.

¹⁷⁸ De Facto Relationships Working Paper, page 55.

¹⁷⁹ This could be achieved simply by inserting the words "in whole or in part" in paragraph (c) of clause 3.15 after the words "reason arising".

* **Conclusion on Option 3**

In summary, the Commission recommends that if the inability of a partner to support himself or herself adequately results "in whole or in part" from the circumstances of the de facto relationship, in determining the amount of maintenance, the court should be able to consider basically the same matters as the Family Court does in determining maintenance.

Division 1 - Purpose and how it is to be achieved

58. Purpose - provide maintenance in certain circumstances

The purpose of this Part is to provide for maintenance at the end of a de facto relationship by a de facto partner who is able to pay maintenance to a de facto partner who is unable to support himself or herself adequately because of circumstances arising from the relationship.

59. Purpose achieved by conferring maintenance rights and obligations

This purpose is achieved by -

- (a) providing that a de facto partner who satisfies the prerequisites set out in Part 1 (Prerequisites for property adjustment and maintenance proceedings) and who is unable to support himself or herself adequately because of circumstances arising from the de facto relationship should have -*
 - (i) maintenance rights against the other partner; and*
 - (ii) as far as practicable, the same matters considered in deciding the amount of maintenance as a married partner; and*
- (b) allowing applications to a court for maintenance.*

Division 2 - Application**60. Partner may apply**

After the end of a de facto relationship, a de facto partner may apply to a court for an order for maintenance.

61. No other maintenance rights or obligations

A de facto partner is liable to maintain the other de facto partner and a de facto partner is entitled to maintenance from the other de facto partner only as provided by this Part.

62. Not affected by other rights

(1) *An application may be made under this Division whether an application for another remedy or relief has been made, or may be made, under this Act or another law.*

(2) *In this section -*

"law" includes a law of the Commonwealth, another State or a Territory.

Division 3 - Maintenance orders**63. Court may make maintenance order**

A court may make an order that a de facto partner pay periodic or other maintenance for the other partner.

64. Additional prerequisite - relationship made maintenance necessary

A court may make an order under section 63 (Court may make maintenance order) only if it is satisfied that the de facto partner applying for the order is unable to adequately support himself or herself -

- (a) because the partner's earning capacity has been adversely affected by the circumstances of the de facto relationship; or*
- (b) for another reason arising in whole or in part from circumstances arising from the de facto relationship.*

Example of paragraph (a) -

Ms A and Mr B lived in a de facto relationship for 10 years. For the first 6 years of the relationship, Ms A was employed. The partners then agreed that Ms A would remain at home to care for an elderly invalid relative of Mr B while Mr B continued in his more lucrative employment. At the end of the relationship, Ms A has few assets and requires retraining to return to her previous earning capacity.

Example of paragraph (b) -

Ms L and Mr M lived in a de facto relationship for 25 years. Before the relationship, Ms L lived with her parents and was unemployed. The partners agreed that Ms L would remain at home to have the children of the relationship and to support Mr M in his business career. Throughout the relationship, Ms L was the homemaker and supported Mr M as he successfully advanced in his career. Their children are now all adults. At the end of the relationship, Ms L has no readily marketable job skills to earn an income. She has substantial assets but the income from them is not sufficient to support her adequately.

Example of paragraph (b) -

Ms S and Mr T lived in a de facto relationship for 10 years. Ms S brought her 1 year old child into the relationship. When the relationship began, Ms S and Mr T agreed that Ms S would give up her full-time employment so that she could care for Mr T and her child. Mr T accepted Ms S's child into the household and the 3 formed a close-knit family unit with Mr T financially supporting Ms S and her child.

Example outside paragraph (b) -

Mr X and Mr Y lived in a de facto relationship for 5 years. Both partners remained in employment with Mr X having a substantially higher earning capacity than Mr Y. Neither partner made substantial financial sacrifices or suffered financial detriment arising from the relationship.

Clause 64 differs from the *Family Law Act 1975 (Cwth)* provision¹⁸⁰ and the provisions in the de facto relationships legislation in other jurisdictions.¹⁸¹ The *Family Law Act 1975 (Cwth)* provision and the equivalent provisions in the de facto relationships legislation were compared earlier.¹⁸² Under the proposed legislation, an applicant must be able to satisfy the court of one of the matters set out in clause 64 before the court may make an order for maintenance. Both of these conditions focus on the circumstances of the de facto relationship.

Clause 64 differs from the equivalent clause, clause 3.15, which was tentatively recommended by the Commission in the De Facto Relationships Working Paper and set out in full earlier.¹⁸³ Clause 64 now contains 2 conditions. These conditions are compared below with the conditions contained in the equivalent provision in the Working Paper.

- * ***inability to adequately support himself or herself because the partner's earning capacity adversely affected by the circumstances of the relationship***

Paragraph (a) allows the court to make a spousal maintenance order if the applicant's earning capacity is adversely affected by the circumstances of the de facto relationship. This paragraph mirrors the equivalent paragraph in the De Facto Relationships Working Paper.

The example included in the legislation illustrates the purpose of clause 64 paragraph (a).

¹⁸⁰ Section 72.

¹⁸¹ Section 27 *De Facto Relationships Act 1984 (NSW)* and section 26 *De Facto Relationships Act 1991 (NT)*.

¹⁸² See pages 73-76 of the Report.

¹⁸³ See pages 76-77 of the Report.

- * *inability to support himself or herself for any other reason arising in whole or in part from the circumstances of the de facto relationship*

The legislation provides examples which fall both within and outside paragraph (b). Aspects of paragraph (b) were discussed in more detail at the beginning of Part 4.¹⁸⁴

As is the case for paragraph (a), to satisfy paragraph (b), the inability to adequately support oneself must arise from the circumstances of the relationship.

In the legislation recommended in the De Facto Relationships Working Paper, the clause equivalent to clause 64 (clause 3.15) allowed the court to make a spousal maintenance order if the applicant was unable to support himself or herself adequately -

- "(a) *by reason of having the care and control of a child of the de facto partners or a child of the other partner, who has not attained the age of 18 years on the day on which the application was made;*
- (b) *...; or*
- (c) *for any other adequate reason arising from the circumstances of the de facto relationship.*¹⁸⁵

In clause 64, the Commission has deleted paragraph (a) of clause 3.15(1) but widened paragraph (c). Paragraph (a) has been deleted because the Commission believes that the court should be able to make spousal maintenance orders if the applicant has the care and control of a "child" of de facto partners as defined in clause 4. This definition is broader than the child described in clause 3.15(1)(a).

There are circumstances in which it would be harsh for a person with the care and control of his or her own child, not a child of the other partner, to be denied the ability to claim spousal maintenance. The third example in clause 64 of the draft legislation is such a case.

The Commission is of the view that in this example, if Ms S and Mr T separate, Ms S should be entitled to claim spousal maintenance. Ms S's need results from their decision that Ms S stay at home; that is, from circumstances arising in whole or in part from the de facto relationship. Provided this can be satisfied, a person should be entitled to claim spousal maintenance. Whether the child in question was a child born into the de facto relationship or a child of either partner brought into the de facto relationship should be irrelevant.

Having said this, however, if a partner brings a child into a de facto relationship, this fact alone will not entitle a claim for spousal maintenance to be made.

¹⁸⁴ See pages 76-78 of the Report.

¹⁸⁵ Clause 3.15(1)(a) and (c) of the draft legislation in the Working Paper.

Example

Fred and Betty enter into a de facto relationship. Fred brings into the relationship a one year old child. Fred has part-time employment which continues during the de facto relationship. Betty is in full-time employment which also continues throughout the relationship. Fred and Betty separate after 6 months.

Fred wishes to claim spousal maintenance from Betty. Although Fred satisfies the requirements of paragraph (b) of clause 28, he will not be able to satisfy paragraph (b) of clause 64. Even if Fred can show an inability to financially support himself, that inability has not resulted from the circumstances of the relationship. Accordingly, Fred's claim will fail.

65. Interim maintenance orders

If the court considers that -

- (a) the de facto partner applying for a maintenance order is in immediate need of financial assistance; and*
- (b) it is not practicable in the circumstances to decide immediately if any order should be made;*

the court may order the other partner to pay to the applicant, until the application is decided, the periodic or other amounts that the court considers reasonable.

This clause enables the court to make urgent maintenance orders in appropriate circumstances. The order is temporary. It has effect only until the maintenance application can be disposed of by the court.

66. Specify maintenance component of other orders

(1) If -

- (a) a court makes an order under this Act that has the effect of requiring payment of a lump sum or the transfer or settlement of property; and*
- (b) the purpose, or 1 of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of either of the de facto partners;*

the court must -

- (c) *express the order to be an order to which this section applies; and*
 - (d) *specify the part of the payment, or the value of the part of the property transferred or settled, that is attributable to the provision of maintenance for the partner.*
- (2) *Subsection (1) applies to an order under this Act whether or not the order -*
- (a) *is made in a proceeding about the maintenance of a de facto partner; or*
 - (b) *is made by consent; or*
 - (c) *varies an earlier order.*
- (3) *It does not matter whether the lump sum is payable in a single amount or by instalments.*
- (4) *A payment, transfer or settlement under an order that -*
- (a) *is not expressed to be an order to which this section applies; or*
 - (b) *is expressed to be an order to which this section applies, but does not specify a part attributable to the provision of maintenance;*
- is not to be taken to be for the maintenance of a de facto partner.*

It is often the case that on the breakdown of a de facto relationship a partner may claim both an interest in property of his or her partner as well as an order for maintenance. In these circumstances, the court may order the payment of money or transfer of property to satisfy both the property and maintenance claims. In other words, a portion of the order made represents a lump sum maintenance award.

Clause 66 requires the court, when making an order, to specify what portion of the payment or value of the property provides for the maintenance of the de facto partner. The clause mirrors section 77A of the *Family Law Act 1975 (Cwth)*. The explanatory notes to the Bill inserting this section explain the intention of the Commonwealth Parliament in inserting the new provisions. The primary focus is on "income-testing for Social Security purposes of maintenance received other than by

way of periodic sums".¹⁸⁶ If the order made relates to maintenance, this can affect any income-tested benefit received by the person in whose favour the order is made.

Division 4 - Matters for consideration by court in deciding amount of maintenance

In the discussion at the beginning of Part 4 of the legislation, the Commission expressed the view that, provided a partner's inability to support himself or herself adequately arose from the circumstances of the relationship, that person should have basically the same rights to maintenance as are conferred by the *Family Law Act 1975 (Cwth)*. If a person qualifies for maintenance under the proposed legislation, in determining the amount of maintenance to be ordered, the factors which are set out in the *Family Law Act 1975 (Cwth)* are largely the same as the factors set out in the proposed legislation. Division 4 describes those matters which may be considered by the court in determining the amount, if any, of maintenance to be ordered.

67. Matters for consideration by court

In deciding the amount of maintenance (if any) under section 63 (Court may make maintenance order), a court must consider the matters set out in this Division.

68. Age and health

The court must consider the age and state of health of each of the de facto partners.

69. Resources and employment capacity

The court must consider -

- (a) the income, property and financial resources of each of the de facto partners; and*
- (b) the physical and mental capacity of each of them for appropriate gainful employment.*

¹⁸⁶ Explanatory memorandum to the *Family Law Act Amendment Bill 1987*, paragraph 1, line 5.

70. Caring for children

The court must consider whether either de facto partner has the care and control of a child of the partners who is under 18.

71. Necessary commitments

The court must consider the commitments of each of the de facto partners that are necessary to enable the partner to support -

- (a) himself or herself; and*
- (b) a child or another person that the partner has a duty to maintain.*

72. Responsibility to support others

The court must consider the responsibility of either de facto partner to support another person.

The Commission is aware that there is potential for some overlap between clauses 71 and 72. The Commission is also aware of the plethora of case law on the equivalent provisions of the *Family Law Act 1975 (Cwth)*.¹⁸⁷ To ensure that spousal maintenance orders made under the proposed legislation reflect as closely as possible those made under the *Family Law Act 1975 (Cwth)*, the Commission is of the view that the matters which the court is directed to consider under the proposed legislation should mirror as closely as possible the matters set out in the *Family Law Act 1975 (Cwth)*. For this reason, clauses 71 and 72 reflect the terminology used in the equivalent provision in the *Family Law Act 1975 (Cwth)*.

¹⁸⁷ Section 75(2)(d) and (e).

73. Government assistance

- (1) *The court must consider the eligibility of either de facto partner for -*
- (a) *an Australian pension, allowance or benefit that is not income tested; or*
 - (b) *a foreign pension, allowance or benefit;*
- and the amount of any such pension, allowance or benefit being paid to either partner.*
- (2) *The court must disregard -*
- (a) *the eligibility of either partner for an Australian pension, allowance or benefit that is income tested; and*
 - (b) *the amount of any such pension, allowance or benefit being paid to either partner.*
- (3) *For the purposes of this section, whether an Australian pension, allowance or benefit is income tested depends on whether it is an income tested pension, allowance or benefit within the meaning of the Family Law Act 1975 of the Commonwealth.*
- (4) *In this section -*
- "Australian pension, allowance or benefit"** *means a pension, allowance or benefit under the law of the Commonwealth or a State or Territory;*
- "foreign pension, allowance or benefit"** *means a pension, allowance or benefit under the law of a foreign country.*

74. Appropriate standard of living

If the de facto partners have separated, the court must consider what standard of living is reasonable for each of the partners in all the circumstances.

75. Effect on future earning capacity

The court must consider the extent to which the payment of maintenance to the de facto partner whose maintenance is under consideration would increase the earning capacity of the partner by enabling the partner -

- (a) to undertake a course of education or training; or*
- (b) to establish a business; or*
- (c) otherwise to obtain an adequate income.*

76. Contributions to partner from whom maintenance claimed

The court must consider the extent to which the de facto partner whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other partner.

77. Length of relationship

The court must consider the length of the de facto relationship.

78. Effect of relationship on earning capacity

The court must consider the extent to which the de facto relationship has affected the earning capacity of the de facto partner whose maintenance is under consideration.

79. Property adjustment

The court must consider the terms of any order made or proposed to be made under Part 3 (Adjustment of property interests) about the property of either or both of the de facto partners.

80. Financial circumstances of cohabitation

If either de facto partner is cohabiting with another person, the court must consider the financial circumstances of the cohabitation.

81. Child maintenance

The court must consider any payments provided for the maintenance of a child in the care and control of either de facto partner.

82. Other facts and circumstances

The court must also consider any fact or circumstance that the court considers the justice of the case requires to be taken into account.

Division 5 - Change in circumstances

This Division outlines the consequences of death, marriage or entry into another relationship on the ability of a person to apply for maintenance or on the effect of a maintenance order which has already been made.

83. Effect on proceeding of death of partner

A proceeding for a maintenance order cannot be started or continued after the death of either of the de facto partners.

84. Effect on proceeding of marriage or another relationship

A proceeding for a maintenance order in favour of a de facto partner cannot be started or continued if, since the end of the de facto relationship, the partner has married or started another de facto relationship.

85. Effect on order of death of partner

- (1) *A maintenance order ceases to have effect on the death of either of the de facto partners.*
- (2) *Nothing in this section affects the right to recover arrears due under a maintenance order at the death of the de facto partner.*

86. Effect on order of marriage

- (1) *A maintenance order ceases to have effect on the marriage of the de facto partner in whose favour the order was made.*
- (2) *If a defacto partner in whose favour a maintenance order was made marries, the partner must, without delay, give the de facto partner against whom the order was made written notice of the marriage and its date.*
- (3) *Any money paid for a period after the marriage may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.*
- (4) *Nothing in this section affects the right to recover arrears due under a maintenance order at the date of the marriage.*

If a party in whose favour a maintenance order has been made marries, clause 86(1) provides that the maintenance order ceases to have effect.

Clause 86(2) states that the person in receipt of maintenance must, without delay, give the de facto partner paying maintenance written notice of the marriage and its date.

87. Effect on order of another relationship if notified

- (1) *A maintenance order ceases to have effect if -*
 - (a) *the de facto partner in whose favour the order was made starts another de facto relationship; and*
 - (b) *the partner has given the de facto partner against whom the order was made written notice that the other de facto relationship has started and the date it started.*
- (2) *If a de facto partner in whose favour a maintenance order was made starts another de facto relationship, the partner must, without delay, give the de facto partner against whom the order was made written notice that the other de facto relationship has started and the date it started.*

- (3) *Any money paid for a period after the other de facto relationship started may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.*
- (4) *Nothing in this section affects the right to recover arrears due under a maintenance order at the date the other de facto relationship started.*

This clause closely reflects the provisions of clause 86. Under clause 86, on the marriage of a de facto partner, any maintenance payments made to that partner will cease. The Commission considers that entering a subsequent de facto relationship should have the same effect as marriage. The difference in these two cases, however, is one of proof. While it is easy to prove that marriage has taken place, it is not as easy to establish that another de facto relationship has begun. For this reason, clause 87 provides that a maintenance order ceases to have effect from the date the de facto partner receiving maintenance notifies the partner paying the maintenance that he or she has entered into another de facto relationship. As with clause 86, clause 87 states that the person in receipt of maintenance must, without delay, give the de facto partner paying maintenance written notice that the other de facto relationship has begun and the date it began.

88. Effect on order of another relationship if not notified

- (1) *If a de facto partner against whom a maintenance order has been made believes that the other partner has started another de facto relationship but has not been given notice of it under section 87(2) (Effect on order of another relationship if notified), the first partner may apply to the court for a discharge of the order.*
- (2) *If the court is satisfied that the de facto partner in whose favour a maintenance order has been made has started another de facto relationship, the court must discharge the order.*
- (3) *If an order is discharged, it ceases to have effect from the date the other de facto relationship started.*
- (4) *Any money paid for a period after the other de facto relationship started may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.*
- (5) *Nothing in this section affects the right to recover arrears due under a maintenance order at the date the other de facto relationship started.*

Clause 88 enables the de facto partner who is paying the maintenance to apply for discharge of the order if he or she believes that the other de facto partner has entered into a subsequent de facto relationship but has failed to notify the payer of the maintenance accordingly.

