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SHARED PROPERTY

Resolving property disputes between people who live together
and share property

WP No 36

Queensland Law Reform Commission
October 1991

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INTRODUCTION

The Queensland Law Reform Commission is reviewing the law governing property disputes between people who live together under the one roof.

In order to obtain public comment, the Commission has published this Discussion Paper. The Commission expects that the issues raised in the Discussion Paper will be of interest to many members of the community. Where people are living together in a non-marital situation, the matters discussed in the Paper may be directly relevant. Many interest groups may also wish to comment on the direction of reform in this area.

The first two chapters of the Discussion Paper discuss broad policy issues on the need for reform and options for reform. The Commission specifically invites public comment on the scope of reform and how that reform can be achieved.

To obtain more specific comment, the Commission has drafted legislation. The legislation appears in full in Chapter 4. Chapter 3 contains a clause by clause analysis of this draft legislation. It should be stressed that this legislation does not represent the Commission's final views on the direction of reform. It has been included within the Discussion Paper merely to provide a focus for discussion and comment.

The Commission is aware that some of the tentative proposals for reform present difficulties. Many of these kinds of difficulties are inherent in the process of innovative law reform. The Commission hopes that by obtaining public comment, it will be able to make recommendations for reform in this important area which are appropriate and can practically be implemented.

The closing date for submissions is 31 January 1992. Written submissions should be sent to -

***The Secretary
Queensland Law Reform Commission
PO BOX 312
ROMA STREET QLD 4003***

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QUESTIONS ARISING FROM THE LEGISLATION

Throughout the commentary in Chapter 3, the Commission invites submissions by posing specific questions on various aspects of the proposed legislation. For ease of reference, these questions are listed below with the corresponding page number. Public submissions should not be limited to responding to these specific questions. The Commission is interested in receiving input on all aspects of the Discussion Paper.

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1. NEED FOR REFORM?

In today's society, property can be owned and shared in many different ways. A man and woman although not formally married may live together as wife and husband and pool all of their resources for many years. An elderly and sick parent may ask an adult child to move in and care for the parent. The child may comply if promised a share in the house in return. A grandmother may give her daughter and son-in-law money to build a granny flat on the understanding that the grandmother can live there until her death. Two or more friends may pool their resources to enable them to buy a house which they otherwise could not afford. Two students sharing accommodation may pool their money to buy a car. One of the students pays most of the purchase price and the other student has the responsibility of maintaining and repairing the car. The possibilities are endless.

People falling within these categories constitute a significant portion of the community.

Difficulties arise if the parties have a dispute. For example, should a de facto wife be entitled to property accumulated during the relationship but held in the name of the de facto husband? Is the child who lived with and cared for her elderly parent for ten years entitled to an interest in her parent's house? If the grandmother no longer wishes to live with her daughter and son-in-law, is she entitled to an interest in the improved house? The friends who purchased the house together decide to go separate ways. What proportion of the house is each friend entitled to? Will the student who paid more for the purchase of the car be entitled to a larger beneficial interest in the car?

There is currently no easy answer to these questions.

In a traditional marriage, if the wife and husband separate, there is a mechanism to solve property disputes.¹ In contrast, there is no statute which governs the division of property where people share property in other situations. In these cases, the parties affected must rely on the common law. There is a general consensus within the legal profession, however, that the common law does not satisfactorily resolve property disputes in a non-marital context. There are no clear-cut and certain principles which the courts apply in determining beneficial entitlement to property. Principles such as resulting trust, constructive trust, proprietary estoppel and equitable lien have all had their day in court.

¹ Section 79 Family Law Act 1975 (Cwth).

The High Court decision in Baumgartner v Baumgartner² did help to clarify the common law regarding property disputes between de facto couples. The assistance that this case will provide in de facto cases where the fact situation is different from that of Baumgartner's case or in a non-de facto context is doubtful.

One of the major problems with the common law before Baumgartner's case was the importance of the "common intention of the parties".³ Failure to prove this intention could deprive a party of a beneficial entitlement to the property. The majority judgment in Baumgartner's case clarified when the courts will be prepared to impose a constructive trust.⁴

According to the majority, a constructive trust will be imposed where a person refuses to recognise the existence of an equitable interest and this refusal amounts to unconscionable conduct. In Baumgartner's case, the parties had lived in a de facto relationship for over 4 years. There was a child of the relationship. The de facto wife was claiming an interest in the mortgaged home. In the circumstances of the case, the court was prepared to impose a constructive trust giving the de facto wife a beneficial entitlement in the home. The de facto husband's refusal to recognise her equitable interest in the home amounted to unconscionable conduct.

The court then discussed the extent of the de facto wife's beneficial entitlement. In the circumstances of the case, the majority stated that there should be an equality of beneficial ownership at least as a starting point. From that starting point of equality, the court adjusted the entitlements to reflect -

- * the different financial contributions made by the parties during the relationship;⁵
- * the contributions made by the de facto husband to the mortgage before the parties began their relationship;
- * the contributions made by the de facto husband to the mortgage after the relationship ended; and
- * the value of the furniture taken by the de facto wife from the home after the relationship ended.

² (1987) 164 CLR 137.

³ For comment on the ability of the law to permit an intent to be imputed, see Allen v Snyder [1977] 2 NSWLR 685 at 694 per Glass JA; Boccalatte v Bushelle [1980] QdR 180 at 184 per Matthews J; Calverley v Green (1984) 155 CLR 242 at 261; Muschinski v Dodds (1984) 160 CLR 583 at 595 per Gibbs CJ.

⁴ The constructive trust is a form of relief granted by the court. It enables a court to give a beneficial entitlement in property to a person even though the property is not held in that person's name.

⁵ The de facto wife was credited with the pro rata amount that she would normally have earned during the period she left work to have the couple's baby.

It is likely that this case may provide assistance where the disputing parties have lived in a de facto relationship, have pooled their resources during that relationship and the dispute relates to the home in which they live. It is doubtful whether principles of unconscionability will provide a solution for all people who do not satisfy these criteria. The test of unconscionability is somewhat indeterminate. Furthermore, Baumgartner's case is relatively recent. Whether the principles set out by the majority in that case will stand the test of time is unknown.⁶

From the preliminary inquiries made by the Commission, it appears that it is also the view of the legal profession that reform is needed in this area of law. Out of a total of 51 practitioners practising in family law who responded to a questionnaire prepared by the Commission,⁷ only one practitioner felt that reform was not needed in the law governing de factos. Out of the 51 practitioners who responded to the questionnaire, only one solicitor had not been approached in the past 12 months for legal advice by a client about their de facto relationship. The remaining practitioners estimated that about 1,300 clients sought advice about de facto relationships during this time.

Of these 51 practitioners, 45 had also been approached over the past five years for advice about property disputes by clients in a non-marital and non-de facto context.

The Commission believes legislation is necessary. It is essential that people be able to obtain reliable and certain legal advice about the law that governs their affairs. In addition to making the law certain, an added benefit of legislation is that, if litigation is necessary, procedure and proof is simplified and the cost of litigation should decrease.

Under existing laws governing people who share property, rules of equity often recognise that people can acquire rights in the property although they may not legally own the property. This occurred in Baumgartner's case as described above. The de facto wife had certain rights over the house although she did not have legal title to the house.

The difficulty which exists is that it can be very costly to establish an equitable title (as the de facto wife did in Baumgartner's case). There must be a full examination by the courts of all of the facts and the application of intricate and sophisticated principles of equity. This causes injustice to the person whose title equity would recognise if given the opportunity. A principal object of this legislation is to cut

⁶ See, for example, the judgment in Baumgartner's case of Gaudron J who imposed a constructive trust on grounds of unjust enrichment rather than unconscionability.

⁷ Fourteen solicitors were from Brisbane city, 14 from Brisbane suburbs and 31 from outside Brisbane city area. While the Commission appreciates that this sample group is small, the comments made provide a preliminary guide to problems experienced by practitioners and the need for reform. The Commission has circulated these questionnaires to all members of the Family Law Practitioners Association and hopes that responses will provide further information on the need for reform.

through some of these difficulties and give better access to the law to the equitable owner.

Giving better access to a certain extent changes the law. Under the proposals of the Commission, many people who cannot afford to have their interests recognised because of costs should hopefully be able to. Further, since the legislation will be framed in plain English, it should be easier to understand, both by claimants and the court, than the complex language of constructive trusts. Under the proposals, the door may be opened a little wider than it is now to people claiming an interest in property.

In recommending that legislation be enacted to cater for all people with property disputes, the Commission is attempting to clarify and improve people's rights under the existing law. The Commission is not seeking to equate de facto or any other relationships with marriage. It is simply responding to a clear need in the community.

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2. OPTIONS FOR REFORM

Assuming that there is a need for reform in the law governing non-marital property disputes, an appropriate method for reform must be chosen. There are a number of reform options available -

- * refer State powers to the Commonwealth about property disputes in a de facto relationship and also enact State legislation about other people living together under the one roof who share property;
- * enact State legislation governing all people living together under the one roof who share property; or
- * refer State powers to the Commonwealth about all people living together under the one roof who share property.

Each option will be considered in more detail below. The Commission invites public comment on which is the preferable option for reform, in terms of the extent and nature of reform and the relevant court to exercise jurisdiction.

A. Referral of State powers to the Commonwealth about de facto property disputes; State to legislate for non-de facto disputes

One option is for the State to refer its powers to legislate about de facto property disputes to the Commonwealth, yet enact legislation to govern non de facto property disputes. The Commission has already received a number of submissions from within the legal profession strongly advocating the option of referring to the Commonwealth State powers to legislate on de facto property disputes.⁸

In March 1991, a Commonwealth Joint Select Committee was established to report on certain aspects of the operation and interpretation of the Family Law Act. The Joint Select Committee was asked to consider and make recommendations about "the proper resolution of family law property disputes, including the question whether it is desirable that the Family Law Act be extended to property disputes arising out of de facto relationships". The Joint Select Committee is scheduled to report to each House of Parliament by the first sitting week of August 1992.

The option of referral of powers to the Commonwealth is also currently on the agenda of the Standing Committee of Attorneys-General.

⁸ The Commission met informally with the Family Law Council on 22 May 1991. In that meeting, a number of members of the Council also canvassed the desirability of a referral of powers to the Commonwealth in relation to de facto relationships.

In Western Australia, the Legislative Council's Select Committee on de facto relationships recommended in October 1990 that the State refer powers in relation to de facto relationships to the State Family Court.⁹ It was recommended that legislation be enacted based on the NSW De Facto Relationships Act and that the State Family Court have jurisdiction to hear matters arising under that Act.

If Queensland refers its powers over de factos, a possible result is that the Family Court will exercise jurisdiction over de facto relationships and the Family Law Act will apply as if the de facto couple were married. This course is based on the premise that a de facto relationship can be equated with marriage.¹⁰ There are a number of arguments both for and against this option.

Arguments in favour of referral of powers -

*** Expertise of the Family Court**

With minor exceptions,¹¹ the Family Court deals exclusively with family law matters. Certainly the Family Court has built up a special expertise in this area. The initiatives in any proposed legislation would probably be more easily integrated into the existing Family Court structures than current state court structures.

In addition, a consideration in appointing a Judge to the Family Court is that person's suitability to deal with matters of family law by reason of training, experience and personality.¹²

*** Speed of resolution in Family Court**

Because of the well-developed case management procedures in the Family Court, Brisbane Registry, the time between commencing an action to resolve a property dispute (which is done by filing an

⁹ It should be noted, however, that there is a different court structure in Western Australia. The Family Court is a State, not a Federal court. Accordingly, the State is able to enact legislation and give the Family Court jurisdiction to hear matters arising under that legislation.

¹⁰ Another option upon a referral of powers is for the Commonwealth to pass separate legislation governing de facto couples, possibly based on the NSW legislation. Jurisdiction under this legislation could be conferred upon the Family Court. Under this option, the distinction between a de facto relationship and a marriage will be maintained.

¹¹ The Family Court has jurisdiction over the custody, maintenance and guardianship of ex-nuptial children (Commonwealth Powers (Family Law - Children) Act 1990 (Old) and section 60E Family Law Act 1975 (Cwth)). The Family Court also deals with non-marital matters under its cross-vested jurisdiction. For example, if a custody dispute between de facto partners is commenced in the Family Court, that Court may also be prepared to determine a property dispute between the de facto couple which was commenced in the Family Court.

¹² Section 22(2) Family Law Act 1975 (Cwth).

application) and trial is on average about six months.¹³ While the Commission has been unable to obtain comparable statistics from the Supreme Court Registry, it understands that the average time between the commencement of proceedings and the matter proceeding to trial is far in excess of six months.¹⁴

The advantage of speedy resolution of property disputes in these kinds of relationships is obvious. It is usually only after these matters are resolved that parties can begin to recover from the effects of the breakdown of the relationship.