Division 6 - Modification of maintenance orders

As the heading suggests, this Division provides for the variation of maintenance orders. The Division outlines the circumstances in which the court may make an order discharging or varying the amount of maintenance and sets out the matters which the court may consider in determining the new amount of maintenance, if any.

89. Court may modify maintenance order

On an application by a de facto partner about whom a maintenance order has been made, a court may -

- (a) subject to section 90 (Prerequisites for discharge or variation of amount of maintenance), discharge the order; or*
- (b) suspend the operation of the order in whole or part and either until further order or until a fixed time or the happening of a particular event; or*
- (c) revive, in whole or part, an order suspended under paragraph (b); or*
- (d) subject to section 90, vary the order to increase or decrease any amount ordered to be paid or in another way.*

90. Prerequisites for discharge or variation of amount of maintenance

The court may make an order discharging, or varying the amount of maintenance under, a maintenance order only if it is satisfied -

- (a) that, since the order was made or last varied, the circumstances of either of the de facto partners have changed in a way that justifies the court doing so; or*
- (b) that it is more than 1 year since the order was made or last varied and in that time the cost of living has changed to an extent that justifies the court doing so; or*

- (c) *in a case where the order was made by consent that the amount ordered to be paid is not proper or adequate; or*
- (d) *that -*
 - (i) *material facts were withheld from the court that made the order or from a court that varied the order; or*
 - (ii) *material evidence given before such a court was false.*

91. Matters for consideration concerning cost of living

In satisfying itself that the cost of living has changed to an extent that justifies it discharging or varying the amount of maintenance under a maintenance order, the court must consider any changes that have happened during the relevant period in -

- (a) *the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or*
- (b) *a group of numbers or amounts, relating to the price of goods and services, issued by the Australian Statistician that is prescribed by regulation.*

92. Matters for consideration concerning whether proper and adequate

In satisfying itself that the amount ordered to be paid in a maintenance order made by consent is not proper or adequate, the court must consider any payments, and any transfer or settlement of property, previously made by a de facto partner to -

- (a) *the other partner; or*
- (b) *another person for the benefit of the other partner.*

93. Matters for consideration in modifying order

In deciding an application under section 89 (Court may modify maintenance order), the court must consider the matters set out in Division 4 (Matters for consideration by court in deciding amount of maintenance).

94. Decrease may be retrospective

An order of either of the following types may be expressed to be retrospective to a date the court considers appropriate -

- (a) an order decreasing the amount of a periodic sum payable under a maintenance order;*
- (b) an order discharging a maintenance order.*

95. Right to recover arrears not affected

The discharge of a maintenance order does not affect the right to recover arrears due under the order when the discharge takes effect.

CHAPTER 4 - RESOLUTION OF FINANCIAL MATTERS BY MEDIATION AND ARBITRATION

The provisions in Chapter 4 are based on those in Part IIIA of the *Family Law Act 1975 (Cwth)* on mediation and arbitration. Part IIIA was inserted in the *Family Law Act 1975 (Cwth)* in 1991. It provides alternatives to the resolution of disputes in court. The Commission considers the alternative dispute resolution provisions to be equally relevant to de facto relationships.

PART 1 - PURPOSE AND HOW IT IS TO BE ACHIEVED

96. Purpose - recognition of alternative resolution mechanisms

The purpose of this Part is to encourage mediation and arbitration as ways of resolving financial matters at the end of a de facto relationship.

97. Purpose achieved by interrelationship with court resolution

This purpose is achieved by -

- (a) facilitating access to information about mediation and arbitration by de facto partners and other interested persons; and*
- (b) establishing a relationship between resolution by mediation or arbitration of financial matters at the end of a de facto relationship and resolution of the matters by a court; and*
- (c) providing for the registration and review of awards made in arbitration.*

PART 2 - ADVICE ABOUT MEDIATION AND ARBITRATION

Part 2 requires the registrar of the relevant court to advise people about facilities available for mediation and arbitration in the court structure and how those facilities are made available. In the legislation proposed in the Working Paper, the Commission also recommended that people who plan to begin proceedings under the legislation and their partners be given a document setting out particulars of mediation and arbitration facilities available both within and outside the court structure.¹⁸⁸ While the Commission still considers this a desirable practice to adopt, it does not recommend that it be a requirement enshrined in the legislation.

¹⁸⁸ Clause 5.8(2) of legislation proposed in Working Paper.

Accordingly, no equivalent of clause 5.8(2) of the legislation proposed in the Working Paper appears in the legislation proposed in this Report.

98. Advice about court facilities

The registrar of a court must, on request, advise -

- (a) a de facto partner; and*
- (b) a party to a proceeding under this Act in the court;*

about any mediation or arbitration facilities available in the court and how the facilities are made available.

PART 3 - MEDIATION

Part 3 provides for mediation to be carried out to resolve disputes between parties. Mediation is available under Part 3 before or after proceedings have begun. Evidence of anything said or of an admission made during mediation is not admissible in later proceedings if, for example, the mediation is unsuccessful and the matter is resolved by the court.

99. Mediation before proceeding started

(1) A person who -

- (a) is a de facto partner or a child of de facto partners; and*
- (b) is involved in a dispute about a matter about which a proceeding could be, but has not been, started under this Act;*

may file a notice in a court requesting mediation of the dispute.

(2) If a notice is filed in a court -

- (a) the notice must be dealt with under its rules of court; and*

- (b) *if a mediation service is available at the registry of the court and the dispute is one that, under its rules of court, may be mediated the registrar of the court must make arrangements for an approved mediator to mediate the dispute under its rules of court.*

100. Mediation after proceeding started

- (1) *A court may, with the consent of the parties to a proceeding before it under this Act, make an order referring any or all of the matters in dispute in the proceeding for mediation by an approved mediator.*
- (2) *If a court makes an order under subsection (1), it may -*
- (a) *adjourn the proceeding; and*
 - (b) *make any additional orders, or give any directions, that it considers appropriate to facilitate the effective conduct of the mediation.*

101. Court may make orders at end of mediation

If -

- (a) *a court makes an order under section 100(1) (Mediation after proceeding started) about any matter in dispute in a proceeding before it; and*
- (b) *a party to the proceeding files a notice in the court that the mediation of the matter has ended;*

the court may make any orders, or give any directions, that it considers appropriate about the proceeding.

102. Mediation privileged

- (1) *Anything said or admitted during a mediation under this Part is not admissible as evidence in a proceeding before a court or person authorised by a law, or by consent of the parties, to hear evidence.*
- (2) *Subsection (1) does not apply to a proceeding for an offence allegedly committed at the mediation.*
- (3) *In this section -*

"law" includes a law of the Commonwealth, another State or a Territory.

PART 4 - ARBITRATION

Part 4 provides for arbitration as an alternative to court proceedings to resolve disputes. Where proceedings are currently on foot between the parties, the court may refer the proceedings, or any part of them, to arbitration. Alternatively, the parties themselves may arrange a private arbitration of the dispute before proceedings begin. Part 4 also describes the mechanisms for review of awards made in both court ordered arbitration and private arbitration.

103. Arbitration if court refers property adjustment or maintenance proceeding

- (1) *A court may make an order referring any of the following to an approved arbitrator for arbitration -*
 - (a) *a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court);*
 - (b) *part of the proceeding;*
 - (c) *a matter arising in the proceeding.*
- (2) *A court may make an order under subsection (1) with or without the consent of the parties.*

- (3) If a court makes an order under subsection (1), it may -
- (a) adjourn the proceeding; and
 - (b) make any additional orders, or give any directions, that it considers appropriate to facilitate the effective conduct of the arbitration.
- (4) A party to an award in an arbitration carried out because of an order under subsection (1) may register the award in the court that made the order.
- (5) If registered in a court, an award has effect as if it were an order made by the court.

104. Private arbitration of property adjustment or maintenance proceeding

- (1) Persons who are involved in a dispute about a matter about which a proceeding could be, but has not been, started under this Act may arrange a private arbitration of all or part of the dispute.
- (2) A court of competent jurisdiction may, on application by a party to the arbitration, make any orders, or give any directions, that the court considers appropriate to facilitate the effective conduct of the arbitration.
- (3) The arbitrator must, on application by a party to the arbitration, give written reasons for the award.
- (4) A party to an award made in a private arbitration may register the award, in a court of competent jurisdiction.
- (5) If registered in a court of competent jurisdiction, an award has effect as if it were an order made by the court.
- (6) In this section -

"court of competent jurisdiction", in relation to a dispute, means a court in which a proceeding under this Act could have been started to resolve the dispute;

"dispute" means a dispute about a matter about which a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court) could be started.

105. Review of awards in court ordered arbitration

- (1) *A party to a registered award made in an arbitration carried out because of an order made under section 103(1) (Arbitration if court refers property adjustment or maintenance proceeding) may apply for review of the award to -*
 - (a) *the court which made the order; or*
 - (b) *any higher court that has jurisdiction under this Act.*
- (2) *The court that reviews an award under this section must review it by rehearing the matters to which the award relates and -*
 - (a) *must decide, as if for the first time, all questions of fact and law arising in relation to the arbitration; and*
 - (b) *may make any of the following orders that it considers appropriate -*
 - (i) *an order affirming the award;*
 - (ii) *an order varying the award;*
 - (iii) *an order setting aside the award and substituting a decision;*
 - (iv) *an order setting aside the award and remitting the matter to the arbitrator with directions or recommendations.*

106. Review of awards in private arbitration

- (1) *A party to a registered award made in a private arbitration of a dispute may apply to a court of competent jurisdiction for review of the award on questions of law.*
- (2) *The court that reviews an award under this section may -*
 - (a) *decide all questions of law arising in relation to the arbitration; and*

(b) *make any of the following orders that it considers appropriate -*

- (i) *an order affirming the award;*
- (ii) *an order varying the award;*
- (iii) *an order setting aside the award and substituting a decision;*
- (iv) *an order setting aside the award and remitting the matter to the arbitrator with directions or recommendations.*

(3) *In this section -*

"court of competent jurisdiction", *in relation to a dispute, means a court in which a proceeding under this Act could have been started to resolve the dispute.*

PART 5 - MEDIATORS AND ARBITRATORS

107. Confidentiality

(1) *A person who is or has been an approved mediator or arbitrator or a private arbitrator must not -*

- (a) *make a record of protected information; or*
- (b) *whether directly or indirectly, divulge or communicate protected information;*

unless the record is made, or the information divulged or communicated -

- (c) *under this Act; or*
- (d) *in the performance of duties as an approved mediator or arbitrator or a private arbitrator.*

Maximum penalty 40 penalty units.

(2) *In this section -*

"protected information" means information that is obtained by a person as an approved mediator or arbitrator or a private arbitrator.

Clause 107 requires an approved mediator or arbitrator or a private arbitrator to keep the information that is obtained under this Act confidential. The clause also sets out the penalty for a breach of the section.

108. Protection

In performing the functions of an approved mediator or arbitrator or a private arbitrator, the mediator or arbitrator has the same protection and immunity as a Supreme Court Judge has in performing a Judge's functions.

When performing the function of a mediator or arbitrator, an approved mediator or arbitrator or a private arbitrator is provided by clause 108 with the same protection and immunity as a Judge of the Supreme Court.

CHAPTER 5 - EXISTENCE OF A DE FACTO RELATIONSHIP

The purpose of Chapter 5 is to avoid duplication of proceedings. This is done by allowing the Supreme Court and the District Courts to make a declaration as to the existence or non-existence of a de facto relationship which will be binding for all proceedings.

Chapter 5 may be of assistance to a person who must prove the existence of a de facto relationship in two unrelated actions. An example of such a case is given in clause 109 of the draft legislation. If a de facto partner is killed in an accident at work, that person's partner may be entitled to compensation under the *Workers' Compensation Act 1990 (Qld)* or under the family provisions of Part IV of the *Succession Act 1981 (Qld)*.¹⁸⁹ To succeed in both claims, the surviving partner must prove that a de facto relationship existed at the time of death.

It would avoid duplication of proceedings if the issue could be litigated once and the resulting declaration binding for subsequent proceedings.

PART 1 - DECLARATION ABOUT EXISTENCE OF RELATIONSHIP

Division 1 - Purpose and how it is to be achieved

109. Purpose - avoid duplication

The purpose of this Chapter is to help people avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more unrelated proceedings.

Example -

*A de facto partner is killed in an accident at work. Whether or not the deceased's de facto partner is eligible for worker's compensation under the *Workers' Compensation Act 1990* or may claim under the family provision of Part 4 of the *Succession Act 1981* will depend on whether the partners were living in a de facto relationship at the time of death. It will avoid duplication of proceedings if this issue were litigated once only.*

¹⁸⁹ This clause will be of greater advantage to a potential litigant where the qualifying period for a de facto relationship is the same in all legislation. The clause can still be of assistance, however, if this is not the case. If the qualifying period is different for the relevant legislation (the *Workers' Compensation Act 1990 (Qld)* and the *Succession Act 1981 (Qld)* in the example in the text), the court may be requested to grant a declaration that a de facto relationship existed for a period which will satisfy both Acts.

110. Purpose achieved by facilitating binding declaration

This purpose is achieved by allowing applications to a court for a declaration about the existence or non-existence of a de facto relationship.

Division 2 - Application

Division 2 allows a person to apply to the Supreme Court or a District Court for a declaration that a de facto relationship did or did not exist at a particular time or for a particular period. The application may be brought by a de facto partner or by a trustee or executor if the management or distribution of property or an estate is affected by the existence of a de facto relationship.

This Division also makes provision for the court to adjourn the hearing if a person's interests would be affected by the application and that person is not present.

111. Partner may apply

A person may apply to the Supreme Court or a District Court for a declaration that -

- (a) there is, or has been, a de facto relationship between the person and another named person at a particular time or for a particular period; or*
- (b) there is not, or was not, a de facto relationship between the person and another named person at a particular time or for a particular period.*

112. Affected executor or trustee may apply

If the management or distribution of property or an estate is affected by whether there is or has been a de facto relationship between 2 named persons at a particular time or for a particular period, the trustee of the property or the executor of the estate may apply to the Supreme Court or a District Court for a declaration -

- (a) that there is, or has been, a de facto relationship between the named persons at a particular time or for a particular period; or*
- (b) that there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period.*

An example of when clause 112 may be of assistance is where an executor is administering a deceased estate. A person may allege that he or she was living in a de facto relationship with the deceased and, therefore, entitled to claim under Part IV - Family Provision of the *Succession Act 1981 (Qld)*. The situation could arise where that person threatens to make such a claim but does not promptly do so. As the executor would be reluctant to distribute the estate where a threat of such a claim existed, the administration of the estate would be delayed. Clause 112 could be used by the executor to obtain a declaration that the person alleging to be a surviving de facto partner did or did not live in a de facto relationship with the deceased during the relevant period.

113. Court may adjourn hearing if other affected person

If, on an application under this Part, a court considers that -

(a) *a person whose interests would be affected by the making of a declaration -*

(i) *is not present or represented; or*

(ii) *has not been given the opportunity to be present or represented;*

at the hearing of the application; and

(b) *the person ought to be present or represented at the hearing;*

the court may adjourn the hearing in order to enable the person to be given an opportunity to be present or represented.

Division 3 - Declaration

114. Court may make declaration about existence of relationship

If, on an application under this Part, the court is satisfied that there is, or was, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

115. Court may make declaration about non-existence of relationship

If, on an application under this Part, the court is satisfied that there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

116. Declaration to include date

A declaration must include -

- (a) the date at which there was, or was not, the de facto relationship; or*
 - (b) the dates between which there was, or was not, the de facto relationship;*
- or both.*

117. Death of partners irrelevant

A declaration may be made whether or not the person or either of the persons named by the applicant as a partner or partners to the de facto relationship is alive.

118. Effect of declaration

- (1) A declaration made by a court has effect as a judgment of the court.*
- (2) The persons named in the declaration are presumed, as specified in the declaration, to have had or not to have had a de facto relationship at the date stated in the declaration, between the dates stated in the declaration or both.*
- (3) Subsection (2) applies for all purposes.*

Clause 118 is pivotal to the operation of this chapter. It provides that the declaration has effect as a judgment of the court. Moreover, once the declaration

is made, the partners are for all purposes presumed conclusively¹⁹⁰ to have had a de facto relationship at a particular date or during a particular period.

PART 2 - REVOCATION OF DECLARATION

Part 2 allows a court to revoke a declaration made under Part 1 of this chapter. It also allows the court to make any ancillary orders necessary to place a person affected by the revocation in the same position, as far as practicable, as that person would have been in if the declaration had not been made.

Division 1 - Application

119. Party or affected person may apply

If a declaration has been made under Part 1 (Declaration about existence of relationship) -

- (a) a person who applied, or could have applied, for the declaration;
or*
- (b) a person who is affected by the declaration;*

may apply to the court that made the declaration for a revocation of the declaration.

120. Court may adjourn hearing if other affected person

If, on an application under this Part, a court considers that -

- (a) a person whose interests would be affected by the making of an order -*
 - (i) is not present or represented; or*
 - (ii) has not been given the opportunity to be present or represented;*

at the hearing of the application; and

¹⁹⁰ This presumption is subject to the revocation of a declaration which may be made by the court under Part 2.

- (b) *the person ought to be present or represented at the hearing;*
the court may adjourn the hearing in order to enable the person to be given an opportunity to be present or represented.

Division 2 - Revocation

121. Court may revoke declaration

If, on an application under this Part, the court is satisfied that -

- (a) *a new fact or circumstance has arisen that has not previously been disclosed to the court; and*
- (b) *if the applicant was a party to the application for the declaration the fact or circumstance was not within the applicant's knowledge when the declaration was made;*

the court may make an order revoking the declaration.