* **Appropriate conference facilities are in operation in Family Court**

Before a property dispute goes to trial in the Family Court, the parties must attend an Order 24 conference.¹⁵ In 1990/1991, these conferences had a resolution rate of 58.3%.¹⁶ The Commission understands that the Family Court is planning to bring in a pre-first return date compulsory conference for property matters¹⁷ which will mean that compulsory mediation occurs at an earlier stage in the dispute. This should further decrease the number of disputes which go to trial.

* **Familiarity with procedure**

Family law practitioners are familiar with the procedures of the Family Court. If de facto property disputes are handled by family law practitioners, their familiarity with these procedures will assist the resolution of de facto disputes within the existing framework of the Family Law Act.

¹³ The Commission received these statistics from the Registrar of the Brisbane Registry.

¹⁴ In fact, the Commission has been advised that in the Supreme Court there is a six to eight month delay from the time of entering a matter for hearing to the date of trial. A matter will not be entered for hearing until well after the action has been commenced.

¹⁵ The parties must attend an Order 24 conference unless the court exercises its discretion in section 79(9) not to order the conference. Order 24 rule 1 permits both a 'property or financial matters conference' and a 'conciliation and counselling conference'. The reason for the former needs no further comment. The latter is ordered where children are concerned.

¹⁶ The Commission was given these statistics by the Registrar of the Family Court in Brisbane. Although the Order 24 conferences are not limited to property disputes, it is estimated that approximately 90% of the Order 24 conferences relate to property.

¹⁷ The current draft Case Management Guidelines of the Family Court of Australia (March 1991) provide that an Order 24 property conference may be ordered prior to the Directions Hearing.

* **Increased certainty of outcome**

Currently, family law practitioners can predict with reasonable certainty the likely distribution of property that will be ordered if the dispute goes to trial.¹⁸ If the Family Law Act were applicable to de facto property disputes, more certainty would be introduced into the resolution of property disputes between de facto couples.¹⁹

Arguments against referral of powers -

* **De facto relationship should not be equated with marriage**

Some legal practitioners have indicated to the Commission that it is inappropriate to equate a de facto relationship with marriage. The Commission believes this view is shared by many people in the community. It should also be noted, however, that the contrary view has been strenuously advanced to the Commission. On this view, to distinguish between a de facto and married couple unfairly disadvantages the parties in a de facto relationship.

* **Some people elect to avoid regulation by Family Law Act**

The Commission has been advised that some people elect to avoid regulation by the Family Law Act by not marrying. If, by referring State powers, de facto couples are regulated by the Family Law Act, it can be argued that referral will be an unwarranted intrusion into the private affairs of citizens.²⁰

A contrary view has also been put to the Commission. If one partner elects not to marry to avoid a division of that person's property on the breakdown of the relationship, intrusion into that person's affairs in those circumstances could be justified. That person's partner should be entitled to a fair property distribution.

¹⁸ This appears to be the case despite the broad direction given to the Family Court to alter property interests under section 79 Family Law Act 1975 (Cwth). The certainty in advising clients is probably due to the large body of case law built up since the Family Law Act was passed which provides guidelines to practitioners.

¹⁹ In contrast, it can be argued that it is difficult to predict the likely property adjustment that will be ordered under the De Facto Relationships Act 1984 (NSW). Contrast the cases of Dwyer v Kaljo (1987) 11 FamLR 785 and Davey v Lee (1990) 13 FamLR 688. The discretion given to the courts under the De Facto Relationships Act 1984 is not as broad, however, as that given to the Family Court under the Family Law Act 1975. As more cases are litigated on the NSW legislation, it is likely that a clearer direction will be given on how the courts will exercise their discretion.

²⁰ It should be noted, however, that under the legislation proposed by the Commission, parties are able to enter into cohabitation and separation agreements. Provided that the agreement complies with the requirements of the legislation, it will be binding on the court. In this fashion, the parties can avoid the statute's regulation of property interests.

* **Further State legislation required to cover other parties**

Even if State powers are referred for de facto property disputes, State legislation will be required to govern disputes between other people who share property and live together under the one roof. Further, it can be argued that considerations relevant to solving property disputes between de factos may be more relevant to all people who share property than to a married couple. If this is so, it may be more appropriate to enact separate legislation to govern de factos rather than for de factos to be governed by the Family Law Act.

* **Referral may not be a short-term option**

A further difficulty with the referral of power is that it may be some time before the States and Commonwealth agree to, and put in place, legislation to effect a referral of power. It is unclear when, if at all, State governments will be prepared to refer that power.

In addition to the concerns raised above on the referral of State power, it should further be noted that State referral alone will not provide relief. It is then up to the Commonwealth to draft and pass appropriate legislation. There could be considerable delay after referral of power before Commonwealth legislation comes into operation. Further, there is no guarantee that the Commonwealth will decide to pass legislation governing de facto property disputes.

On balance, the Commission is of the view that the Family Court is the appropriate forum to resolve property disputes in domestic relationships.

B. Enact State legislation

Legislation on de facto relationships has been enacted in NSW,²¹ Victoria,²² South Australia²³ and the Northern Territory.²⁴ Although the NSW and Northern Territory legislation is very comprehensive in relation to de facto relationships,²⁵ neither of these Acts nor the legislation in the other States deal with property

²¹ De facto Relationships Act 1984 (NSW).

²² Property Law (Amendment) Act 1987 (Vic).

²³ Family Relationships Act 1975, Part III (SA).

²⁴ De Facto Relationships Act 1991 (NT).

²⁵ The legislation deals with property matters, maintenance, cohabitation and separation agreements and domestic violence and harassment.

disputes between people other than de facto couples.²⁶ The legal needs of these people are no less pressing than those of de facto couples.

Enacting State legislation to govern property disputes between people who live together under the one roof and share property is clearly one option for reform. Under this option, and given the current practice of the courts under cross-vesting legislation,²⁷ it is likely to be the State courts in cases unrelated to family law disputes, not the Family Court, that will exercise the jurisdiction under the Act. This means that the advantages of the Family Court in hearing disputes between de facto couples (discussed earlier) would not be enjoyed.

Cross-vesting as a possible solution

At this preliminary stage of its enquiry, the Commission is of the view that the Family Court would be the most suitable court to hear and determine property disputes that arise out of domestic relationships.

Ideally, this cross-vesting legislation could be used so that all of the advantages of the referral of powers to the Commonwealth outlined earlier could be achieved. In other words, the Family Court which is accustomed to dealing with property disputes between married parties and assessing the value of non-financial contributions, could determine property disputes between de facto and other non-marital partners under State legislation.

Under section 4(2) of the State and Commonwealth cross-vesting legislation,²⁸ the Family Court has jurisdiction over "State matters". Therefore, if Queensland enacted legislation, dealing with all people who share property and who live under the one roof, the Family Court would have the jurisdiction to deal with matters arising under the Act.

In a similar vein, the cross-vesting legislation allows a matter to be transferred to the Family Court if it is considered by the Supreme Court "more appropriate" that the matter be determined by the Family Court.²⁹ Proceedings can also be transferred to the Family Court if it is "otherwise in the interests of justice" that the

²⁶ In fact, the Commission has been unable to find legislation in any jurisdiction which deals with property disputes between people who share property and live under the one roof other than a marital or de facto relationship.

²⁷ Re Staples and McCall (1989) 13 FamLR 279 and Re Chapman and Jansen (1990) 13 FamLR 853.

²⁸ Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) and Jurisdiction of Courts (Cross-vesting) Act 1987 (Cwth), respectively.

²⁹ Section 5(1)(b)(i) and (ii) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) and section 5(1)(b)(i) and (ii) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cwth). Section 5(1)(b)(i) is relevant where there are also proceedings pending in the Family Court. Under section 5(1)(b)(ii), the proceedings will only be transferred if the matters in paragraphs A to C are satisfied.

matter be dealt with by the Family Court.³⁰

The De Facto Relationships Act 1984 NSW deals with property and maintenance disputes between de facto couples and cohabitation and separation agreements. Since the cross-vesting legislation was enacted in 1987, the Family Court has had jurisdiction to hear matters arising under that Act. Given the expertise of the Family Court in property and maintenance disputes, it would seem logical for the Family court to hear such matters under the state legislation.

However, cross-vesting cases such as Re Staples and McCall³¹ and Re Chapman and Jansen³² and a recent Family Court practice direction³³ indicate otherwise. If the only dispute between a de facto couple relates to property, it is unlikely that the Family Court will hear the matter. It is likely that this kind of matter will be transferred to the Supreme Court. In Re Staples and McCall and Re Chapman and Jansen, the Family Court considered whether a property dispute between a de facto couple should be dealt with by that Court or be transferred to the Supreme Court. Under the cross-vesting legislation, the Family Court would be required to transfer the proceedings if it considered the Supreme Court was the "more appropriate" court.³⁴ The Family Court must also transfer proceedings to the Supreme Court if it considers that it would be in the "interests of justice" for the matter to be heard and determined in that Court.³⁵

In both Re Staples and McCall and Re Chapman and Jansen, proceedings were transferred to the Supreme Court. The Family Court decided that the Supreme Court was "more appropriate" because the Supreme Court is the court which would have had jurisdiction over the matter if the cross-vesting legislation had not been enacted.³⁶

The recent Family Court practice direction reflects these decisions. Under that practice direction, applications which, apart from cross-vesting legislation, fall outside the Family Court's jurisdiction, should not be filed unless there is a related

³⁰ *Ibid*, section 5(1)(b)(iii).

³¹ (1989) 13 FamLR 279.

³² (1990) 13 FamLR 853.

³³ Practice Direction No. 3 of 1990.

³⁴ Sections 5(4)(b)(ii) Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) and Jurisdiction of Courts (Cross-vesting) Act 1987 (Cwth).

³⁵ *Ibid*, sections 5(4)(b)(iii).

³⁶ Compare, however, Bell v Street (1990) 14 FamLR 214 where Needham J. ordered by consent that the property dispute between the de facto couple be transferred to the Family Court.

proceeding³⁷ within the Family Court's jurisdiction. If such an application falling outside the Family Court's jurisdiction is made in the Family Court, the practice direction provides that the matter is likely to be transferred to the Supreme Court.

Unfortunately, the cross-vesting case law and this practice direction indicate that the Family Court is unlikely to hear the overwhelming majority of matters arising under any State legislation which may be proposed by the Commission.

The Commission is of the view, however, that the Family Court in Re Staples and McCall and Re Chapman and Jansen have interpreted the cross-vesting legislation narrowly. It may be that later decisions interpret the words "more appropriate" differently. A possible alternative interpretation is that the words "more appropriate" mean "more suitable". On this interpretation, it is more likely that the Family Court (with the advantages outlined earlier) will be considered "more appropriate" than the Supreme Court to hear and determine disputes arising out of domestic relationships.

Even if the courts adopted this alternative interpretation of the cross-vesting legislation, the Family Court practice direction would still be a bar for matters arising under any proposed State legislation to be heard and determined in the Family Court. For the practice to alter, a new practice direction would have to be issued by the Family Court.

C. Referral of all State powers to Commonwealth

The third option would be for the State to refer to the Commonwealth all of its powers in relation to people who share property and live under the one roof, including de facto couples. If this referral were made, it is possible that these kind of disputes would be handled by the Family Court.³⁸

There are a number of arguments in favour of the Family Court handling property disputes arising out of a de facto relationship. These were discussed in detail earlier.

This third proposal, however, goes much further. It proposes the referral of the State's power to govern property disputes over all people who share property and

³⁷ See, for example, Broman and Clarke (1990) 13 FamLR 676 where proceedings were brought in the Family Court by the de facto wife for custody, child maintenance and property settlement. The Family Court did not transfer the dispute to the Supreme Court because of the other matters pending in the Family Court concerning custody and maintenance of the child. See also Lambert v Dean (1989) 13 FamLR 285 where the Supreme Court transferred the matter to the Family Court because there were proceedings pending in the Family Court which related to the Supreme Court proceedings and it was "more appropriate" for the matters to be determined by the Family Court.

³⁸ The Commonwealth could pass specific legislation governing these kinds of property disputes. The Family Court could be given jurisdiction over such disputes. Alternatively, the Commonwealth could make the Family Law Act 1975 (Cwth) applicable to all people who have a property dispute in these circumstances.

live under the one roof. The control over and drafting of the legislation would not then be in the hands of the State Parliament.

It could be argued that the Supreme Court has expertise over non-marital property disputes which has been built up over centuries. This expertise would be lost if the power were referred. The kind of domestic relationships in which property disputes can arise is diverse. They include siblings, friends who share a home and a grandmother who pays for a granny flat to be added to her child's home. Considerations different from those relevant in the Family Court in property disputes between husband and wife may be applicable.

D. Tentative Conclusions

The Commission has proceeded in this reference on the basis that a referral of power for *de factos* only or for all people who share property, even if recommended by the Commission, is not likely in the near future. Further, the interpretation of the State and Commonwealth cross-vesting legislation together with the recent practice direction of the Family Court do not facilitate the determination of these matters by the Family Court. As a result, enactment of State legislation would appear the preferable option. Tentative legislation has been drafted by the Commission to cover both *de facto* parties and other people living under the one roof who share property and have a dispute about that property.