122. Court may make ancillary orders

- (1) *If a court makes an order revoking a declaration, the court may, if it considers that it would be just and equitable to do so, make any ancillary order necessary to place a person affected by the revocation of the declaration in the same position, as far as practicable, as the person would have been in if the declaration had not been made.*
- (2) *The court may, for example, make an order under subsection (1) varying rights in property or the financial resources of de facto partners or another person.*

123. Effect of revocation

- (1) *If the court makes an order revoking a declaration, the declaration ceases to have effect.*
- (2) *The revocation of the declaration does not affect anything done in reliance on the declaration before the order revoking the declaration was made.*

CHAPTER 6 - COURTS

The Commission recommends that the Family Court is the appropriate forum in which to hear and determine matters arising under the proposed legislation.¹⁹¹ If the requisite steps to vest jurisdiction in the Family Court are not taken, the matters arising under the legislation will be dealt with in the existing State courts according to the relevant monetary jurisdiction.

Part 1 of Chapter 6 specifically confers jurisdiction on the Supreme Court, District Courts and Magistrates Courts, outlines the jurisdictional limits for the purposes of the Act and provides for the transfer of proceedings between courts. The powers of the court to make appropriate orders under the Act are conferred by Part 2. Part 3 deals with who is entitled to intervene in proceedings commenced under the Act and the rights of intervenors, orders for costs which can be made under the Act, and restrictions on publishing an account of de facto proceedings. Part 4 provides for powers of the courts to enforce orders made under the Act.

PART 1 - JURISDICTION

124. Courts having jurisdiction under this Act

- (1) *The following courts have jurisdiction to hear and decide all matters under this Act -*
- (a) *the Supreme Court;*
 - (b) *a District Court;*
 - (c) *a Magistrates Court.*
- (2) *Subsection (1) has effect subject to the following provisions -*
- *Chapter 5 (Existence of a de facto relationship);*
 - *section 125 (Limit of jurisdiction of District and Magistrates Courts).*

This clause specifically confers jurisdiction on the Supreme Court, District Courts and Magistrates Courts to hear and determine matters arising under the Act.

¹⁹¹ See page 3 of the Report.

125. Limit of jurisdiction of District and Magistrates Courts

- (1) A District Court or Magistrates Court has jurisdiction to make the following orders only if section 126(2)(a) (Transfer of proceeding beyond jurisdictional limit) applies -
- (a) an order or declaration concerning an interest in property if the value of the interest is more than the court's jurisdictional limit;
 - (b) an order for maintenance of a value more than the court's jurisdictional limit.
- (2) Subsection (1) has effect subject to section 126.

Clause 125 limits the jurisdiction of the District Courts and Magistrates Courts for the purposes of the Act to their ordinary monetary limit as set out in the *District Courts Act 1967 (Qld)* and the *Magistrates Courts Act 1921 (Qld)* respectively.¹⁹² The legislation makes it clear that it is the value of the interest claimed, not the value of the property itself, which is relevant for this purpose.

126. Transfer of proceeding beyond jurisdictional limit

- (1) If the value of an interest in property concerned in a proceeding under this Act before a District Court or Magistrates Court is more than twice the court's jurisdictional limit, the court must transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest.
- (2) If the value of an interest in property concerned in a proceeding under this Act before a District Court or Magistrates Court is more than the court's jurisdictional limit but equal to or less than twice the limit, then -
- (a) if the parties to the proceeding file a form under the rules of the relevant court agreeing to the court hearing and deciding the proceeding the court may either -
 - (i) hear and decide the proceeding; or

¹⁹² The monetary jurisdictions of the Magistrates Courts and the Districts Courts are \$20,000 and \$200,000 respectively: section 4 *Magistrates Courts Act 1921 (Qld)* and section 66 *District Courts Act 1967 (Qld)*.

- (ii) *transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest; or*
- (b) *if the parties to the proceeding do not file such a form the court must transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest.*
- (3) *Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.*
- (4) *If a proceeding is transferred to another court, the court must proceed as if the proceeding had been originally started in the court.*
- (5) *Without prejudice to the duty of a court to comply with this section, failure by the court to comply does not invalidate any order of the court in the proceeding.*

Under clause 126, if the value or interest in property is more than the relevant court's jurisdictional limit, provided both parties consent the matter may still be heard in that court. However, if the value or interest is more than twice the jurisdictional limit, the court must transfer the proceedings to a court that has jurisdiction to hear the matter.

127. Stay or dismissal of proceeding in relation to same person

- (1) *If there is a proceeding under this Act started by or in relation to the same person pending in more than 1 court, a court in which a proceeding is pending may -*
 - (a) *stay the proceeding pending before it for the time that it considers appropriate; or*
 - (b) *dismiss the proceeding.*
- (2) *Before staying or dismissing a proceeding, a court may make any orders and give any directions it considers appropriate.*

A court is empowered to stay or dismiss a proceeding under this clause if proceedings by or in relation to the same person are brought in different courts.

128. Transfer of proceeding to more appropriate court

(1) If -

- (a) *there is a proceeding under this Act pending in a court; and*
- (b) *the court considers that it is more appropriate that the proceeding be dealt with in another court having jurisdiction under this Act;*

the court may transfer the proceeding to the other court.

Example -

Ms A and Mr B lived in a de facto relationship for 5 years. After they separate, there is a dispute about entitlement to their assets which are valued at \$15 000. Ms A applies to the Supreme Court seeking a declaration about her entitlement to the assets. Given the value of the assets is within the monetary limit of a Magistrates Court, the Supreme Court is likely to consider that it is more appropriate that the matter be dealt with by a Magistrates Court. Accordingly, the Supreme Court may transfer the proceeding to a Magistrates Court.

- (2) *Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.*

A transfer of proceeding may be ordered under this clause if the matter has been commenced at an inconvenient location. Similarly, a court is likely to order a transfer to the District or Magistrates Courts if proceedings concerning property within a lower jurisdictional limit are commenced in the Supreme Court. The example given in the legislation illustrates such a case.

129. Courts to act in aid of each other

All courts having jurisdiction under this Act must act in aid of and be auxiliary to each other in all matters under this Act.

PART 2 - POWERS

The provisions in Part 2 focus on conferring the courts responsible for administering the Act with sufficient powers to make the necessary orders.

130. Purpose and how it is to be achieved

The purpose of this Part is to ensure that the courts having jurisdiction under this Act have sufficient powers to make appropriate orders.

131. Court's powers

- (1) *In exercising its powers under this Act, a court may do any 1 or more of the following -*
- (a) *order the transfer of property;*
 - (b) *order that a specified transfer or settlement of property be made by way of maintenance for a de facto partner;*
 - (c) *order the sale of property, and the distribution of the proceeds of sale in any proportions that the court considers appropriate;*
 - (d) *order that a document be executed, that a document of title be produced or that anything else be done to enable an order to be carried out effectively or to provide security for the proper performance of an order;*
 - (e) *order payment of a lump sum, whether in a single amount or by instalments;*
 - (f) *order payment of a periodic amount;*
 - (g) *order that payment of an amount ordered to be paid be secured in whole or in part in a way that the court directs;*
 - (h) *appoint or remove trustees;*

- (i) *make an order or grant an injunction -*
 - (i) *for the protection of, or otherwise relating to, the property or financial resources of a party to an application; or*
 - (ii) *to aid enforcement of another order made in relation to an application;*
 - (j) *make an order or grant an injunction about the use or occupancy of the de facto partners' home;*
 - (k) *if a de facto partner is the lessee of the home in which the de facto partners have lived and on separation the other partner wishes to remain in the home the court may, with the consent of the lessor, order that the lease be assigned from the lessee to the other partner;*
 - (l) *order that payments be made direct to a de facto partner, to a trustee or into court for the benefit of a partner;*
 - (m) *make a permanent order or grant a permanent injunction;*
 - (n) *make an order or grant an injunction -*
 - (i) *pending the disposal of the proceeding; or*
 - (ii) *for a fixed term or for life or during joint lives; or*
 - (iii) *until the happening of a particular event, including, for example, a further order;*
 - (o) *impose conditions;*
 - (p) *make an order by consent;*
 - (q) *make any other order or grant any other injunction that it considers necessary to do justice.*
- (2) *This section does not affect any other power of the court under this Act or another law.*
- (3) *In this section -*

"law" *includes a law of the Commonwealth.*

The powers conferred on the court by clause 131 are modelled on the powers conferred on the Family Court by section 80 of the *Family Law Act 1975 (Cwth)*. They also largely reflect the powers conferred on the court by the de facto relationships legislation in New South Wales, Northern Territory and Victoria.¹⁹³

Clause 131(1)(k) confers on the court a power which is not conferred by the *Family Law Act 1975 (Cwth)* or by the existing de facto relationships legislation. Paragraph (k) gives the court power to transfer beneficial entitlements under a lease, provided the consent of the landlord is first obtained. The following example illustrates when it would be desirable for this kind of power to be used.

Example

Robyn and Keith lived in a de facto relationship for ten years. There are two children of the relationship. Robyn and Keith have rented the house in which they lived since the beginning of their relationship. The lease is in Robyn's name. The children attend the school and kindergarten in the vicinity of the house. During the relationship, Keith's mother who lives nearby regularly helped care for the children. On separation, Keith obtained custody of the children. Keith and Robyn both wish to stay in the home and have the other move out.

In the circumstances of this case, an order allowing Keith to stay in the house could be as valuable to Keith as any property or maintenance order the court may make. Provided the landlord consents to Keith becoming lessee and being subject to the conditions of the lease, the court should be empowered to order the assignment of the lease from Robyn to Keith.

132. Execution of documents by court order

(1) If -

- (a) a person has refused to comply with an order of a court directing the person to execute a document; or
- (b) for another reason, a court considers it appropriate;

the court may appoint an officer of the court or another person to execute the document in the name of a person and to do everything necessary to give validity and effect to the document.

¹⁹³ Section 38 *De Facto Relationships Act 1984 (NSW)*, section 37 *De Facto Relationships Act 1991 (NT)* and section 291 *Property Law Act 1958 (Vic)*.

- (2) *The execution of the document by the appointed person has the same validity and effect as if it had been executed by the person directed by the order to execute it.*
- (3) *A court may make any order it considers appropriate about the payment of the costs and expenses of and incidental to the preparation of the document and its execution.*

Clause 132 will be useful in the following situations.

- (i) *A person has not complied with an order to execute a document.*

If a person does not comply with an order that he or she execute a document, this clause allows the court to appoint an officer of the court to execute the document instead.

- (ii) *The court is satisfied that a person will not comply with an order to execute a document*

In an application for property adjustment under the proposed legislation, the court can order the transfer of property from one party to the other. As part of this order, the court can specifically require one party to execute the transfer document. If it is clear to the court, for example because of previous conduct of the party, that the party will not execute the transfer as ordered, the court may wish, in the first instance, to order that an officer of the court rather than the party execute the transfer.

133. Orders and injunctions in the absence of a party

- (1) *In a case of urgency, a court may make an order or grant an injunction under this Act in the absence of a party.*
- (2) *An application under this section may be made orally or in writing.*
- (3) *The court may make an order or grant an injunction on an oral application only if it considers that it is necessary because of the extreme urgency of the case.*
- (4) *The court may give any directions about the filing, serving and further hearing of an application.*

- (5) *An order made or injunction granted under subsection (1) must be expressed to operate or apply only until a specified time or the further order of the court.*
- (6) *If a court makes an order or grants an injunction under subsection (1), it may give directions about -*
- (a) *the service of the order or injunction and any other documents it considers appropriate; and*
 - (b) *the hearing of an application for a further order.*

Clause 133 empowers the court to make an order or grant an injunction even in the absence of the other party. Any order or injunction granted under this clause will operate only until a time specified in the order or until a further order of the court is made.

In the New South Wales, Northern Territory and Victorian legislation,¹⁹⁴ the power to grant relief in the absence of a party is limited to injunctive relief and, in New South Wales and Northern Territory, to granting interim maintenance. Under the *Family Law Act 1975 (Cwth)*, provided that there is sufficient urgency, the court is not restricted in the orders which can be made in the absence of a party. As the court may wish to exercise a power other than granting an injunction or ordering interim maintenance as a matter of urgency, the Commission recommends adopting the *Family Law Act 1975 (Cwth)* model.

134. Variation and setting aside of orders

- (1) *If, on the application of a person in relation to whom an order has been made under this Act, a court is satisfied that -*
- (a) *there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose matters as required by this Act or another circumstance; or*
 - (b) *because of circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or*

¹⁹⁴ Section 40 *De Facto Relationships Act 1984 (NSW)*, section 39 *De Facto Relationships Act 1991 (NT)* and section 293 *Property Law Act 1958 (Vic)*.

- (c) *a person has defaulted in carrying out an obligation imposed on the person by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order; or*
- (d) *a child of the partners (or the applicant if the applicant has the care and control of a child of the partners) will suffer hardship if the court does not vary the order because of circumstances of an exceptional nature relating to the welfare of the child that have arisen since the order was made;*

the court may vary the order.

(2) *In this section -*

"vary" includes -

- (a) *set aside; and*
- (b) *set aside and substitute another.*

Clause 134 sets out the circumstances in which an order which has been made under this Act can be varied or set aside.

There are four circumstances which will justify variation of the order under this clause. These circumstances mirror the matters in the equivalent section in the *Family Law Act 1975 (Cwth)*.¹⁹⁵

The fourth situation in which the court may vary an order is if since making the order, circumstances have arisen so that a child of the partners (or the applicant if the applicant has the care and control of a child) will suffer hardship if the order is not varied or set aside.

The meaning of "child" of the de facto partners for the purpose of clause 134 paragraph (d) is that given in the definition section.¹⁹⁶ Where a person has the care and control of his or her own child, not a child of the partner, that person may be entitled to have an order varied under clause 134. However, it should be noted that the court will only make a substitute order "if it considers it appropriate" in the circumstances.

¹⁹⁵ Section 79A.

¹⁹⁶ Clause 4 of the draft legislation.

135. Transactions to defeat claims

- (1) *If a court is satisfied that an existing or anticipated order in a proceeding under this Act is likely to be defeated by the making of a document or disposition by a party to the proceeding, the court may set aside or restrain the making of the document or disposition.*
- (2) *If a court is satisfied that an existing or anticipated order in a proceeding under this Act was defeated by the making of a document or disposition by a party to the proceeding, the court may order that -*
 - (a) *any property dealt with by the document or disposition be applied towards, or charged with, payment of -*
 - (i) *an amount payable under an order adjusting interests in the property of 1 or more of the parties to the proceeding; or*
 - (ii) *costs; or*
 - (b) *the proceeds of a sale be paid into court to abide its order.*
- (3) *A court may order a party or person acting in collusion with a party to pay the costs of -*
 - (a) *another party; or*
 - (b) *a purchaser in good faith; or*
 - (c) *another interested person;**of and incidental to -*
 - (d) *the document or disposition; or*
 - (e) *the setting aside or restraining of the document or disposition.*
- (4) *For the purposes of this section, something is made by a person if the thing is made by or on behalf of, or by direction or in the interests of, the person.*
- (5) *For the purposes of this section, it does not matter whether the document or disposition is intended to defeat the order concerned.*

Clause 135 enables the court, on application, to set aside a transaction where the other party is attempting to dispose of property. It mirrors the de facto relationships legislation in New South Wales, Northern Territory, Victoria and the *Family Law Act 1975 (Cwth)*.¹⁹⁷

136. Interests of other parties

- (1) *In the exercise of its powers under this Part, a court must have regard to the interest in the property of, and must make any order proper for the protection of, a purchaser in good faith and other interested persons.*
- (2) *A court may order that a person be given notice of a proceeding or be made a party to the proceeding on the application of the person or if it appears to the court that the person may be affected by an order under this Part.*

This clause also relates to a disposition by one of the parties of the property in dispute.

When exercising its discretion under clause 135 to set aside or restrain the making of a document or disposition, the court must have regard to the interest in the property of a purchaser in good faith or other interested person. This provision also mirrors the provisions in the de facto relationships legislation in New South Wales, Northern Territory, Victoria and the *Family Law Act 1975 (Cwth)*.¹⁹⁸

137. Duty of Court to end financial relationship

In a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court), a court must make orders that, as far as practicable, will end the financial relationship between the de facto partners.

This clause requires the courts to make orders that will finally determine the financial relationship between the parties and avoid further proceedings between them as far as this is possible. The philosophy behind this "clean break" principle

¹⁹⁷ Section 42 *De Facto Relationships Act 1984 (NSW)*, section 41 *De Facto Relationships Act 1991 (NT)*, section 295 *Property Law Act 1958 (Vic)* and section 85 *Family Law Act 1975 (Cwth)*.

¹⁹⁸ Section 43 *De Facto Relationships Act 1984 (NSW)*, section 42 *De Facto Relationships Act 1991 (NT)*, section 296 *Property Law Act 1958 (Vic)* and section 85(3) *Family Law Act 1975 (Cwth)*.

is that the parties are best able to recover from the former relationship by settling all financial matters and beginning new lives.

PART 3 - MISCELLANEOUS MATTERS CONCERNING PROCEEDINGS

Division 1 - Intervention

In a proceeding brought under the proposed legislation, the need may arise for a third party to intervene in the proceedings. The following example illustrates when the need to intervene may arise.

Example

Carol and Greg separate after living in a de facto relationship for 10 years. During the relationship, Carol's mother contributes \$20,000 to Carol and Greg towards the purchase price of a house. The house is registered in Greg's name. On separation, Carol seeks an order under the proposed legislation to alter interests in the house.

In the circumstances above, it is possible that a dispute could arise concerning the nature of the contribution of \$20,000 made by Carol's mother. Greg may argue that the \$20,000 was a gift. In contrast, Carol and her mother may claim it was a loan only and should be repaid before the remaining interest in the house is distributed between Carol and Greg.

To argue her case, Carol's mother may want to intervene in the property proceedings between Carol and Greg.

Under the *Family Law Act 1975 (Cwth)*,¹⁹⁹ the Family Court is given wide powers to allow a person to intervene in proceedings under that Act. Carol's mother would be entitled to intervene in the proceedings if Carol and Greg were married.