Even at this preliminary stage of our reference, the Commission is concerned as to whether it should limit its review to the law governing *de facto* relationships only. The Commission has already received submissions that the immediate focus for reform should be limited to *de facto* relationships. No doubt limiting the reference in this way would facilitate the early passage of legislation. Legislation governing *de facto* relationships was enacted in New South Wales in 1984.³⁹ In 1987, Victoria passed legislation governing *de facto* property disputes.⁴⁰ The Northern Territory has recently passed legislation based on the New South Wales legislation.⁴¹ The Select Committee on *De Facto Relationships* in Western Australia recently recommended passing legislation based on the New South Wales legislation and conferring this jurisdiction on its Family Court. If Queensland passed legislation based on the New South Wales Act, the case law built up in that State since 1984 would be directly applicable and useful in interpreting Queensland legislation.

³⁹ *De Facto Relationships Act 1984 (NSW)*.

⁴⁰ *Property Law (Amendment) Act 1987 (Vic)*.

⁴¹ *De Facto Relationships Act 1991 (NT)*.

The Commission, however, is concerned that legislation so limited would not address the difficulties faced by people who have property disputes in non-marital and non-de facto relationships. In this regard, the following kinds of fact situations are of concern.

Example A

A spinster daughter has lived with and cared for her ageing and sick mother for 20 years in the mother's house. The daughter has performed all the domestic functions for her mother during that time. In the last 5 years, the mother's health has deteriorated and the daughter has given up her job to care for her mother full-time. The mother turns against her daughter and orders her to leave the house.

Example B

A grandmother contributes \$30,000 to her daughter and son-in-law so that they can build a granny flat onto their house. The money is given on the understanding that the grandmother can live there until her death. Because both parents work, the grandmother assumes a very active role in caring for her grandchildren. The parties' relationship sours and the grandmother decides to leave, but her daughter and son-in-law refuse to reimburse her for her financial contributions or contributions to the household.

Currently, legislation does not give any rights to the spinster daughter in Example A or the grandmother in Example B. The common law remedies available to both parties are uncertain in the nature and extent of the relief, if any, which they afford.

In an attempt to provide assistance to people like the daughter and grandmother in these kinds of cases, the Commission has been faced with three fundamental questions -

1. Who should be entitled to relief under any proposed legislation?
2. What should the courts be able to take into account in providing relief?
3. What should be the nature and extent of relief available?

To provide statutory relief in the situations outlined in examples A and B, legislation cannot be limited to de facto couples.

In the legislation which follows, relief is provided to "sharers". The definition of sharers is broad enough to include the daughter and grandmother in the above examples. The definition will also cover a homosexual couple who has been living together for two years. In terms of relief provided by the legislation, homosexual couples have been treated in the same way as other sharers. The Commission has received submissions that the legislation should extend to homosexual couples. The Commission invites comment on whether there is any reason why

the relief provided to sharers under the proposed legislation should be denied to homosexual couples.

In civil proceedings, people living in a homosexual relationship are not discriminated against and the proposed legislation reflects the current position. Formerly discrimination was possible because of their amenability to the sanctions of the criminal law.

The problem which must be addressed is how to limit the legislation so that frivolous or unmeritorious claims do not clog the system or bring the law into disrepute.

The Commission realises the difficulties inherent in the breadth of its proposals. For example, the definition of "sharer" is very wide. Under the current proposals, tenants who have been living together for 2 years will qualify to apply for relief. This will enable a tenant to apply to a court for an interest in another tenant's stereo, claiming to have made contributions to the welfare of that tenant through doing the bulk of the homemaking tasks such as mowing the lawn and doing the cooking and cleaning during the 2 year period. While it is unlikely that the tenant would be successful in obtaining any relief in an application under the Bill, on the current definition of "sharer", that tenant will at least satisfy the jurisdictional requirements.

The legislation which follows represents preliminary deliberations on this ground-breaking reform. It must be stressed that the proposals are based on the objectives of reforming this area of law not only in relation to de facto couples, but also to other people who live under the one roof and share property.

The Commission invites submissions as to whether reform should or should not extend beyond de facto relationships. The Commission invites constructive comment on ways to narrow the ambit of the legislation while making it sufficiently wide to cover the meritorious claims such as those illustrated in examples A and B above.

The rest of this Discussion Paper is comprised of 2 parts. The first part (chapter 3) is an analysis of the proposed legislation section by section. The final part (chapter 4) is the draft legislation in full. In the commentary, submissions are invited on specific issues. Submissions should not necessarily be limited to the questions highlighted in the Discussion Paper. The Commission is interested in obtaining comments on all aspects of the Discussion Paper.

It is to be emphasised that the Commission is not committed to recommending legislation based on the proposals canvassed in this Discussion Paper. The Commission invites submissions not only on specific aspects of the proposals, but also on the broader policy issues.

3. DRAFT LEGISLATION AND COMMENTARY

SHARED PROPERTY ACT

As the legislation in the Discussion Paper represents the Commission's preliminary views on reform in this area, comments on specific issues have been invited throughout the commentary. These questions appear in the unshaded boxes. In some places in the legislation, two mutually exclusive options have been suggested. In these cases, the Commission invites submissions on which is the preferable option, or suggestions for improvement of either alternative.

This chapter is divided into 6 parts. These parts represent the 6 parts of the proposed legislation. Within each part are listed all of the sections of that part. These sections are set out in full in the shaded boxes. In brackets after the section heading is an abbreviated reference to the equivalent section in the other jurisdictions, namely, De Facto Relationships Act 1984 (NSW), Property law Act 1958 (Vic) and De Facto Relationships Act 1991 (NT). Reference in a section heading to "*Cwth*" is a reference to the Family Law Act 1975 (Cwth).

Part I - Preliminary

Part I is crucial to this legislation. Under Part III of the legislation, a "sharer" is entitled to make an application to adjust interests in property. "Sharer" is defined in clause 1.5. "Shared property" is also defined in clause 1.5.

These definitions are important as they delineate who is entitled to apply for relief and the property against which relief can be ordered.

The Commission is anxious to receive input on these jurisdictional threshold issues. They are central to the breadth of application of the legislation. This Part is also important as it preserves the general law rights of people who are governed by the legislation (clause 1.7).

1.1 Purposes of this Act

The primary purposes of this Act are to -

- (a) confer rights on sharers to apply for an adjustment of interests in property;*
- (b) provide declaratory relief with respect to existing rights to property;*
- (c) allow relationships to be regulated by cohabitation and separation agreements;*

- (d) *provide for the declaration of the existence of a de facto relationship;*
- (e) *confer on courts the necessary jurisdiction and power required by this Act.*

The purposes set out in this clause reflect the current legislative proposals. The Commission has received submissions on the extent of its legislative proposals. For example, it has been suggested that legislation of this kind should allow courts to make maintenance orders and allow parties to enter into agreements which provide for maintenance payments. If the nature of the proposed legislation alters as a result of public submissions, the purposes clause must change to reflect those alterations.

1.2 Title of this Act

This Act may be cited as the Shared Property Act 1992.

The title of this legislation was carefully chosen. It reflects the focus of the current proposals which is the sharing of property. The legislation does not purport to regulate all aspects of a de facto relationship. It focuses on the adjustment of property rights between people who fall within the definition of "sharer". If the focus of the legislation changes as a result of public comment, the title of the legislation will also be altered to reflect this.

1.3 Commencement

- (1) *Section 1.2 and this section commence on*
- (2) *The remaining provisions of this Act commence on*

1.4 Regulations

The Governor in Council may make regulations to promote the purposes of this Act and its administration.

Clauses 1.3 and 1.4 are self explanatory and require no further comment.

1.5 Definitions (s.3 NSW ; s.275 Vic ; s.3 NT)

"child" when used as a "child of the sharers" means -

- (a) *a child born as a result of sexual relations between the sharers;*
- (b) *a child of the woman of whom her de facto partner is presumed, pursuant to the Status of Children Act 1978-1988, to be the father, or*
- (c) *a child adopted by the sharers.*

The word "child" is used in clauses 3.3(2), 3.7(3), 3.7(4), 3.8(1), 3.8(2), 3.8(3) and 5.2(4).

The definition mirrors the New South Wales, Victorian and Northern Territory legislation.

"cohabitation agreement" means an agreement between sharers, whether or not there are other parties to the agreement -

- (a) *which is made (whether before, on or after the commencement of this Act) -*
 - (i) *in contemplation of their becoming sharers; or*
 - (ii) *during the time that they are sharers; and*
- (b) *which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,*

and includes an agreement which varies an earlier cohabitation agreement;

This definition is extracted from the New South Wales and Northern Territory legislation.⁴² Under clause 1.5, however, the definition has been widened to incorporate all people who are "sharers" within the definition of that word. Traditionally, cohabitation agreements are entered into by couples who are in

⁴² The Victorian legislation does not provide for de facto couples entering into cohabitation and separation agreements. The terms of such agreements, however, may be taken into account as a factor when the court is adjusting interests in real property (section 285 Property Law Act 1958 (Vic)).

a de facto relationship or who are contemplating entering into a de facto relationship.

To come within this definition, a cohabitation agreement does not have to be in writing or certified by a solicitor.⁴³ Under this definition, the parties do not have to live together for any length of time for the cohabitation agreement to be binding.

"de facto partner" means -

- (a) *in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and*
- (b) *in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.*

This definition is the same as the New South Wales, Victorian and Northern Territory legislation.

"financial matters" in relation to sharers, means matters with respect to either or both of the following -

- (a) *the property of those sharers or either of them;*
- (b) *the financial resources of those sharers or either of them.*

This definition is based on the New South Wales and Northern Territory legislation.

Cohabitation and separation agreements make provision for "financial matters". It is therefore necessary to define what is meant by this phrase.

Paragraphs (a) and (b) of the definition of "financial matters" deal with the property and financial resources of the sharers. Clearly both of these paragraphs will be relevant for cohabitation and separation agreements between sharers and should be included in the definition.

⁴³ Certification requirements are dealt with in clause 5.3 and are discussed below. Unless the agreement is certified, the court may make an order adjusting interests in property which is inconsistent with the terms of the agreement. Before a solicitor can certify the agreement, she or he must advise her or his client on various aspects of the agreement.

The New South Wales and Northern Territory equivalents have an additional paragraph (c) which provides that financial matters include -

"(c) the maintenance of either or both of the sharers".

That is, the parties to a cohabitation or separation agreement may not only deal with entitlements to property. They may also deal with entitlements of one of the parties to maintenance. For example, on entering a de facto relationship, the parties may decide that the woman leave the workforce to raise children. The cohabitation agreement may provide that if the parties separate, she will be entitled to spousal maintenance.

Difficulties arise in integrating maintenance provisions into cohabitation or separation agreements under the Commission's proposals. In its review, the Commission's focus is on adjusting interests in property, not on awarding orders for maintenance. There is no provision in the legislation for the court to order maintenance.⁴⁴ Therefore, it is inappropriate for this legislation to deal with maintenance provisions in a cohabitation contract.

The contrary view has, however, been put to the Commission. It has been suggested that any proposed legislation should address the issue of maintenance. In this context, parties should be able to provide for the payment of maintenance in a cohabitation or separation agreement and have this agreement recognised by the court in an application under Part III for property adjustment.

This argument has particular force where the partners own few assets and on separation, one partner is caring for a child of the relationship and the other is earning an income. Because there are few assets, the carer of the child will not seek a property adjustment under Part III. However, an order for spousal maintenance or for the enforcement of the maintenance provisions in the cohabitation or separation agreement will be vital to the carer.

The Commission invites comments on whether, within the framework of the proposed legislation, it is appropriate to deal with clauses in cohabitation or separation agreements which provide for maintenance.

Q1 *Should the legislation allow maintenance provisions to be included in cohabitation and separation agreements?*

As the legislation is currently drafted, when acting for a client in drafting a cohabitation or separation agreement, a solicitor would have to advise a client

⁴⁴ Note, however, that in adjusting interests in property, the court may consider the matters set out in clause 3.8.

that a court, in an application under Part III, would not be able to enforce the maintenance clause. The parties to the agreement should take this into account in adjusting the property or financial resources entitlements under the cohabitation or separation agreement. Presumably, therefore, where an agreement is certified, it would not contain a maintenance provision.

If the agreement is not certified, it will not be binding on a court in an application under Part III.⁴⁵ It will, however, be one matter that the court considers in making the order adjusting interests in property. Presumably, the court will refer to all clauses of the agreement, including the clause providing for maintenance.

In discussing the effect of the maintenance clause, clause 5.1 should also be noted. Although a maintenance provision in an agreement under these proposals will not be binding on a court in an application under Part III, the agreement "is subject to and enforceable in accordance with the law of contract".⁴⁶ If one of the parties did not abide by the agreement, the other party could commence action for specific performance of the contract. All clauses of that agreement, including the maintenance provision (subject to ordinary contractual principles), will be enforceable.