The right of a person to intervene in proceedings which have been commenced in the Supreme Court, District Courts and Magistrates Courts is, however, far more limited.²⁰⁰ There is no equivalent to the provision in the *Family Law Act 1975 (Cwth)*²⁰¹ in the Rules of the Supreme Court or of the District or Magistrates Courts. The Commission understands that the intervention section in the *Family Law Act 1975 (Cwth)* is operating well in practice. It therefore recommends

¹⁹⁹ Section 92.

²⁰⁰ The power to intervene is limited to cases where the party to the action is under a disability, such as a mental disability or where the action is a probate or admiralty action: Order 3 rules 15, 16, 17 and 21 of the *Supreme Court Rules*, rules 27 and 28 of the *District Courts Rules* and rule 29 of the *Magistrates Courts Rules*.

²⁰¹ Section 92.

inserting in the legislation provisions modelled on the equivalent provisions in the *Family Law Act 1975 (Cwth)*.

138. Application for leave

A person may apply for leave to intervene in a proceeding under this Act.

139. Leave to intervene

- (1) *A court may grant a person leave to intervene in a proceeding before the court.*
- (2) *The court may grant leave subject to any conditions that it considers appropriate.*

140. Intervener's rights

A person who intervenes in a proceeding by leave of the court is a party to the proceeding with all the rights, duties and liabilities of a party unless the court orders otherwise.

Clause 140 mirrors the equivalent provision in the *Family Law Act 1975 (Cwth)*.²⁰² The Commission is aware of litigation on the words "all the rights, duties and liabilities of a party" in the provision in the *Family Law Act 1975 (Cwth)*.²⁰³ As the wording of clause 140 almost exactly reproduces the *Family Law Act 1975 (Cwth)* equivalent, the case law will be relevant in interpreting clause 140.

Division 2 - Costs

In proceedings in the Supreme Court, District Courts and Magistrates Courts, costs generally follow the event.²⁰⁴ This means that the legal costs of the successful party are paid by the unsuccessful party. In contrast, in proceedings in the Family

²⁰² Section 92(3).

²⁰³ See *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337; *Harris and Harris; Re Banaco Pty Ltd* (1980) FLC 90-906; *Barro, In Marriage of* (1983) FLC 91-300; *Re M* (1983) FLC 91-314.

²⁰⁴ Order 91 of the *Supreme Court Rules*, rule 363 of the *District Courts Rules* and rule 319 of the *Magistrates Courts Rules*.

Court, the parties generally bear their own costs.²⁰⁵ The Family Court does, however, have discretion to order that one party pay the costs of the other party. The Court may make such an order if, for example, the proceedings result from the failure of one of the parties to comply with a previous order or if one of the parties has been wholly unsuccessful in the proceedings.²⁰⁶

The Commission recommends that for the purposes of the proposed legislation, the provision concerning costs should be modelled on the *Family Law Act 1975 (Cwth)* provision. In other words, a party to a proceeding under the proposed legislation will generally bear his or her own costs. The court will have the discretion, however, to make any order for costs that it considers just having taken into account the matters set out in the proposed legislation. Clause 141 reflects this recommendation.

141. Party bears own costs

- (1) *A party to a proceeding under this Act bears the party's own costs.*
- (2) *However, if the court is satisfied that there are circumstances that justify it making an order, it may make any interlocutory or other order for costs or security for costs that it considers appropriate.*
- (3) *In considering whether there are circumstances that justify it making an order, the court must consider the following matters -*
 - (a) *the income, property and financial resources of each of the parties;*
 - (b) *whether any party has assistance by way of legal aid and the terms of the assistance;*
 - (c) *the conduct of each of the parties in relation to the proceeding, including, for example, conduct about pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts and production of documents;*
 - (d) *whether the proceeding results from a party's failure to comply with a previous order made under this Act;*

²⁰⁵ Section 117 *Family Law Act 1975 (Cwth)*.

²⁰⁶ Section 117(2A)(d) and (e) *Family Law Act 1975 (Cwth)*.

- (e) whether any party has been wholly unsuccessful in the proceeding;
- (f) whether any party made an offer of settlement under its rules of court and the terms of the offer;
- (g) any fact or circumstance that the court considers the justice of the case requires to be taken into account.

Division 3 - Publication of proceedings

The majority of proceedings commenced under the proposed legislation and the *Family Law Act 1975 (Cwth)* are very personal in nature. The disputes which concern the distribution of property or payment of spousal maintenance will be determined by the court only when the parties are unable to resolve these matters between themselves. In such disputes, matters of a personal nature, including the financial circumstances of the parties, will be before the court. For this reason, the *Family Law Act 1975 (Cwth)*²⁰⁷ restricts publication of the identity of the parties to the proceedings.²⁰⁸

The Commission recommends a similar restriction be inserted in the proposed legislation. Clauses 142-144 of the proposed legislation reflect this recommendation. Clause 142 lists the circumstances in which a person is permitted to publish an account of a de facto proceeding. The terms "publish" and "account of a de facto proceeding" are defined in clauses 12 and 13 of the draft legislation. Clause 143 sets out the restrictions on publishing an account of a de facto proceeding. Clause 144 makes it an offence to publish a matter contrary to clauses 142 and 143. While clauses 12, 13 and 142-144 are in a different format to the equivalent provision in the *Family Law Act 1975 (Cwth)*,²⁰⁹ they are modelled on that provision.

²⁰⁷ Section 121.

²⁰⁸ Note, however, the exceptions to this restriction set out in section 121(9) *Family Law Act 1975 (Cwth)*.

²⁰⁹ Section 121.

142. Specifically authorised publication

- (1) A person may publish an account of a *de facto* proceeding in the following ways -
- (a) by communicating, to a person concerned in another proceeding in any court, a court document from the *de facto* proceeding for use in the other proceeding;
 - (b) by communicating a court document from the *de facto* proceeding to -
 - (i) a body that is responsible for disciplining members of the legal profession; or
 - (ii) a person concerned in a disciplinary proceeding against a member of the legal profession;
 - (c) by communicating, to a body that grants assistance by way of legal aid, a court document from the *de facto* proceeding for use in deciding whether assistance should be provided or continued in a particular case;
 - (d) by publishing a notice or report about the *de facto* proceeding by direction of a court;
 - (e) by publishing an account of the *de facto* proceeding in a publication genuinely intended primarily for use by the members of a profession;
 - (f) by publishing an account of the *de facto* proceeding to -
 - (i) a member of a profession in relation to the member's practice of the profession; or
 - (ii) a student in relation to the student's studies.

(2) In this section -

"court" means a court or tribunal established under a law of the Commonwealth or a State or Territory.

143. No identification in general publication

- (1) *A person may publish an account of a de facto proceeding only if the publication does not identify -*
- (a) *a party to the proceeding; or*
 - (b) *a witness in the proceeding; or*
 - (c) *another person who is, or is alleged to be, concerned in a matter relevant to the proceeding; or*
 - (d) *a person related to, or associated with, a person mentioned in paragraph (a), (b) or (c).*
- (2) *A publication identifies a person if it is sufficient to identify the person to -*
- (a) *a member of the public; or*
 - (b) *a member of the section of the public to whom the publication was made.*
- (3) *Subsection (1) does not apply to a publication under section 142 (Specifically authorised publication).*

144. Offence

- (1) *A person must not publish an account of a de facto proceeding except under section 142 (Specifically authorised publication) or 143 (No identification in general publication).*

Maximum penalty 40 penalty units.

- (2) *A proceeding for an offence against this section may be started only with the written consent of the Director of Prosecutions.*
- (3) *A document purporting to be a consent mentioned in subsection (2) is taken to be the consent, and to have been properly given, unless the contrary is established.*

PART 4 - ENFORCEMENT

The proposed legislation confers on the Supreme Court, District Courts and Magistrates Courts power to administer the Act.²¹⁰

If the State courts are responsible for administering this Act, the usual enforcement powers of the relevant court will apply when enforcing orders made under the Act. For example, the Supreme Court has an array of powers to enforce judgments including power to garnishee wages,²¹¹ power to seize and sell goods or land,²¹² power to issue a writ of sequestration to seize the goods of a person until the order is complied with,²¹³ power to issue a writ of attachment enabling a person or the property of a person to be taken into custody,²¹⁴ power to appoint a receiver,²¹⁵ power to nominate a third party to perform an act or execute a document,²¹⁶ power to charge shares and securities²¹⁷ and power to bring proceedings for contempt of court for failing to comply with an order of the court.²¹⁸

The Commission recommends that section 66 of the *District Courts Act 1967 (Qld)* be amended to confer jurisdiction on the District Courts to hear applications under the proposed legislation. Section 67(1) of the *District Courts Act 1967 (Qld)* gives the District Courts when exercising the jurisdiction under section 66 all the powers and authorities of the Supreme Court. The District Courts are specifically given the power to "make any order, including an order for attachment or committal in consequence of disobedience of an order" as may be made by a Supreme Court judge.²¹⁹ The District Courts therefore will possess the powers referred to in the previous paragraph in enforcing an order under the proposed legislation.

²¹⁰ Clause 124 of the draft legislation.

²¹¹ Order 49 *Supreme Court Rules* and section 3 *Wages Attachment Act 1936 (Qld)*.

²¹² Order 47 rule 3 and Order 48 rules 1 and 3 *Supreme Court Rules*.

²¹³ Order 48 rule 4 *Supreme Court Rules*.

²¹⁴ Order 53 *Supreme Court Rules*.

²¹⁵ Order 47 rules 3 and 36 *Supreme Court Rules*.

²¹⁶ Order 47 rule 29 *Supreme Court Rules*.

²¹⁷ Order 50 rule 3 *Supreme Court Rules*.

²¹⁸ Order 84 and Order 53 rule 8 *Supreme Court Rules*.

²¹⁹ Section 67(1)(b) *District Courts Act 1967 (Qld)*.

Magistrates Courts have powers to enforce orders to pay money. These methods include the issue of a warrant of execution authorising a bailiff to seize and sell goods,²²⁰ seizure and sale of land²²¹ and power to garnishee.²²² In addition to these powers, in certain circumstances a judgment made in a Magistrates Court may be registered in a District Court and enforced as if it were a judgment of that Court.²²³ Magistrates Courts do not, however, have power to enforce orders other than for the payment of money. They could not, for example, order that furniture be transferred from one partner to the other. Power to enforce such orders is conferred by the proposed legislation.

With the exception outlined in relation to the Magistrates Courts, the Commission considers that the powers of the State courts to enforce orders made under the proposed legislation are to a large extent satisfactory. The Commission therefore believes that there is no need for extensive enforcement procedures to be inserted in the legislation. The powers which the Commission recommends should be conferred on the State courts are set out in this chapter.

145. Purpose and how it is to be achieved

The purpose of this Part is -

- (a) *to recognise that the existing powers of the courts having jurisdiction under this Act are largely satisfactory to enforce orders made under this Act; and*
- (b) *to add to those powers where necessary.*

146. Enforcement of higher court's maintenance order by Magistrates Court

An order made by the Supreme Court or a District Court for the periodic payment of maintenance may be enforced by a Magistrates Court as if it were a judgment of the Magistrates Court.

Under the proposed legislation, orders for periodic maintenance can be made by the Supreme Court, District Courts and Magistrates Courts. In practice, it is likely

²²⁰ Rule 230(4) *Magistrates Courts Rules*.

²²¹ Rule 238 *Magistrates Courts Rules*.

²²² Rules 259, 261A and 269 *Magistrates Courts Rules*.

²²³ Section 100 *District Courts Act 1967 (Qld)*.

that most periodic maintenance orders will be made by Magistrates Courts. This is because most periodic maintenance orders are likely to be short-term orders only and will fall within the Magistrates Courts' jurisdictional limit. The Supreme Court, District Courts and Magistrates Courts all have reasonably extensive powers to enforce compliance with periodic maintenance orders.

In terms of minimising the costs to the parties and reducing case loads in the Supreme Court and the District Courts, it will be preferable for enforcement of periodic maintenance orders to be administered predominantly by Magistrates Courts.

Clause 146 facilitates a periodic maintenance order made by the Supreme Court or a District Court to be enforced by a Magistrates Court as if it were a judgment of that court.

147. Enforcement of non-monetary orders and injunctions

- (1) *If a court is satisfied that a person has knowingly and without reasonable excuse contravened an order (other than an order for the payment of money) made or an injunction granted by it under this Act, the court may -*
- (a) *order the person to pay a fine of not more than 40 penalty units; and*
 - (b) *either -*
 - (i) *require the person to enter into a recognisance, with or without sureties, in an amount that the court considers reasonable, that the person will comply with the order; or*
 - (ii) *order the person to be imprisoned until the person enters into such a recognisance or until the end of 3 months, whichever happens first; and*
 - (c) *order the person to hand over to the court the documents that the court considers appropriate; and*
 - (d) *appoint an officer of the court or other person to execute any document in the name of the person; and*
 - (e) *make any other order that the court considers necessary to enforce compliance with the order or injunction.*
- (2) *Nothing in this section affects the power of a court to punish a person for contempt of court.*

In the discussion at the beginning of this Part, the powers of the Supreme Court, District Courts and Magistrates Courts to enforce orders were briefly reviewed. Both the Supreme Court and District Courts have power to punish for contempt. In those courts, if there is a failure to comply with an order to transfer property, the person in default could be committed for contempt. Magistrates Courts have no such power. The Commission recommends the enactment of clause 147 to supplement the powers of Magistrates Courts in this regard.

Clause 147 also sets out other powers which may be of assistance to the courts in enforcing orders made under the proposed legislation.

CHAPTER 7 - MISCELLANEOUS

148. Regulations

The Governor in Council may make regulations under this Act.

* **Rules of court**

Clause 7.3 of the legislation proposed in the Working Paper conferred on the Supreme Court, District Courts and Magistrates Courts power to make Rules of Court for the purpose of regulating proceedings under the Act. However, because the *Supreme Court Act 1991 (Qld)*, *District Courts Act 1967 (Qld)* and *Magistrates Courts Act 1921 (Qld)*²²⁴ empower the courts to make rules, it is unnecessary for this legislation also to confer the power to make rules.

²²⁴ Section 104 *Supreme Court of Queensland Act 1991 (Qld)*, section 101 *District Courts Act 1967 (Qld)* and section 14 *Magistrates Courts Act 1921 (Qld)*.

CHAPTER 8 - CONSEQUENTIAL AMENDMENTS

As part of its review of the law on de facto relationships, the Commission recommends the amendment of various Queensland statutes. Chapter 8 provides for these amendments.

149. Acts amended

The Acts specified in the Schedule are amended as set out in the Schedule.

* ***Conferring jurisdiction on the Supreme Court, District Courts and Magistrates Courts***

Clause 124 of the proposed legislation expressly confers on the Supreme Court, District Courts and Magistrates Courts jurisdiction to hear any application for an order or relief under the Act. For the reasons set out in the commentary to Part 4 of Chapter 6,²²⁵ the Commission recommended that the *District Courts Act 1967 (Qld)* be amended to reflect this increase in jurisdiction. This Act is amended as set out in the Schedule to the proposed legislation.

* ***Appeal structure***

Decisions of the Supreme Court

The Commission is not recommending any alteration to the *Supreme Court of Queensland Act 1991 (Qld)* in relation to the appeal structure. A party will have the usual rights of appeal which exist if a party is dissatisfied with an order or judgment of the Trial Division of the Supreme Court.²²⁶

Decisions of the District Court

The Commission recommends that a party may appeal to the Court of Appeal from a final judgment of a District Court made under the proposed legislation as a matter of right, regardless of the value of the interest claimed in the proceedings. A party who is dissatisfied with any other judgment of the District Court under the proposed legislation may appeal to the Court of Appeal only with the leave of a Judge of the Court of Appeal. Section 92 of the *District Courts Act 1967 (Qld)* will be altered to reflect this recommendation.

²²⁵ See page 128 of the Report.

²²⁶ Section 72 *Supreme Court of Queensland Act 1991 (Qld)*.

Decisions of the Magistrates Court

The Commission is not recommending any alteration to the appeal structure from a decision of the Magistrates Court to the District Court. However, the proposed legislation confers on Magistrates Courts additional jurisdiction, namely to declare existing title or rights in property. The Commission recommends that appeals from such declarations be appeals as of right to the District Courts. Section 11 of the *Magistrates Courts Act 1921 (Qld)* will be amended to reflect this recommendation.

*** Stamp Act 1894 (Qld)**

On the breakdown of a marriage, the parties will want to settle their financial affairs so that they can, to as great an extent as possible, be financially independent and begin new lives. This may involve the transfer of the former matrimonial home or the family car into the other partner's name. An instrument transferring property will normally attract *ad valorem* stamp duty. The amount of stamp duty payable will depend on the value of the property.

So that people settling their property interests on the breakdown of a marriage do not incur this duty, the *Family Law Act 1975 (Cwth)* and *Stamp Act 1894 (Qld)* provide stamp duty exemption for certain instruments.²²⁷

In proceedings under the *Family Law Act 1975 (Cwth)*, the court may order one party to transfer the matrimonial home to the other party.²²⁸ To comply with this order, a transfer document would have to be signed. This document may attract stamp duty exemption.²²⁹

Instruments entered into pursuant to agreements registered in the Family Court under section 86 of the *Family Law Act 1975 (Cwth)* or approved by the court under section 87 of the *Family Law Act 1975 (Cwth)* may also attract stamp duty exemption.²³⁰

The instruments entered into as a result of the breakdown of a de facto relationship should also attract stamp duty exemption. Stamp duty exemption should apply

²²⁷ Section 90 *Family Law Act 1975 (Cwth)* and sections 59B and 59C *Stamp Act 1894 (Qld)*. Consultations with the Queensland Office of State Revenue revealed that as a result of an internal administrative directive, such instruments are being exempt from stamp duty under section 90 of the *Family Law Act 1975 (Cwth)* rather than under sections 59B and 59C of the *Stamp Act 1894 (Qld)*. (See also (1992) Vol 12 No 7 *The Proctor* (August) at page 20 which sets out the administrative statement by Ms Jane MacDonnell, Executive Director, Office of State Revenue.)

²²⁸ Section 79 *Family Law Act 1975 (Cwth)*.