"financial resources" in relation to sharers or shared property means -

- (a) *a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;*
- (b) *property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the benefit of the sharers or any of them;*
- (c) *property the alienation or disposition of which is wholly or partly under the control of the sharers or any of them and which is lawfully capable of being used or applied by or on behalf of the sharers or any of them in or towards their his or her own purposes; and*
- (d) *any other valuable benefit.*

⁴⁵ Clause 5.3(2).

⁴⁶ Clause 7.1(2).

This definition mirrors the New South Wales, Victorian and Northern Territory legislation. It is important in clause 3.7(3). The contribution to a sharer's financial resources will affect the order made by the court in adjusting interests in property.

"property" in relation to sharers or any of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.

Again, this definition is extracted from the New South Wales, Victorian and Northern Territory legislation.

"separation agreement" means an agreement between sharers, whether or not there are other parties to the agreement -

- (a) which is made (whether before, on or after the commencement of this Act) -
 - (i) in contemplation of the termination of their relationship as sharers; or
 - (ii) after the termination of their relationship as sharers; and
- (b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

This definition is also based on New South Wales and Northern Territory legislation.

As the name suggests, a separation agreement is an agreement which makes provision with respect to financial matters when parties have terminated or are contemplating terminating their relationship as sharers.

"share"

To be entitled to apply for an adjustment of property interests under Part III, a person must be a "sharer". To be a sharer, the party must have "shared" property with another. Under the current proposals, the word "share" has not been defined. The view of the Commission at this stage is that the word "share" has a clear and well-understood meaning. On this view, it would not enhance the legislation by attempting to define the word.

Q2 Should the legislation insert a definition for the word "share"?

["shared property"]

In drafting the proposed legislation, the Commission is considering 2 options.

Under option A, the concept of "shared property" is relevant. Clause 3.7 facilitates the making of an application to adjust interests in property. Under this option, the application can only be made against "shared property". In the draft legislation, option A is indicated by including "shared" (which appears in the square brackets) in the legislation.

Option B is the wider option and allows an application by a sharer against all property of the other sharer. The application is not limited to an application against "shared property". Under option B, therefore, there will be no reference to "shared property" in the legislation.

OPTION A - "shared property" to be defined

["shared property" means property shared by two or more persons, including de facto partners, for the purpose or in the course of their living or residing together under the one roof and includes a shared motor vehicle.]

The following commentary on "shared property" then is only relevant if the first option A is chosen.

The difficulty in defining "shared property" is that it must be broad enough to cover a variety of circumstances in which property can be shared and in which disputes can arise. The following examples illustrate the problem.

Example A

Two friends, X and Y, pool their resources to buy a house. The house is registered in both names. The friends live in the house but do not purchase any other assets jointly. Apart from the purchase of the house, they are completely financially independent. While living together, the friends share furniture, cutlery, linen and other household items, although these are all owned by X. Further, X owns a car and each day gives Y a lift to work. X and Y share equally the home duties.

Example B

A woman and man live in a de facto relationship. They pool their resources to buy a house. The house is registered in both names. The woman leaves the workforce to assume the role of homemaker and to have children.

Example C

A woman and man lived in a de facto relationship for 10 years. They pool their financial resources for the first 5 years, until the woman leaves the workforce to assume the role of homemaker and to have their children. The major asset on separation is the husband's entitlement from the superannuation fund to which he and his employer have been contributing for 15 years.

Comment

What property should come within the definition of "shared property"?

In example A, it is likely that the only property dispute that will arise would be over the house property. However, the proposed definition of "shared property" is wide enough to cover all the property referred to in the example.

If a dispute did arise in example A, and Y claimed an entitlement to X's property (other than the house), it is unlikely that Y would be successful. Y will probably not satisfy any of the requirements in clause 3.7(3).

To do justice in example B, however, it is essential that the definition of "shared property" be wide enough to cover the property mentioned in example A. The Commission believes, therefore, that the definition cannot fairly be limited to property acquired jointly.

Because of the wide variety of relationships in which a dispute can arise concerning entitlement to property, the definition of "shared property" must necessarily also be wide. Whether a person will in fact be entitled to an interest in the property will depend on the contributions that person has made. These contributions are listed in clause 3.7(3).

In example C, the major dispute would be over what beneficial entitlement the woman should have in the man's superannuation. As the definition of "shared property" is currently drafted, it is unlikely that it would include a person's superannuation entitlements.

Similarly, if one of the sharers has bought an investment property, it is unlikely to fall within this definition.

The Commission is concerned about the breadth of the proposed legislation. One way of narrowing the scope of the legislation is to limit the property against which an application to adjust interests can be made. Option A attempts to do this by introducing the concept of "shared property". The Commission is aware that defining a term such as "shared property" could introduce threshold jurisdictional questions.⁴⁷ That is, legal argument could follow on whether the property against which the application is made can properly be classed as "shared property".

OPTION B - no definition of "shared property" to appear in the legislation

No definition of "shared property" to be inserted.

Under this wider option, the legislation will not provide a definition of "shared property". As a result, the application under clause 3.7(1) relates to any property of the sharer, not just to "shared property". Under this option, therefore, an application can be brought in relation to superannuation entitlements or investment properties.

Q3 Should applications under the legislation to adjust interests in property be limited to "shared property"?

Q4 If so, how should "shared property" be defined?

⁴⁷ Concern has been expressed to the Commission on the lack of clarity of the words "for the purpose" and "in the course of" in the definition of "shared property". A related concern is the difficulty in determining whether property is in fact shared. For example, if a holiday house is owned by one partner and used by the sharers only once a year, will the holiday house become "shared property"?

"sharers" means persons who are sharing or who have shared property, including *de facto* partners, not being persons married to each other, who live or reside or have lived or resided together under the one roof, at least one of whom has made contributions of the kind referred to in section 3.7(3) [or 3.7(4)].

To qualify as a sharer under the current definition, the person must show that -

- (a) property is or has been shared by the parties;
- (b) the parties live or have lived together under the one roof; and
- (c) at least one of the sharers has made "contributions" of the kind referred to in section 3.7(3) [or 3.7(4)].

The definition of "sharers" is central to the operation of this legislation. To obtain relief under Part III of the Act, a person must qualify as a "sharer". This definition has caused the Commission enormous difficulty.

As mentioned in Chapter 2 of this Discussion Paper, the Commission wants this Act to provide relief to people in the position of the spinster daughter caring for her mother for 20 years and the grandmother who has contributed both financially and as a carer for her grandchildren over a long period.