²²⁹ Section 90(1)(a) *Family Law Act 1975 (Cwth)*.

²³⁰ Sections 90(1)(b) and 90(2) *Family Law Act 1975 (Cwth)*. For a review of the stamp duty exemptions in New South Wales, the Northern Territory and Victoria under their de facto relationships legislation, see *De Facto Relationships Working Paper*, page 161.

whether the instrument is entered into pursuant to an order made under the proposed legislation, a cohabitation or separation agreement or other arrangement made between the parties.

The Commission recommends that the *Stamp Act 1894 (Qld)* be amended accordingly.

APPENDIX A

SUBMISSIONS LIST

The Commission received 14 written submissions or comments on the De Facto Relationships Working Paper No 40. The following individuals and organisations made written submissions or comments and consented to the publication of their identity.

Australian Festival of Light and Community Standards Organisation (Queensland)

Department of Family Services and Aboriginal and Islander Affairs

Mr D Doherty

Family Court of Australia

Legal Aid Office (Queensland)

M Morain

His Honour Judge Maxwell Morley Q C

Mr G Page

Queensland Association for Gay and Lesbian Rights

Mr M Smith

Women's Legal Service

APPENDIX B

DE FACTO RELATIONSHIPS BILL 1993

Queensland



DE FACTO RELATIONSHIPS BILL 1993

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ACTS AMENDED

DISTRICT COURTS ACT 1967

MAGISTRATES COURTS ACT 1921

1993

A BILL

FOR

**An Act to facilitate the resolution of financial matters at the end of a
de facto relationship and for other purposes**

The Parliament of Queensland enacts—	1
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(b) to recognise that de facto partners should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement; and	11 12 13
(c) to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the partners and, in certain cases, any child of the partners; and	14 15 16
(d) to provide for maintenance at the end of a de facto relationship by a de facto partner who is able to pay maintenance to a de facto partner who is unable to support himself or herself adequately because of circumstances arising from the relationship; and	17 18 19 20
(e) to provide for declaratory relief to help people ascertain their existing interests in property of de facto partners; and	21 22
(f) to provide for injunctive relief to help people protect their existing	23

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	and adjusted interests in property of de facto partners; and	1
(g)	to provide for declaratory relief about the existence or non-existence of a de facto relationship and so help people avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more unrelated proceedings; and	2 3 4 5 6
(h)	to facilitate the resolution of matters concerning a de facto relationship by the Supreme Court, a District Court or a Magistrates Court; and	7 8 9
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5

6

“**approved arbitrator**” means an arbitrator approved under a regulation;

7

“**approved mediator**” means a mediator approved under a regulation;

8

“**child**” of de facto partners means—

9

(a) a child born because of sexual relations between the partners; or

10

(b) a child of the female partner whose male partner is presumed to
be the father of the child under an Act, a Commonwealth Act, an
Act of another State or a Territory Act; or

11

12

13

(c) a child adopted by the partners; or

14

(d) a child who, at a time during the de facto relationship, is or was—

15

(i) treated by either partner as a child of the relationship; and

16

(ii) ordinarily a member of the partners’ household;

17

“**cohabitation agreement**” has the meaning given by section 9 (Meaning
of “cohabitation agreement”);

18

19

“**court**” means a court having jurisdiction under this Act;

20

“**court document**” of a proceeding means—

21

(a) a pleading in the proceeding; or

22

(b) a transcript of evidence in the proceeding; or

23

(c) another document used in relation to the proceeding;

24

“**de facto partner**” has the meaning given by section 6 (Meaning of
“de facto partner”);

25

26

“**de facto relationship**” has the meaning given by section 5 (Meaning of

27

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“de facto relationship”);	1
“ Family Law Act proceeding ” means a proceeding under the <i>Family Law Act 1975</i> of the Commonwealth;	2 3
“ financial matters ” has the meaning given by section 7 (Meaning of “financial matters”);	4 5
“ financial resources ” has the meaning given by section 8 (Meaning of “financial resources”);	6 7
“ maintenance order ” means an order for maintenance under section 63 (Court may make maintenance order);	8 9
“ monetary limit ” of a District Court has the meaning given in section 66 (District Courts’ civil jurisdiction) of the <i>District Courts Act 1967</i> ;	10 11
“ monetary limit ” of a Magistrates Court has the meaning given in section 2 of the <i>Magistrates Courts Act 1921</i> ;	12 13
“ private arbitration ” means arbitration carried out by a private arbitrator other than arbitration carried out because of an order made under section 103 (Arbitration if court refers property adjustment or maintenance proceeding);	14 15 16 17
“ private arbitrator ” means an arbitrator prescribed by regulation;	18
“ property adjustment order ” means an order adjusting interests in property under section 40 (Court may make property adjustment order);	19 20 21
“ publish ” has the meaning given by section 12 (Meaning of “publish”);	22
“ recognised agreement ” has the meaning given by section 11 (Meaning of “recognised agreement”);	23 24
“ separation agreement ” has the meaning given by section 10 (Meaning of “separation agreement”).	25 26
 <i>Division 2—De facto relationship and partner concepts</i>	 27
 Meaning of “de facto relationship”	 28
<i>Clause</i> 5. A “ de facto relationship ” is the relationship between 2 persons (whether of a different or the same gender) who, although they are not	29 30

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legally married to each other, live in a relationship like the relationship between a married couple.	1 2
Meaning of “de facto partner”	3
<i>Clause</i> 6. A “de facto partner” is a person who lives or lived in a de facto relationship.	4 5
<i>Division 3—Financial matters and financial resources concepts</i>	6
Meaning of “financial matters”	7
<i>Clause</i> 7. De facto partners’ “financial matters” are matters about the property, maintenance or financial resources of either or both of them.	8 9
Meaning of “financial resources”	10
<i>Clause</i> 8. A person’s “financial resources” include the following—	11
(a) a prospective claim or entitlement under a scheme, fund or arrangement under which superannuation, resignation, termination, retirement or similar benefits are provided to, or in relation to, the person;	12 13 14 15
(b) property that, under a discretionary trust, may become vested in, or applied to, the benefit of the person;	16 17
(c) property the disposition of which is (wholly or partly) under the control of the person and that may be used or applied by or on behalf of the person for the person’s benefit; and	18 19 20
(d) any other valuable benefit of the person.	21
<i>Division 4—Cohabitation, separation and recognised agreement concepts</i>	22 23
Meaning of “cohabitation agreement”	24
<i>Clause</i> 9.(1) A “cohabitation agreement” is an agreement that—	25

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	(a) is made by de facto partners—	1
	(i) in contemplation of starting their de facto relationship; or	2
	(ii) during their de facto relationship; and	3
	(b) deals with all or some of the partners' financial matters.	4
	(2) A “cohabitation agreement” includes an agreement that varies a cohabitation agreement.	5 6
	(3) It does not matter whether—	7
	(a) there are other parties to a cohabitation agreement; or	8
	(b) a cohabitation agreement is made before, on or after the commencement of this Act; or	9 10
	(c) a cohabitation agreement deals with other matters.	11
	Meaning of “separation agreement”	12
<i>Clause</i>	10.(1) A “separation agreement” is an agreement that—	13
	(a) is made by de facto partners—	14
	(i) in contemplation of ending their de facto relationship; or	15
	(ii) after their de facto relationship has ended; and	16
	(b) deals with all or some of the partners' financial matters.	17
	(2) A “separation agreement” includes an agreement that varies a cohabitation agreement or separation agreement.	18 19
	(3) It does not matter whether—	20
	(a) there are other parties to a separation agreement; or	21
	(b) a separation agreement is made before, on or after the commencement of this Act; or	22 23
	(c) a separation agreement deals with other matters.	24
	Meaning of “recognised agreement”	25
<i>Clause</i>	11.(1) A “recognised agreement” of de facto partners is a cohabitation or separation agreement of the partners that—	26 27

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	(a) is a written agreement; and	1
	(b) is signed by the partners and witnessed by a justice of the peace (qualified) or solicitor; and	2 3
	(c) contains a statement of all significant property, financial resources and liabilities of each partner when the partner signs the agreement.	4 5 6
	(2) Whether all significant property, financial resources and liabilities of a partner are stated depends on whether the value of a property, financial resource or liability of the partner that is not stated is significant given the aggregate value of the partner's stated property, financial resources and liabilities.	7 8 9 10 11
	<i>Division 5—Publication and account of a de facto proceeding concepts</i>	12
	Meaning of “publish”	13
<i>Clause</i>	12. A person “ publishes ” something if the person disseminates the thing to the public or a section of the public, including, for example, by publishing the thing in a—	14 15 16
	(a) newspaper or periodical; or	17
	(b) radio or television broadcast.	18
	Meaning of “account of a de facto proceeding”	19
<i>Clause</i>	13. An “ account of a de facto proceeding ” is an account of the whole or a part of a proceeding under this Act.	20 21
	PART 4—OPERATION OF ACT	22
	Application of Act	23
<i>Clause</i>	14.(1) This Act applies to all de facto relationships other than relationships that ended before the commencement of this Act.	24 25

(2) It does not matter whether a de facto relationship started before or after the commencement of this Act.	1 2
Other rights not affected	3
<i>Clause</i> 15. Nothing in this Act affects a right of a de facto partner to apply for a remedy or relief under another law.	4 5
CHAPTER 2—RESOLUTION OF FINANCIAL MATTERS BY DE FACTO PARTNERS	6 7
PART 1—GENERAL	8
<i>Division 1—Purpose and how it is to be achieved</i>	9
Purpose—self regulation	10
<i>Clause</i> 16. The purpose of this Chapter is to allow de facto partners to plan their financial future and resolve financial matters at the end of their relationship.	11 12
Purpose achieved by permitting cohabitation and separation agreements	13 14
<i>Clause</i> 17. This purpose is achieved by permitting de facto partners to make cohabitation and separation agreements that, in certain circumstances, exclusively regulate the resolution of financial matters at the end of their relationship.	15 16 17 18
<i>Division 2—Use of cohabitation and separation agreements</i>	19
Cohabitation and separation agreements are valid	20
<i>Clause</i> 18. De facto partners may make cohabitation and separation agreements.	21

	Court's jurisdiction may not be excluded	1
<i>Clause</i>	19. A provision in a cohabitation or separation agreement that purports to exclude the jurisdiction of a court is invalid, but its invalidity does not affect the validity of the rest of the agreement.	2 3 4
	Law of contract applies	5
<i>Clause</i>	20. A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this Act.	6 7
	Effect on periodic maintenance of partner's death	8
<i>Clause</i>	21. (1) If a de facto partner who is required to pay periodic maintenance under a cohabitation or separation agreement dies, the provisions of the agreement relating to the payment of periodic maintenance by the partner cease to have effect unless the agreement expressly provides otherwise.	9 10 11 12
	(2) If a de facto partner who is entitled to receive periodic maintenance under a cohabitation or separation agreement dies, the provisions of the agreement relating to the payment of periodic maintenance to the partner cease to have effect.	13 14 15 16
	(3) Subsections (1) and (2) do not affect the right of a person to recover arrears of periodic maintenance that are payable under a cohabitation or separation agreement at the time of a partner's death.	17 18 19
	Effect on property adjustment and lump sum payment of partner's death	20 21
<i>Clause</i>	22. If a de facto partner dies before the provisions of a cohabitation or separation agreement relating to property and lump sum payments have been carried out, the provisions may be enforced on behalf of or against the estate of the deceased partner unless the agreement expressly provides otherwise.	22 23 24 25 26

PART 2—RELATIONSHIP BETWEEN AGREEMENTS AND PROCEEDINGS	1 2
<i>Division 1—Recognised agreements</i>	3
No property adjustment or maintenance order inconsistent with recognised agreement	4 5
<i>Clause</i> 23.(1) If a court is satisfied that there is a recognised agreement, the court must not make a property adjustment or maintenance order that is inconsistent with the agreement’s provisions on financial matters.	6 7 8
(2) Subsection (1) is subject to—	9
• section 24 (Court to ignore revoked provision); and	10
• section 25 (Court may vary recognised agreement if serious injustice or impracticable).	11 12
Court to ignore revoked provision	13
<i>Clause</i> 24. For the purpose of section 23 (No property adjustment or maintenance order inconsistent with recognised agreement), a court must ignore a provision that the de facto partners have, in writing or by their conduct, revoked or consented to its revocation.	14 15 16 17
Court may vary recognised agreement if serious injustice or impracticable	18 19
<i>Clause</i> 25.(1) If, on an application for a property adjustment or maintenance order, the court is satisfied that—	20 21
(a) enforcement of a recognised agreement of the de facto partners would result in serious injustice for a party to the agreement or a child of the partners; or	22 23 24
(b) because of circumstances that have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out;	25 26 27
the court may vary all or any of the provisions of the agreement.	28

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(2) It does not matter whether the serious injustice would happen on the application before the court or on another application for a remedy or relief under another law. 1
2
3

(3) It does not matter whether the agreement purports to prevent a variation of all or any of the agreement's provisions. 4
5

(4) If the court varies a provision of the agreement, section 23 (No property adjustment or maintenance order inconsistent with recognised agreement) applies to the agreement as varied. 6
7
8

(5) This section does not affect any other right a person may have to have the agreement varied. 9
10

(6) In this section— 11
“law” includes a law of the Commonwealth, another State or a Territory; 12
“vary” includes set aside. 13

Division 2—Other agreements 14**Other cohabitation or separation agreements may be considered** 15

Clause 26. If, on an application for a property adjustment or maintenance order, a court— 16
17

(a) is satisfied that there is a cohabitation or separation agreement of the de facto partners; but 18
19

(b) is not satisfied that it is a recognised agreement; 20

the court— 21

(d) may make any order that it could have made if there were no cohabitation or separation agreement; but 22
23

(e) in making its order, may consider the agreement's provisions on financial matters, in addition to the matters the court is required to consider under Part 3 (Adjustment of property interests) or 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court). 24
25
26
27
28

	Court to ignore revoked provision	1
<i>Clause</i>	27. For the purpose of section 26 (Other cohabitation or separation agreements may be considered), a court must ignore a provision that the de facto partners have, in writing or by their conduct, revoked or consented to its revocation.	2 3 4 5
	 CHAPTER 3—RESOLUTION OF FINANCIAL MATTERS BY COURT	 6 7
	 PART 1—PREREQUISITES FOR PROPERTY ADJUSTMENT AND MAINTENANCE PROCEEDINGS	 8 9
	Type of de facto relationship	10
<i>Clause</i>	28. A court may make a property adjustment or maintenance order only if it is satisfied that—	11 12
	(a) the de facto partners have lived together in a de facto relationship for at least 2 years; or	13 14
	(b) there is a child of the de facto partners under 18; or	15
	(c) the de facto partner who applied for the order has made substantial contributions of the kind mentioned in section 43 (Contributions to property or financial resources) or 44 (Contributions to family welfare) and that failure to make the order would result in serious injustice to the de facto partner.	16 17 18 19 20
	Time limit for making application	21
<i>Clause</i>	29.(1) A court may make a property adjustment or maintenance order only if—	22 23
	(a) the application was made within 2 years after the day on which the de facto relationship ended; or	24 25
	(b) the court has granted the applicant leave to apply.	26

	(2) The court may grant leave only if it is satisfied that hardship would result to 1 of the de facto partners or a child of the partners if leave were not granted.	1 2 3
	Disclosure of financial circumstances	4
<i>Clause</i>	30. (1) A party to a proceeding for a property adjustment or maintenance order must disclose the party's financial circumstances in the way prescribed by the rules of the relevant court.	5 6 7
	(2) If a party to a proceeding does not comply with subsection (1), the court deciding the proceeding may order the party to comply.	8 9
	(3) A court may make a property adjustment or maintenance order in favour of a party only if the party has complied with subsection (1).	10 11
	(4) Nothing in this section affects a court's power to make an interim order.	12 13
	PART 2—DECLARATION OF PROPERTY INTERESTS	14 15
	<i>Division 1—Purpose and how it is to be achieved</i>	16
	Purpose—ascertain existing interest	17
<i>Clause</i>	31. The purpose of this Part is to help people ascertain their existing rights in property of de facto partners.	18 19
	Purpose achieved by declaration of property interests	20
<i>Clause</i>	32. This purpose is achieved by allowing a court to declare the title or rights of parties to a proceeding in property of de facto partners without regard to any adjustment in rights under Part 3 (Adjustment of property interests).	21 22 23 24

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	<i>Division 2—Declaration</i>	1
	Court may declare property interests	2
<i>Clause</i>	33.(1) In a proceeding between de facto partners about existing title or rights in property, a court may declare the title or rights (if any) that a partner or another party to the proceeding has in the property.	3 4 5
	(2) It does not matter whether the de facto relationship has ended.	6
	Court may give effect to declaration	7
<i>Clause</i>	34. A court may make orders to give effect to a declaration under this Division.	8 9
	 PART 3—ADJUSTMENT OF PROPERTY INTERESTS	 10
	<i>Division 1—Purpose and how it is to be achieved</i>	11
	Purpose—just and equitable property distribution	12
<i>Clause</i>	35. The purpose of this Part is to ensure a just and equitable property distribution at the end of a de facto relationship.	13 14
	Purpose achieved by conferring property rights and obligations	15
<i>Clause</i>	36. This purpose is achieved by—	16
	(a) providing that de facto partners who satisfy the prerequisites set out in Part 1 (Prerequisites for property adjustment and maintenance proceedings) should have, as far as practicable, the same property rights and obligations as married partners have at the end of their marriage; and	17 18 19 20 21
	(b) allowing applications to a court for an adjustment of interests in property.	22 23

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<i>Division 2—Application</i>	1
Partner may apply	2
<i>Clause</i> 37. After a de facto relationship has ended, a de facto partner may apply to a court for an order adjusting interests in the property of either or both of the de facto partners.	3 4 5
Partners or child may benefit from adjustment	6
<i>Clause</i> 38. The application may be for the benefit of either or both of the de facto partners or a child of the partners.	7 8
Not affected by other rights	9
<i>Clause</i> 39.(1) An application may be made under this Division whether an application for another remedy or relief has been made, or may be made, under this Act or another law.	10 11 12
(2) In this section—	13
“law” includes a law of the Commonwealth, another State or a Territory.	14
<i>Division 3—Order adjusting property interests</i>	15
Court may make property adjustment order	16
<i>Clause</i> 40.(1) A court may make any order that it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the partners or a child of the partners in the property.	17 18 19
(2) It does not matter whether the court has declared the title or rights in the property.	20 21
Additional prerequisite—compulsory conference	22
<i>Clause</i> 41.(1) A court may make a property adjustment order only if—	23
(a) the parties to the proceeding have attended a conference about the matters in dispute with an officer appointed by the court (a	24 25

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“compulsory conference”); or	1
(b) the court considers that, because the order must be made urgently or because of some other special circumstance, it is appropriate to make the order although the parties to the proceeding have not attended a compulsory conference; or	2 3 4 5
(c) the court considers that it is not practicable to require the parties to the proceeding to attend a compulsory conference.	6 7
(2) Subsection (1) does not apply to—	8
(a) an order until further order; or	9
(b) an order made with the consent of all parties to the proceeding.	10
 <i>Division 4—Matters for consideration in deciding what is just and equitable</i>	 11 12
 Matters for consideration by court	 13
<i>Clause</i> 42. In deciding what is just and equitable under section 40 (Court may make property adjustment order), a court must consider the matters set out in this Division.	14 15 16
 Contributions to property or financial resources	 17
<i>Clause</i> 43.(1) The court must consider the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners or a child of the partners to—	18 19 20
(a) the acquisition, conservation or improvement of any of the property of either or both of the partners; and	21 22
(b) the financial resources of either or both of the partners.	23
(2) However, the non-financial contributions of a child of the partners must be considered only if the child’s contributions are substantial.	24 25
(3) It does not matter whether the property or financial resources mentioned in subsection (1) still belong to either or both of the partners when the court is considering the contributions made.	26 27 28

	Contributions to family welfare	1
<i>Clause</i>	44.(1) The court must consider the contributions, including any homemaking or parenting contributions, made by either of the de facto partners or a child of the partners to the welfare of—	2 3 4
	(a) the partners; or	5
	(b) the family constituted by the partners and 1 or more of the following—	6 7
	(i) a child of the partners;	8
	(ii) a person who is—	9
	(A) accepted by either of the partners into the household of the partners; and	10 11
	(B) dependent on either of the partners.	12
	(2) However, the contributions of a child of the partners must be considered only if the child’s contributions are substantial.	13 14
	<i>Example—</i>	15
	A de facto couple own and live on a farm. They have twins, a boy and a girl. The twins always lived on the farm. After the twins left school, the parents bought 2 additional farms. The son then worked on the farms for no wages assuming that, in time, 1 of the farms would be his. The daughter looked after the family’s home for no wages assuming that, in time, 1 of the farms would be hers. In both cases, the children did much more than the household chores (such as mowing the lawn and doing the dishes) that a family might normally expect of family members. When the children were 31 years, the parents separated.	16 17 18 19 20 21 22 23 24
	The son’s contributions are substantial and would be considered under section 43 (Contributions to property or financial resources). The daughter’s contributions are also substantial and would be considered under section 44 (Contributions to family welfare).	25 26 27 28
	Effect on future earning capacity	29
<i>Clause</i>	45. The court must consider the effect of any proposed order on the earning capacity of either de facto partner.	30 31

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Maintenance matters	1
<i>Clause</i> 46. The court must consider the matters mentioned in Division 4 (Matters for consideration by court in deciding amount of maintenance) of Part 4 (Maintenance) as far as they are relevant.	2 3 4
Child support	5
<i>Clause</i> 47. The court must consider any child support under the <i>Child Support (Assessment) Act 1989</i> of the Commonwealth that a de facto partner has provided, or is to provide, for a child of the de facto partners.	6 7 8
Other orders	9
<i>Clause</i> 48. The court must consider any other order affecting a de facto partner or a child of the de facto partners made under any of the following—	10 11
(a) this Act;	12
(b) the <i>Family Law Act 1975</i> of the Commonwealth;	13
(c) the <i>De Facto Relationships Act 1984</i> of New South Wales;	14
(d) Part 9 of the <i>Property Law Act 1958</i> of Victoria;	15
(e) the <i>De Facto Relationships Act 1991</i> of the Northern Territory;	16
(f) another law of a State or Territory concerning de facto relationships that the court considers should be taken into account.	17 18 19
<i>Division 5—Adjournment because of likely change in financial circumstances</i>	20 21
Likelihood of significant change in financial circumstances	22
<i>Clause</i> 49. A court may adjourn an application to adjust interests in the property of either or both of the de facto partners, if the court considers that—	23 24
(a) there is likely to be a significant change in the financial circumstances of either or both of the partners and that it is reasonable to adjourn the application having regard to the time	25 26 27

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	when the change is likely to happen; and	1
	(b) an order that the court could make about the property if the change happens is more likely to do justice between the parties than an order that the court could make immediately.	2 3 4
	Matters for consideration by court	5
<i>Clause</i>	50. In considering whether there is likely to be a significant change in the financial circumstances of either of the de facto partners, the matters a court may consider include any change in the financial circumstances of the partner that may happen because of—	6 7 8 9
	(a) the vesting of a financial resource in the partner; or	10
	(b) the use or application of a financial resource for the partner's benefit.	11 12
	Orders may be made before adjournment	13
<i>Clause</i>	51. Before a court adjourns an application to adjust interests in property, it may make any order that it considers appropriate about the property.	14 15
	Adjournments on other grounds not affected	16
<i>Clause</i>	52. Nothing in this Division limits the power of the court to grant an adjournment in a proceeding before it.	17 18
	<i>Division 6—Stay because of Family Law Act proceeding</i>	19
	Family Law Act proceeding	20
<i>Clause</i>	53.(1) If a Family Law Act proceeding about the property of either of the de facto partners is started at any time before a court has made a final order in a proceeding under this Part to adjust interests in the property of either of the partners, the court may stay the proceeding under this Part.	21 22 23 24
	(2) Either of the partners or another party to the Family Law Act proceeding may apply for the stay.	25 26

	Delay in Family Law Act proceeding	1
<i>Clause</i>	54. If—	2
	(a) a proceeding is stayed under section 53 (Family Law Act proceeding); and	3 4
	(b) there is a delay in the relevant Family Law Act proceeding;	5
	a party to the stayed proceeding may apply for the stayed proceeding to be continued.	6 7
	 <i>Division 7—Change in circumstances</i>	 8
	Delayed operation of order	9
<i>Clause</i>	55. If the court considers that a de facto partner is likely, within a short time, to become entitled to property that may be applied in satisfaction of an order made under section 40 (Court may make property adjustment order), the court may delay the operation of the order until a date, or the happening of an event, specified in the order.	10 11 12 13 14
	Effect on proceeding of death of party	15
<i>Clause</i>	56.(1) If a party to a proceeding for a property adjustment order dies before a final order has been made, the proceeding may be continued by or against the personal representative of the deceased party.	16 17 18
	(2) A court may make an order if it considers that—	19
	(a) it would have adjusted interests in property if the deceased party had not died; and	20 21
	(b) it is still appropriate to adjust the interests despite the death of the deceased party.	22 23
	(3) The order may be enforced on behalf of or against the estate of the deceased party.	24 25
	Effect on order of death of party	26
<i>Clause</i>	57. If a party to a proceeding for a property adjustment order dies after a	27

final order is made in favour of, or against, that party, the order may be enforced on behalf of or against the estate of the deceased party. 1
2

PART 4—MAINTENANCE 3

Division 1—Purpose and how it is to be achieved 4

Purpose—provide maintenance in certain circumstances 5

Clause 58. The purpose of this Part is to provide for maintenance at the end of a de facto relationship by a de facto partner who is able to pay maintenance to a de facto partner who is unable to support himself or herself adequately because of circumstances arising from the relationship. 6
7
8
9

Purpose achieved by conferring maintenance rights and obligations 10

Clause 59. This purpose is achieved by— 11

- (a) providing that a de facto partner who satisfies the prerequisites set out in Part 1 (Prerequisites for property adjustment and maintenance proceedings) and who is unable to support himself or herself adequately because of circumstances arising from the de facto relationship should have— 12
13
14
15
16
 - (i) maintenance rights against the other partner; and 17
 - (ii) as far as practicable, the same matters considered in deciding the amount of maintenance as a married partner; and 18
19
- (b) allowing applications to a court for maintenance. 20

Division 2—Application 21

Partner may apply 22

Clause 60. After the end of a de facto relationship, a de facto partner may apply to a court for an order for maintenance. 23
24

No other maintenance rights or obligations	1
<i>Clause</i> 61. A de facto partner is liable to maintain the other de facto partner and a de facto partner is entitled to maintenance from the other de facto partner only as provided by this Part.	2 3 4
Not affected by other rights	5
<i>Clause</i> 62.(1) An application may be made under this Division whether an application for another remedy or relief has been made, or may be made, under this Act or another law.	6 7 8
(2) In this section—	9
“law” includes a law of the Commonwealth, another State or a Territory.	10
 <i>Division 3—Maintenance orders</i>	 11
Court may make maintenance order	12
<i>Clause</i> 63. A court may make an order that a de facto partner pay periodic or other maintenance for the other partner.	13 14
Additional prerequisite—relationship made maintenance necessary	15
<i>Clause</i> 64. A court may make an order under section 63 (Court may make maintenance order) only if it is satisfied that the de facto partner applying for the order is unable to adequately support himself or herself—	16 17 18
(a) because the partner’s earning capacity has been adversely affected by the circumstances of the de facto relationship; or	19 20
(b) for another reason arising in whole or in part from circumstances arising from the de facto relationship.	21 22
<i>Example of paragraph (a)—</i>	23
Ms A and Mr B lived in a de facto relationship for 10 years. For the first 6 years of the relationship, Ms A was employed. The partners then agreed that Ms A would remain at home to care for an elderly invalid relative of Mr B while Mr B continued in his more lucrative employment. At the end of the relationship, Ms A has few assets and requires retraining to return to	24 25 26 27 28

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her previous earning capacity. 1

Example of paragraph (b)— 2

Ms L and Mr M lived in a de facto relationship for 25 years. Before the 3
relationship, Ms L lived with her parents and was unemployed. The 4
partners agreed that Ms L would remain at home to have the children of the 5
relationship and to support Mr M in his business career. Throughout the 6
relationship, Ms L was the homemaker and supported Mr M as he 7
successfully advanced in his career. Their children are now all adults. At 8
the end of the relationship, Ms L has no readily marketable job skills to earn 9
an income. She has substantial assets but the income from them is not 10
sufficient to support her adequately. 11

Example of paragraph (b)— 12

Ms S and Mr T lived in a de facto relationship for 10 years. Ms S 13
brought her 1 year old child into the relationship. When the relationship 14
began, Ms S and Mr T agreed that Ms S would give up her full-time 15
employment so that she could care for Mr T and her child. Mr T accepted 16
Ms S's child into the household and the 3 formed a close-knit family unit 17
with Mr T financially supporting Ms S and her child. 18

Example outside paragraph (b)— 19

Mr X and Mr Y lived in a de facto relationship for 5 years. Both 20
partners remained in employment with Mr X having a substantially higher 21
earning capacity than Mr Y. Neither partner made substantial financial 22
sacrifices or suffered financial detriment arising from the relationship. 23

Interim maintenance orders 24

Clause 65. If the court considers that— 25

- (a) the de facto partner applying for a maintenance order is in 26
immediate need of financial assistance; and 27
- (b) it is not practicable in the circumstances to decide immediately if 28
any order should be made; 29

the court may order the other partner to pay to the applicant, until the 30
application is decided, the periodic or other amounts that the court considers 31
reasonable. 32

De Facto Relationships

Specify maintenance component of other orders	1
<i>Clause</i> 66.(1) If—	2
(a) a court makes an order under this Act that has the effect of requiring payment of a lump sum or the transfer or settlement of property; and	3 4 5
(b) the purpose, or 1 of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of either of the de facto partners;	6 7 8
the court must—	9
(c) express the order to be an order to which this section applies; and	10
(d) specify the part of the payment, or the value of the part of the property transferred or settled, that is attributable to the provision of maintenance for the partner.	11 12 13
(2) Subsection (1) applies to an order under this Act whether or not the order—	14 15
(a) is made in a proceeding about the maintenance of a de facto partner; or	16 17
(b) is made by consent; or	18
(c) varies an earlier order.	19
(3) It does not matter whether the lump sum is payable in a single amount or by instalments.	20 21
(4) A payment, transfer or settlement under an order that—	22
(a) is not expressed to be an order to which this section applies; or	23
(b) is expressed to be an order to which this section applies, but does not specify a part attributable to the provision of maintenance;	24 25
is not to be taken to be for the maintenance of a de facto partner.	26

De Facto Relationships

<i>Division 4—Matters for consideration by court in deciding amount of maintenance</i>	1 2
Matters for consideration by court	3
<i>Clause 67.</i> In deciding the amount of maintenance (if any) under section 63 (Court may make maintenance order), a court must consider the matters set out in this Division.	4 5 6
Age and health	7
<i>Clause 68.</i> The court must consider the age and state of health of each of the de facto partners.	8 9
Resources and employment capacity	10
<i>Clause 69.</i> The court must consider—	11
(a) the income, property and financial resources of each of the de facto partners; and	12 13
(b) the physical and mental capacity of each of them for appropriate gainful employment.	14 15
Caring for children	16
<i>Clause 70.</i> The court must consider whether either de facto partner has the care and control of a child of the partners who is under 18.	17 18
Necessary commitments	19
<i>Clause 71.</i> The court must consider the commitments of each of the de facto partners that are necessary to enable the partner to support—	20 21
(a) himself or herself; and	22
(b) a child or another person that the partner has a duty to maintain.	23

Responsibility to support others	1
<i>Clause</i> 72. The court must consider the responsibility of either de facto partner to support another person.	2 3
Government assistance	4
<i>Clause</i> 73.(1) The court must consider the eligibility of either de facto partner for—	5 6
(a) an Australian pension, allowance or benefit that is not income tested; or	7 8
(b) a foreign pension, allowance or benefit;	9
and the amount of any such pension, allowance or benefit being paid to either partner.	10 11
(2) The court must disregard—	12
(a) the eligibility of either partner for an Australian pension, allowance or benefit that is income tested; and	13 14
(b) the amount of any such pension, allowance or benefit being paid to either partner.	15 16
(3) For the purposes of this section, whether an Australian pension, allowance or benefit is income tested depends on whether it is an income tested pension, allowance or benefit within the meaning of the <i>Family Law Act 1975</i> of the Commonwealth.	17 18 19 20
(4) In this section—	21
“ Australian pension, allowance or benefit ” means a pension, allowance or benefit under the law of the Commonwealth or a State or Territory;	22 23
“ foreign pension, allowance or benefit ” means a pension, allowance or benefit under the law of a foreign country.	24 25
Appropriate standard of living	26
<i>Clause</i> 74. If the de facto partners have separated, the court must consider what standard of living is reasonable for each of the partners in all the circumstances.	27 28 29

Effect on future earning capacity	1
<i>Clause</i> 75. The court must consider the extent to which the payment of maintenance to the de facto partner whose maintenance is under consideration would increase the earning capacity of the partner by enabling the partner—	2 3 4 5
(a) to undertake a course of education or training; or	6
(b) to establish a business; or	7
(c) otherwise to obtain an adequate income.	8
 Contributions to partner from whom maintenance claimed	 9
<i>Clause</i> 76. The court must consider the extent to which the de facto partner whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other partner.	10 11 12
 Length of relationship	 13
<i>Clause</i> 77. The court must consider the length of the de facto relationship.	14
 Effect of relationship on earning capacity	 15
<i>Clause</i> 78. The court must consider the extent to which the de facto relationship has affected the earning capacity of the de facto partner whose maintenance is under consideration.	16 17 18
 Property adjustment	 19
<i>Clause</i> 79. The court must consider the terms of any order made or proposed to be made under Part 3 (Adjustment of property interests) about the property of either or both of the de facto partners.	20 21 22
 Financial circumstances of cohabitation	 23
<i>Clause</i> 80. If either de facto partner is cohabiting with another person, the court must consider the financial circumstances of the cohabitation.	24 25

Child maintenance	1
<i>Clause</i> 81. The court must consider any payments provided for the maintenance of a child in the care and control of either de facto partner.	2 3
Other facts and circumstances	4
<i>Clause</i> 82. The court must also consider any fact or circumstance that the court considers the justice of the case requires to be taken into account.	5 6
<i>Division 5—Change in circumstances</i>	7
Effect on proceeding of death of partner	8
<i>Clause</i> 83. A proceeding for a maintenance order cannot be started or continued after the death of either of the de facto partners.	9 10
Effect on proceeding of marriage or another relationship	11
<i>Clause</i> 84. A proceeding for a maintenance order in favour of a de facto partner cannot be started or continued if, since the end of the de facto relationship, the partner has married or started another de facto relationship.	12 13 14
Effect on order of death of partner	15
<i>Clause</i> 85.(1) A maintenance order ceases to have effect on the death of either of the de facto partners.	16 17
(2) Nothing in this section affects the right to recover arrears due under a maintenance order at the death of the de facto partner.	18 19
Effect on order of marriage	20
<i>Clause</i> 86.(1) A maintenance order ceases to have effect on the marriage of the de facto partner in whose favour the order was made.	21 22
(2) If a de facto partner in whose favour a maintenance order was made marries, the partner must, without delay, give the de facto partner against whom the order was made written notice of the marriage and its date.	23 24 25

	(3) Any money paid for a period after the marriage may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.	1 2 3
	(4) Nothing in this section affects the right to recover arrears due under a maintenance order at the date of the marriage.	4 5
	Effect on order of another relationship if notified	6
<i>Clause</i>	87.(1) A maintenance order ceases to have effect if—	7
	(a) the de facto partner in whose favour the order was made starts another de facto relationship; and	8 9
	(b) the partner has given the de facto partner against whom the order was made written notice that the other de facto relationship has started and the date it started.	10 11 12
	(2) If a de facto partner in whose favour a maintenance order was made starts another de facto relationship, the partner must, without delay, give the de facto partner against whom the order was made written notice that the other de facto relationship has started and the date it started.	13 14 15 16
	(3) Any money paid for a period after the other de facto relationship started may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.	17 18 19
	(4) Nothing in this section affects the right to recover arrears due under a maintenance order at the date the other de facto relationship started.	20 21
	Effect on order of another relationship if not notified	22
<i>Clause</i>	88.(1) If a de facto partner against whom a maintenance order has been made believes that the other partner has started another de facto relationship but has not been given notice of it under section 87(2) (Effect on order of another relationship if notified), the first partner may apply to the court for a discharge of the order.	23 24 25 26 27
	(2) If the court is satisfied that the de facto partner in whose favour a maintenance order has been made has started another de facto relationship, the court must discharge the order.	28 29 30
	(3) If an order is discharged, it ceases to have effect from the date the	31

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other de facto relationship started.	1
(4) Any money paid for a period after the other de facto relationship started may be recovered as a debt in a court of competent jurisdiction by the de facto partner who made the payment.	2 3 4
(5) Nothing in this section affects the right to recover arrears due under a maintenance order at the date the other de facto relationship started.	5 6
 <i>Division 6—Modification of maintenance orders</i>	 7
 Court may modify maintenance order	 8
<i>Clause</i> 89. On an application by a de facto partner about whom a maintenance order has been made, a court may—	9 10
(a) subject to section 90 (Prerequisites for discharge or variation of amount of maintenance), discharge the order; or	11 12
(b) suspend the operation of the order in whole or part and either until further order or until a fixed time or the happening of a particular event; or	13 14 15
(c) revive, in whole or part, an order suspended under paragraph (b); or	16 17
(d) subject to section 90, vary the order to increase or decrease any amount ordered to be paid or in another way.	18 19
 Prerequisites for discharge or variation of amount of maintenance	 20
<i>Clause</i> 90. The court may make an order discharging, or varying the amount of maintenance under, a maintenance order only if it is satisfied—	21 22
(a) that, since the order was made or last varied, the circumstances of either of the de facto partners have changed in a way that justifies the court doing so; or	23 24 25
(b) that it is more than 1 year since the order was made or last varied and in that time the cost of living has changed to an extent that justifies the court doing so; or	26 27 28
(c) in a case where the order was made by consent—that the amount	29

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ordered to be paid is not proper or adequate; or	1
(d) that—	2
(i) material facts were withheld from the court that made the order or from a court that varied the order; or	3 4
(ii) material evidence given before such a court was false.	5
 Matters for consideration concerning cost of living	 6
<i>Clause 91.</i> In satisfying itself that the cost of living has changed to an extent that justifies it discharging or varying the amount of maintenance under a maintenance order, the court must consider any changes that have happened during the relevant period in—	7 8 9 10
(a) the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or	11 12
(b) a group of numbers or amounts, relating to the price of goods and services, issued by the Australian Statistician that is prescribed by regulation.	13 14 15
 Matters for consideration concerning whether proper and adequate	 16
<i>Clause 92.</i> In satisfying itself that the amount ordered to be paid in a maintenance order made by consent is not proper or adequate, the court must consider any payments, and any transfer or settlement of property, previously made by a de facto partner to—	17 18 19 20
(a) the other partner; or	21
(b) another person for the benefit of the other partner.	22
 Matters for consideration in modifying order	 23
<i>Clause 93.</i> In deciding an application under section 89 (Court may modify maintenance order), the court must consider the matters set out in Division 4 (Matters for consideration by court in deciding amount of maintenance).	24 25 26 27

	Decrease may be retrospective	1
<i>Clause</i>	94. An order of either of the following types may be expressed to be retrospective to a date the court considers appropriate—	2
		3
	(a) an order decreasing the amount of a periodic sum payable under a maintenance order;	4
		5
	(b) an order discharging a maintenance order.	6
	Right to recover arrears not affected	7
<i>Clause</i>	95. The discharge of a maintenance order does not affect the right to recover arrears due under the order when the discharge takes effect.	8
		9
	 CHAPTER 4—RESOLUTION OF FINANCIAL MATTERS BY MEDIATION AND ARBITRATION	10
		11
	 PART 1—PURPOSE AND HOW IT IS TO BE ACHIEVED	12
		13
	Purpose—recognition of alternative resolution mechanisms	14
<i>Clause</i>	96. The purpose of this Part is to encourage mediation and arbitration as ways of resolving financial matters at the end of a de facto relationship.	15
		16
	Purpose achieved by interrelationship with court resolution	17
<i>Clause</i>	97. This purpose is achieved by—	18
	(a) facilitating access to information about mediation and arbitration by de facto partners and other interested persons; and	19
		20
	(b) establishing a relationship between resolution by mediation or arbitration of financial matters at the end of a de facto relationship and resolution of the matters by a court; and	21
		22
		23

- (c) providing for the registration and review of awards made in arbitration. 1
2

PART 2—ADVICE ABOUT MEDIATION AND ARBITRATION 3 4

Advice about court facilities 5

- Clause* 98. The registrar of a court must, on request, advise— 6
- (a) a de facto partner; and 7
- (b) a party to a proceeding under this Act in the court; 8
- about any mediation or arbitration facilities available in the court and how 9
the facilities are made available. 10

PART 3—MEDIATION 11

Mediation before proceeding started 12

- Clause* 99.(1) A person who— 13
- (a) is a de facto partner or a child of de facto partners; and 14
- (b) is involved in a dispute about a matter about which a proceeding 15
could be, but has not been, started under this Act; 16
- may file a notice in a court requesting mediation of the dispute. 17
- (2) If a notice is filed in a court— 18
- (a) the notice must be dealt with under its rules of court; and 19
- (b) if a mediation service is available at the registry of the court and 20
the dispute is one that, under its rules of court, may be 21
mediated—the registrar of the court must make arrangements for 22

	an approved mediator to mediate the dispute under its rules of court.	1 2
	Mediation after proceeding started	3
<i>Clause</i>	100.(1) A court may, with the consent of the parties to a proceeding before it under this Act, make an order referring any or all of the matters in dispute in the proceeding for mediation by an approved mediator.	4 5 6
	(2) If a court makes an order under subsection (1), it may—	7
	(a) adjourn the proceeding; and	8
	(b) make any additional orders, or give any directions, that it considers appropriate to facilitate the effective conduct of the mediation.	9 10 11
	Court may make orders at end of mediation	12
<i>Clause</i>	101. If—	13
	(a) a court makes an order under section 100(1) (Mediation after proceeding started) about any matter in dispute in a proceeding before it; and	14 15 16
	(b) a party to the proceeding files a notice in the court that the mediation of the matter has ended;	17 18
	the court may make any orders, or give any directions, that it considers appropriate about the proceeding.	19 20
	Mediation privileged	21
<i>Clause</i>	102.(1) Anything said or admitted during a mediation under this Part is not admissible as evidence in a proceeding before a court or person authorised by a law, or by consent of the parties, to hear evidence.	22 23 24
	(2) Subsection (1) does not apply to a proceeding for an offence allegedly committed at the mediation.	25 26
	(3) In this section—	27
	“law” includes a law of the Commonwealth, another State or a Territory.	28

PART 4—ARBITRATION		1
Arbitration if court refers property adjustment or maintenance proceeding		2 3
<i>Clause</i>	103.(1) A court may make an order referring any of the following to an approved arbitrator for arbitration—	4 5
	(a) a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court);	6 7 8
	(b) part of the proceeding;	9
	(c) a matter arising in the proceeding.	10
	(2) A court may make an order under subsection (1) with or without the consent of the parties.	11 12
	(3) If a court makes an order under subsection (1), it may—	13
	(a) adjourn the proceeding; and	14
	(b) make any additional orders, or give any directions, that it considers appropriate to facilitate the effective conduct of the arbitration.	15 16 17
	(4) A party to an award in an arbitration carried out because of an order under subsection (1) may register the award in the court that made the order.	18 19 20
	(5) If registered in a court, an award has effect as if it were an order made by the court.	21 22
Private arbitration of property adjustment or maintenance proceeding		23 24
<i>Clause</i>	104.(1) Persons who are involved in a dispute about a matter about which a proceeding could be, but has not been, started under this Act may arrange a private arbitration of all or part of the dispute.	25 26 27
	(2) A court of competent jurisdiction may, on application by a party to the arbitration, make any orders, or give any directions, that the court considers appropriate to facilitate the effective conduct of the arbitration.	28 29 30

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(3) The arbitrator must, on application by a party to the arbitration, give written reasons for the award.	1 2
(4) A party to an award made in a private arbitration may register the award, in a court of competent jurisdiction.	3 4
(5) If registered in a court of competent jurisdiction, an award has effect as if it were an order made by the court.	5 6
(6) In this section—	7
“court of competent jurisdiction”, in relation to a dispute, means a court in which a proceeding under this Act could have been started to resolve the dispute;	8 9 10
“dispute” means a dispute about a matter about which a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court) could be started.	11 12 13
Review of awards in court ordered arbitration	14
<i>Clause</i> 105.(1) A party to a registered award made in an arbitration carried out because of an order made under section 103(1) (Arbitration if court refers property adjustment or maintenance proceeding) may apply for review of the award to—	15 16 17 18
(a) the court which made the order; or	19
(b) any higher court that has jurisdiction under this Act.	20
(2) The court that reviews an award under this section must review it by rehearing the matters to which the award relates and—	21 22
(a) must decide, as if for the first time, all questions of fact and law arising in relation to the arbitration; and	23 24
(b) may make any of the following orders that it considers appropriate—	25 26
(i) an order affirming the award;	27
(ii) an order varying the award;	28
(iii) an order setting aside the award and substituting a decision;	29
(iv) an order setting aside the award and remitting the matter to the arbitrator with directions or recommendations.	30 31

	Review of awards in private arbitration	1
<i>Clause</i>	106.(1) A party to a registered award made in a private arbitration of a dispute may apply to a court of competent jurisdiction for review of the award on questions of law.	2 3 4
	(2) The court that reviews an award under this section may—	5
	(a) decide all questions of law arising in relation to the arbitration; and	6 7
	(b) make any of the following orders that it considers appropriate—	8
	(i) an order affirming the award;	9
	(ii) an order varying the award;	10
	(iii) an order setting aside the award and substituting a decision;	11
	(iv) an order setting aside the award and remitting the matter to the arbitrator with directions or recommendations.	12 13
	(3) In this section—	14
	“ court of competent jurisdiction ”, in relation to a dispute, means a court in which a proceeding under this Act could have been started to resolve the dispute.	15 16 17

PART 5—MEDIATORS AND ARBITRATORS

	Confidentiality	19
<i>Clause</i>	107.(1) A person who is or has been an approved mediator or arbitrator or a private arbitrator must not—	20 21
	(a) make a record of protected information; or	22
	(b) whether directly or indirectly, divulge or communicate protected information;	23 24
	unless the record is made, or the information divulged or communicated—	25
	(c) under this Act; or	26
	(d) in the performance of duties as an approved mediator or arbitrator	27

or a private arbitrator.	1
Maximum penalty—40 penalty units.	2
(2) In this section—	3
“protected information” means information that is obtained by a person as an approved mediator or arbitrator or a private arbitrator.	4
	5
Protection	6
<i>Clause</i> 108. In performing the functions of an approved mediator or arbitrator or a private arbitrator, the mediator or arbitrator has the same protection and immunity as a Supreme Court Judge has in performing a Judge’s functions.	7
	8
	9
	10
 CHAPTER 5—EXISTENCE OF A DE FACTO RELATIONSHIP	11
	12
 PART 1—DECLARATION ABOUT EXISTENCE OF RELATIONSHIP	13
	14
 <i>Division 1—Purpose and how it is to be achieved</i>	15
 Purpose—avoid duplication	16
<i>Clause</i> 109. The purpose of this Chapter is to help people avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more unrelated proceedings.	17
	18
	19
<i>Example—</i>	20
A de facto partner is killed in an accident at work. Whether or not the deceased’s de facto partner is eligible for worker’s compensation under the <i>Workers’ Compensation Act 1990</i> or may claim under the family provision of Part 4 of the <i>Succession Act 1981</i> will depend on whether the partners	21
	22
	23
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were living in a de facto relationship at the time of death. It will avoid duplication of proceedings if this issue were litigated once only.

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2**Purpose achieved by facilitating binding declaration**

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Clause 110. This purpose is achieved by allowing applications to a court for a declaration about the existence or non-existence of a de facto relationship.

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5*Division 2—Application*

6

Partner may apply

7

Clause 111. A person may apply to the Supreme Court or a District Court for a declaration that—

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- (a) there is, or has been, a de facto relationship between the person and another named person at a particular time or for a particular period; or
- (b) there is not, or was not, a de facto relationship between the person and another named person at a particular time or for a particular period.

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15**Affected executor or trustee may apply**

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Clause 112. If the management or distribution of property or an estate is affected by whether there is or has been a de facto relationship between 2 named persons at a particular time or for a particular period, the trustee of the property or the executor of the estate may apply to the Supreme Court or a District Court for a declaration—

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- (a) that there is, or has been, a de facto relationship between the named persons at a particular time or for a particular period; or
- (b) that there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period.

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	Court may adjourn hearing if other affected person	1
<i>Clause</i>	113. If, on an application under this Part, a court considers that—	2
	(a) a person whose interests would be affected by the making of a declaration—	3
	(i) is not present or represented; or	4
	(ii) has not been given the opportunity to be present or represented;	5
	at the hearing of the application; and	6
	(b) the person ought to be present or represented at the hearing;	7
	the court may adjourn the hearing in order to enable the person to be given an opportunity to be present or represented.	8
		9
		10
		11
	 <i>Division 3—Declaration</i>	 12
	 Court may make declaration about existence of relationship	 13
<i>Clause</i>	114. If, on an application under this Part, the court is satisfied that there is, or was, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.	14
		15
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		17
	 Court may make declaration about non-existence of relationship	 18
<i>Clause</i>	115. If, on an application under this Part, the court is satisfied that there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.	19
		20
		21
		22
	 Declaration to include date	 23
<i>Clause</i>	116. A declaration must include—	24
	(a) the date at which there was, or was not, the de facto relationship;	25
	or	26

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	(b) the dates between which there was, or was not, the de facto relationship;	1 2
	or both.	3
	Death of partners irrelevant	4
<i>Clause</i>	117. A declaration may be made whether or not the person or either of the persons named by the applicant as a partner or partners to the de facto relationship is alive.	5 6 7
	Effect of declaration	8
<i>Clause</i>	118.(1) A declaration made by a court has effect as a judgment of the court.	9 10
	(2) The persons named in the declaration are presumed, as specified in the declaration, to have had or not to have had a de facto relationship at the date stated in the declaration, between the dates stated in the declaration or both.	11 12 13 14
	(3) Subsection (2) applies for all purposes.	15
	 PART 2—REVOCATION OF DECLARATION	 16
	 <i>Division 1—Application</i>	 17
	Party or affected person may apply	18
<i>Clause</i>	119. If a declaration has been made under Part 1 (Declaration about existence of relationship)—	19 20
	(a) a person who applied, or could have applied, for the declaration; or	21 22
	(b) a person who is affected by the declaration;	23
	may apply to the court that made the declaration for a revocation of the declaration.	24 25

	Court may adjourn hearing if other affected person	1
<i>Clause</i>	120. If, on an application under this Part, a court considers that—	2
	(a) a person whose interests would be affected by the making of an order—	3
	(i) is not present or represented; or	4
	(ii) has not been given the opportunity to be present or represented;	5
	at the hearing of the application; and	6
	(b) the person ought to be present or represented at the hearing;	7
	the court may adjourn the hearing in order to enable the person to be given an opportunity to be present or represented.	8
		9
		10
		11
	 <i>Division 2—Revocation</i>	 12
	Court may revoke declaration	13
<i>Clause</i>	121. If, on an application under this Part, the court is satisfied that—	14
	(a) a new fact or circumstance has arisen that has not previously been disclosed to the court; and	15
	(b) if the applicant was a party to the application for the declaration—the fact or circumstance was not within the applicant’s knowledge when the declaration was made;	16
	the court may make an order revoking the declaration.	17
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		19
		20
	 Court may make ancillary orders	 21
<i>Clause</i>	122.(1) If a court makes an order revoking a declaration, the court may, if it considers that it would be just and equitable to do so, make any ancillary order necessary to place a person affected by the revocation of the declaration in the same position, as far as practicable, as the person would have been in if the declaration had not been made.	22
		23
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		26
	(2) The court may, for example, make an order under subsection (1)	27

varying rights in property or the financial resources of de facto partners or another person.	1 2
Effect of revocation	3
<i>Clause</i> 123.(1) If the court makes an order revoking a declaration, the declaration ceases to have effect.	4 5
(2) The revocation of the declaration does not affect anything done in reliance on the declaration before the order revoking the declaration was made.	6 7 8
 CHAPTER 6—COURTS	 9
 PART 1—JURISDICTION	 10
 Courts having jurisdiction under this Act	 11
<i>Clause</i> 124.(1) The following courts have jurisdiction to hear and decide all matters under this Act—	12 13
(a) the Supreme Court;	14
(b) a District Court;	15
(c) a Magistrates Court.	16
(2) Subsection (1) has effect subject to the following provisions—	17
• Chapter 5 (Existence of a de facto relationship);	18
• section 125 (Limit of jurisdiction of District and Magistrates Courts).	19 20
 Limit of jurisdiction of District and Magistrates Courts	 21
<i>Clause</i> 125.(1) A District Court or Magistrates Court has jurisdiction to make the following orders only if section 126(2)(a) (Transfer of proceeding beyond jurisdictional limit) applies—	22 23 24

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(a) an order or declaration concerning an interest in property if the value of the interest is more than the court's jurisdictional limit;	1
(b) an order for maintenance of a value more than the court's jurisdictional limit.	2
(2) Subsection (1) has effect subject to section 126.	3
	4
Transfer of proceeding beyond jurisdictional limit	5
Clause 126. (1) If the value of an interest in property concerned in a proceeding under this Act before a District Court or Magistrates Court is more than twice the court's jurisdictional limit, the court must transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest.	6
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(2) If the value of an interest in property concerned in a proceeding under this Act before a District Court or Magistrates Court is more than the court's jurisdictional limit but equal to or less than twice the limit, then—	12
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(a) if the parties to the proceeding file a form under the rules of the relevant court agreeing to the court hearing and deciding the proceeding—the court may either—	15
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	17
(i) hear and decide the proceeding; or	18
(ii) transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest; or	19
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(b) if the parties to the proceeding do not file such a form—the court must transfer the proceeding to a court that has a jurisdictional limit equal to or greater than the value of the interest.	21
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(3) Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.	24
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(4) If a proceeding is transferred to another court, the court must proceed as if the proceeding had been originally started in the court.	27
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(5) Without prejudice to the duty of a court to comply with this section, failure by the court to comply does not invalidate any order of the court in the proceeding.	29
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	Stay or dismissal of proceeding in relation to same person	1
<i>Clause</i>	127.(1) If there is a proceeding under this Act started by or in relation to the same person pending in more than 1 court, a court in which a proceeding is pending may—	2
		3
		4
	(a) stay the proceeding pending before it for the time that it considers appropriate; or	5
		6
	(b) dismiss the proceeding.	7
	(2) Before staying or dismissing a proceeding, a court may make any orders and give any directions it considers appropriate.	8
		9
	Transfer of proceeding to more appropriate court	10
<i>Clause</i>	128.(1) If—	11
	(a) there is a proceeding under this Act pending in a court; and	12
	(b) the court considers that it is more appropriate that the proceeding be dealt with in another court having jurisdiction under this Act;	13
		14
	the court may transfer the proceeding to the other court.	15
	<i>Example—</i>	16
	Ms A and Mr B lived in a de facto relationship for 5 years. After they separate, there is a dispute about entitlement to their assets which are valued at \$15 000. Ms A applies to the Supreme Court seeking a declaration about her entitlement to the assets. Given the value of the assets is within the monetary limit of a Magistrates Court, the Supreme Court is likely to consider that it is more appropriate that the matter be dealt with by a Magistrates Court. Accordingly, the Supreme Court may transfer the proceeding to a Magistrates Court.	17
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	(2) Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.	25
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	Courts to act in aid of each other	28
<i>Clause</i>	129. All courts having jurisdiction under this Act must act in aid of and be auxiliary to each other in all matters under this Act.	29
		30

PART 2—POWERS		1
Purpose and how it is to be achieved		2
<i>Clause</i>	130. The purpose of this Part is to ensure that the courts having jurisdiction under this Act have sufficient powers to make appropriate orders.	3 4 5
Court's powers		6
<i>Clause</i>	131.(1) In exercising its powers under this Act, a court may do any 1 or more of the following—	7 8
	(a) order the transfer of property;	9
	(b) order that a specified transfer or settlement of property be made by way of maintenance for a de facto partner;	10 11
	(c) order the sale of property, and the distribution of the proceeds of sale in any proportions that the court considers appropriate;	12 13
	(d) order that a document be executed, that a document of title be produced or that anything else be done to enable an order to be carried out effectively or to provide security for the proper performance of an order;	14 15 16 17
	(e) order payment of a lump sum, whether in a single amount or by instalments;	18 19
	(f) order payment of a periodic amount;	20
	(g) order that payment of an amount ordered to be paid be secured in whole or in part in a way that the court directs;	21 22
	(h) appoint or remove trustees;	23
	(i) make an order or grant an injunction—	24
	(i) for the protection of, or otherwise relating to, the property or financial resources of a party to an application; or	25 26
	(ii) to aid enforcement of another order made in relation to an application;	27 28
	(j) make an order or grant an injunction about the use or occupancy	29

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of the de facto partners' home;	1
(k) if a de facto partner is the lessee of the home in which the de facto partners have lived and on separation the other partner wishes to remain in the home—the court may, with the consent of the lessor, order that the lease be assigned from the lessee to the other partner;	2 3 4 5 6
(l) order that payments be made direct to a de facto partner, to a trustee or into court for the benefit of a partner;	7 8
(m) make a permanent order or grant a permanent injunction;	9
(n) make an order or grant an injunction—	10
(i) pending the disposal of the proceeding; or	11
(ii) for a fixed term or for life or during joint lives; or	12
(iii) until the happening of a particular event, including, for example, a further order;	13 14
(o) impose conditions;	15
(p) make an order by consent;	16
(q) make any other order or grant any other injunction that it considers necessary to do justice.	17 18
(2) This section does not affect any other power of the court under this Act or another law.	19 20
(3) In this section—	21
“law” includes a law of the Commonwealth.	22
Execution of documents by court order	23
<i>Clause</i> 132.(1) If—	24
(a) a person has refused to comply with an order of a court directing the person to execute a document; or	25 26
(b) for another reason, a court considers it appropriate;	27
the court may appoint an officer of the court or another person to execute the document in the name of a person and to do everything necessary to give validity and effect to the document.	28 29 30

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	(2) The execution of the document by the appointed person has the same validity and effect as if it had been executed by the person directed by the order to execute it.	1 2 3
	(3) A court may make any order it considers appropriate about the payment of the costs and expenses of and incidental to the preparation of the document and its execution.	4 5 6
	Orders and injunctions in the absence of a party	7
<i>Clause</i>	133.(1) In a case of urgency, a court may make an order or grant an injunction under this Act in the absence of a party.	8 9
	(2) An application under this section may be made orally or in writing.	10
	(3) The court may make an order or grant an injunction on an oral application only if it considers that it is necessary because of the extreme urgency of the case.	11 12 13
	(4) The court may give any directions about the filing, serving and further hearing of an application.	14 15
	(5) An order made or injunction granted under subsection (1) must be expressed to operate or apply only until a specified time or the further order of the court.	16 17 18
	(6) If a court makes an order or grants an injunction under subsection (1), it may give directions about—	19 20
	(a) the service of the order or injunction and any other documents it considers appropriate; and	21 22
	(b) the hearing of an application for a further order.	23
	Variation and setting aside of orders	24
<i>Clause</i>	134.(1) If, on the application of a person in relation to whom an order has been made under this Act, a court is satisfied that—	25 26
	(a) there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose matters as required by this Act or another circumstance; or	27 28 29 30

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(b) because of circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or	1 2 3
(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order; or	4 5 6 7
(d) a child of the partners (or the applicant if the applicant has the care and control of a child of the partners) will suffer hardship if the court does not vary the order because of circumstances of an exceptional nature relating to the welfare of the child that have arisen since the order was made;	8 9 10 11 12
the court may vary the order.	13
(2) In this section—	14
“vary” includes—	15
(a) set aside; and	16
(b) set aside and substitute another.	17
Transactions to defeat claims	18
<i>Clause</i> 135.(1) If a court is satisfied that an existing or anticipated order in a proceeding under this Act is likely to be defeated by the making of a document or disposition by a party to the proceeding, the court may set aside or restrain the making of the document or disposition.	19 20 21 22
(2) If a court is satisfied that an existing or anticipated order in a proceeding under this Act was defeated by the making of a document or disposition by a party to the proceeding, the court may order that—	23 24 25
(a) any property dealt with by the document or disposition be applied towards, or charged with, payment of—	26 27
(i) an amount payable under an order adjusting interests in the property of 1 or more of the parties to the proceeding; or	28 29
(ii) costs; or	30
(b) the proceeds of a sale be paid into court to abide its order.	31

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(3) A court may order a party or person acting in collusion with a party to pay the costs of—	1
(a) another party; or	2
(b) a purchaser in good faith; or	3
(c) another interested person;	4
of and incidental to—	5
(d) the document or disposition; or	6
(e) the setting aside or restraining of the document or disposition.	7
(4) For the purposes of this section, something is made by a person if the thing is made by or on behalf of, or by direction or in the interests of, the person.	8
(5) For the purposes of this section, it does not matter whether the document or disposition is intended to defeat the order concerned.	9
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Interests of other parties	14
<i>Clause</i> 136.(1) In the exercise of its powers under this Part, a court must have regard to the interest in the property of, and must make any order proper for the protection of, a purchaser in good faith and other interested persons.	15
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(2) A court may order that a person be given notice of a proceeding or be made a party to the proceeding on the application of the person or if it appears to the court that the person may be affected by an order under this Part.	18
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Duty of court to end financial relationship	22
<i>Clause</i> 137. In a proceeding under Part 3 (Adjustment of property interests) or Part 4 (Maintenance) of Chapter 3 (Resolution of financial matters by court), a court must make orders that, as far as practicable, will end the financial relationship between the de facto partners.	23
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PART 3—MISCELLANEOUS MATTERS	1
CONCERNING PROCEEDINGS	2
 <i>Division 1—Intervention</i>	 3
 Application for leave	 4
<i>Clause</i> 138. A person may apply for leave to intervene in a proceeding under this Act.	5 6
 Leave to intervene	 7
<i>Clause</i> 139.(1) A court may grant a person leave to intervene in a proceeding before the court.	8 9
(2) The court may grant leave subject to any conditions that it considers appropriate.	10 11
 Intervener's rights	 12
<i>Clause</i> 140. A person who intervenes in a proceeding by leave of the court is a party to the proceeding with all the rights, duties and liabilities of a party unless the court orders otherwise.	13 14 15
 <i>Division 2—Costs</i>	 16
 Party bears own costs	 17
<i>Clause</i> 141.(1) A party to a proceeding under this Act bears the party's own costs.	18 19
(2) However, if the court is satisfied that there are circumstances that justify it making an order, it may make any interlocutory or other order for costs or security for costs that it considers appropriate.	20 21 22
(3) In considering whether there are circumstances that justify it making an order, the court must consider the following matters—	23 24
(a) the income, property and financial resources of each of the	25

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| parties; | 1 |
| (b) whether any party has assistance by way of legal aid and the terms of the assistance; | 2
3 |
| (c) the conduct of each of the parties in relation to the proceeding, including, for example, conduct about pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts and production of documents; | 4
5
6
7 |
| (d) whether the proceeding results from a party's failure to comply with a previous order made under this Act; | 8
9 |
| (e) whether any party has been wholly unsuccessful in the proceeding; | 10
11 |
| (f) whether any party made an offer of settlement under its rules of court and the terms of the offer; | 12
13 |
| (g) any fact or circumstance that the court considers the justice of the case requires to be taken into account. | 14
15 |

Division 3—Publication of Proceedings 16**Specifically authorised publication** 17

Clause 142.(1) A person may publish an account of a de facto proceeding in the following ways— 18
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| (a) by communicating, to a person concerned in another proceeding in any court, a court document from the de facto proceeding for use in the other proceeding; | 20
21
22 |
| (b) by communicating a court document from the de facto proceeding to— | 23
24 |
| (i) a body that is responsible for disciplining members of the legal profession; or | 25
26 |
| (ii) a person concerned in a disciplinary proceeding against a member of the legal profession; | 27
28 |
| (c) by communicating, to a body that grants assistance by way of legal aid, a court document from the de facto proceeding for use | 29
30 |

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in deciding whether assistance should be provided or continued in a particular case;	1
(d) by publishing a notice or report about the de facto proceeding by direction of a court;	3
(e) by publishing an account of the de facto proceeding in a publication genuinely intended primarily for use by the members of a profession;	4
(f) by publishing an account of the de facto proceeding to—	5
(i) a member of a profession in relation to the member's practice of the profession; or	6
(ii) a student in relation to the student's studies.	7
(2) In this section—	8
“court” means a court or tribunal established under a law of the Commonwealth or a State or Territory.	9
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No identification in general publication	15
<i>Clause</i> 143.(1) A person may publish an account of a de facto proceeding only if the publication does not identify—	16
(a) a party to the proceeding; or	17
(b) a witness in the proceeding; or	18
(c) another person who is, or is alleged to be, concerned in a matter relevant to the proceeding; or	19
(d) a person related to, or associated with, a person mentioned in paragraph (a), (b) or (c).	20
(2) A publication identifies a person if it is sufficient to identify the person to—	21
(a) a member of the public; or	22
(b) a member of the section of the public to whom the publication was made.	23
(3) Subsection (1) does not apply to a publication under section 142 (Specifically authorised publication).	24
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Offence	1
<i>Clause</i> 144.(1) A person must not publish an account of a de facto proceeding except under section 142 (Specifically authorised publication) or 143 (No identification in general publication).	2 3 4
Maximum penalty—40 penalty units.	5
(2) A proceeding for an offence against this section may be started only with the written consent of the Director of Prosecutions.	6 7
(3) A document purporting to be a consent mentioned in subsection (2) is taken to be the consent, and to have been properly given, unless the contrary is established.	8 9 10
PART 4—ENFORCEMENT	11
Purpose and how it is to be achieved	12
<i>Clause</i> 145. The purpose of this Part is—	13
(a) to recognise that the existing powers of the courts having jurisdiction under this Act are largely satisfactory to enforce orders made under this Act; and	14 15 16
(b) to add to those powers where necessary.	17
Enforcement of higher court's maintenance order by Magistrates Court	18 19
<i>Clause</i> 146. An order made by the Supreme Court or a District Court for the periodic payment of maintenance may be enforced by a Magistrates Court as if it were a judgment of the Magistrates Court.	20 21 22
Enforcement of non-monetary orders and injunctions	23
<i>Clause</i> 147.(1) If a court is satisfied that a person has knowingly and without reasonable excuse contravened an order (other than an order for the payment of money) made or an injunction granted by it under this Act, the	24 25 26

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court may—	1
(a) order the person to pay a fine of not more than 40 penalty units; and	2 3
(b) either—	4
(i) require the person to enter into a recognisance, with or without sureties, in an amount that the court considers reasonable, that the person will comply with the order; or	5 6 7
(ii) order the person to be imprisoned until the person enters into such a recognisance or until the end of 3 months, whichever happens first; and	8 9 10
(c) order the person to hand over to the court the documents that the court considers appropriate; and	11 12
(d) appoint an officer of the court or other person to execute any document in the name of the person; and	13 14
(e) make any other order that the court considers necessary to enforce compliance with the order or injunction.	15 16
(2) Nothing in this section affects the power of a court to punish a person for contempt of court.	17 18

CHAPTER 7—MISCELLANEOUS

Regulations	20
<i>Clause</i> 148. The Governor in Council may make regulations under this Act.	21

CHAPTER 8—CONSEQUENTIAL AMENDMENTS 1

Acts amended 2

Clause 149. The Acts specified in the Schedule are amended as set out in the Schedule. 3

4

5

SCHEDULE	1
ACTS AMENDED	2
section 149	3
DISTRICT COURTS ACT 1967	4
1. Section 66(1)(b)—	5
<i>insert—</i>	6
‘and	7
(xv) under the <i>De Facto Relationships Act 1993</i> except as	8
provided by section 125 (Limit of jurisdiction of District and	9
Magistrates Courts) of that Act.’	10
2. Section 92(1)—	11
<i>insert—</i>	12
‘or	13
(e) in a proceeding under the <i>De Facto Relationships Act 1993</i> ;’.	14
MAGISTRATES COURTS ACT 1921	15
1. Section 2—	16
<i>insert—</i>	17
‘“monetary limit” means \$20 000;’.	18

SCHEDULE (continued)

2. Section 4(1), (2) and (3)—	1
<i>omit</i> '\$20 000', <i>insert</i> 'the monetary limit'.	2
3. Section 4(4)—	3
<i>omit, insert—</i>	4
'(4) A Magistrates Court may decide an action concerning any of the following matters only if this Act allows—	5
(a) the title to land;	6
(b) the validity of a devise, bequest or limitation under a will.	7
'(4A) If an action incidentally concerns the title to land—	8
(a) the Magistrates Court may decide the claim that it is the immediate object of the action to enforce; and	9
(b) the court's judgment is not evidence of title in another action in the Magistrates Court or in a proceeding in another court.	10
'(4B) Subsections (4) and (4A) do not apply to matters under the <i>De Facto Relationships Act 1993</i> .'	11
	12
	13
	14
	15
4. Section 11(3)—	16
<i>omit, insert—</i>	17
' Appeal	18
'(3) An appeal lies to a District Court from a judgment or order of the Court in—	19
(a) an action involving more than \$2 400; or	20
(b) an action for the recovery of possession of land if—	21
(i) the value of the land is more than \$2 400; or	22
(ii) the annual rent of the land is more than \$2 400; or	23
(c) a proceeding in interpleader if the amount claimed or the value of the goods in question is more than \$2 400; or	24
	25
	26

SCHEDULE (continued)

- (d) an application under Part 2 (Declaration of property interests) of Chapter 3 (Resolution of financial matters by court) of the *De Facto Relationships Act 1993*. 1
2
3
- ‘(3A) An appeal lies to a District Court from a judgment or order of the Court in a case not mentioned in subsection (3) only with the District Court’s leave. 4
5
6
- ‘(3B) A District Court may grant leave to appeal only if the District Court is satisfied that the appeal would involve some important principle of law or justice. 7
8
9
- ‘(3C) Despite subsections (3) and (3A), no appeal lies from a decision of the Court if, before the decision is pronounced, there is a written agreement of all parties to the effect that the decision is final. 10
11
12
- ‘(3D) The agreement mentioned in subsection (3C) must be signed by each party or the party’s solicitor or agent. 13
14
- ‘(3E) An appellant must give notice of the appeal, briefly stating the grounds of the appeal, within the time and the way prescribed. 15
16
- ‘(3F) An appellant must— 17
- (a) give security approved by the registrar; or 18
- (b) deposit \$1 600 or, if a greater amount is prescribed by regulation, the greater amount with the registrar; 19
20
- for the costs of the appeal if the appeal is dismissed. 21
- ‘(3G) A notice of appeal stays execution on a judgment only if the Court or a District Court orders that execution be stayed.’. 22
23
24