However, the Commission does not want to open the floodgates to claimants. For instance, it is not the Commission's intention that the proposals should give relief in the following circumstances.

Example D

Jane and Neil have been sharing a house as tenants for 2 years. Jane and Neil argue and decide not to renew the lease on the house. Neil decides to bring an action under the proposed legislation against Jane's lounge suite and stereo, claiming that during the 2 years, he did all of the cleaning. This, of course, is hotly denied by Jane who cross-claims against Neil's car, claiming that she did all of the cooking for 2 years.

Difficulties arise, however, in limiting the definition of "sharers" to avoid people such as Jane and Neil. The Commission has grappled with this problem and is aware of the difficulties inherent in the existing wide definition. One of the options considered by the Commission was a definition excluding certain kinds of relationships. For example -

"Sharers" means people who are or have been living under the one roof,

but not if the main character of their living arrangement during the time that they lived under one roof is or was -

- (a) *a landlord living with his or her tenant, border or lodger;*
- (b) *tenants sharing a home;*
- (c) *borders or lodgers sharing a house;*
- (d) *the lawful detention of one or more of the people;*
- (e) *the provision by one of labour, care or services to another for which adequate compensation is being or has been paid or provided by the other;*
- (f) *a person aged less than 26 years living with his or her parent;*
- (g) *people living together for the purposes of worship;*
- (h) *students living in a college; or*
- (i) *patients living in a hospital.*

There are a number of difficulties inherent in this kind of a definition. Because the "main character" of the relationship is crucial to the definition, disputes will arise over people's perception of a relationship. For example, where people commence living together as tenants but later form a more intimate relationship, the parties' perception may differ on what in fact is the "main character" of the relationship.

A further difficulty of this kind of a definition is the effect of not including a kind of relationship which should not come within the ambit of the legislation. That is, if a category is inadvertently omitted, they will fall within the otherwise wide definition of "sharers".

The limitation currently inserted in the definition is that one of the parties must have made "contributions" of the kind referred to in clause 3.7(3)*[or 3.7(4)]*.⁴⁸

⁴⁸ "or 3.7(4)" appears in brackets and italics because it may not appear in the legislation ultimately recommended. Two options have been inserted in clause 3.7 of the legislation. Clause 3.7 allows a sharer to make an application adjusting an interest in property. In adjusting the interests in that property, the court will consider the matters listed in clauses 3.7(3) and 3.7(4).

The matters which the court may consider in option 1 are wider than in option 2. In both of these options, the matters to be considered include "contributions" made by a sharer. The nature of these contributions is explained in those clauses.

Whether the definition of "sharer" will include a reference to clause 3.7(4) depends on the option ultimately chosen.

Another option considered by the Commission to limit the definition of "sharer" was to require that the contributions be made "to the common household". This requirement imports a degree of mutuality which the definition currently lacks.

An alternative way of limiting the definition of "sharer" to reflect the notion of mutuality is to require that the parties live together "on a domestic basis". Although the word "domestic" represents a concept which is easily understood, there is very little statutory or case law to clarify its meaning. This is particularly the case when dealing with new legislation where such concepts have not the benefit of judicial clarification.

The Commission considered defining "domestic basis" to mean -

"an arrangement that subsists between 2 or more persons maintaining a common household".

The Commission invites comment on whether the phrases "contributions to the common household" or "living together on a domestic basis" would be appropriate to narrow the definition of "sharer" and, therefore, the scope of the legislation.

Q5 *The Commission invites submissions on the current definition of "sharers". In particular, constructive comment on narrowing the definition is welcomed.*

A further option in this context is to limit the definition of "sharer" to de facto and homosexual couples. Although this option would resolve the definitional difficulties discussed above, it would not provide relief to the spinster daughter and grandmother in the examples referred to earlier.

Q6 *Should the definition of "sharers" be limited to couples who are not married?*

One suggestion which has been made to the Commission is that frivolous or unmeritorious applicants could be penalised by the court in terms of costs. If the applicant makes a claim which the court considers frivolous, the applicant may be required to pay the other party's costs. This practice itself may limit the types of people seeking to qualify as sharers under the legislation.

The wide definition of "sharers" also has potential constitutional implications because of the possible overlap of State and Commonwealth legislation. Under

the proposed legislation, a child living with his or her parents may claim an interest in the parent's property because of contributions made by the child.⁴⁹

Under the Family Law Act, if the parents have separated and are seeking an adjustment of property rights under section 79 of the Family Law Act, the child of the marriage is entitled to intervene in those proceedings⁵⁰ and have property orders made in his or her favour. The matters which the Family Court may consider in making such an order include the financial and non-financial contributions made by the child.⁵¹ The Commission is addressing the constitutional implications.

1.6 Application (s.6 NSW; s.276 Vic; s.50 NT)

This Act applies to a person who has been a sharer whether before or after the commencement of this Act but does not apply to a sharer who has stopped living with another sharer under the one roof before the commencement of this Act.

This section is a modified version of the New South Wales, Victorian and Northern Territory legislation.

This clause merely provides that the Act does not apply to a person who has stopped being a sharer before the commencement of the legislation. It does apply to a sharer where the sharing commenced before the commencement of the legislation and continued after the legislation took effect.

1.7 Other rights of applicant not affected (s.7 NSW; s.277 Vic; s.51 NT)

Nothing in this Act affects any right of a sharer to apply for any remedy or relief under this Act or any other Act or any other law.

This section is a modified version of the New South Wales, Victorian and Northern Territory legislation. It retains the general law rights of sharers.

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⁴⁹ Clause 3.7. For example, the child may have worked on the parent's farm for five years for little or no remuneration.

⁵⁰ Section 92 Family Law Act 1975 (Cwth). Section 63C of that legislation also raises the question of whether the child, not the parents, can institute proceedings under section 79.

⁵¹ Section 79(4) Family Law Act 1975 (Cwth).

Part II - Jurisdiction

Chapter 2 invited comment on which would be the preferable court to resolve property disputes under any legislation proposed by the Commission. Because there will be some kind of emotional bond between sharers as defined in the proposed legislation, the Family Court was canvassed as a court well-equipped to resolve such disputes.

State legislation cannot, of course, confer on the Family Court jurisdiction to provide relief. Accordingly, consideration must be given to the relevant State court to have jurisdiction under this legislation.

2.1 Courts having jurisdiction under this Act (s.9 NSW; s.297 Vic; s.4 NT)

A person may apply to -

- (a) the Supreme Court;*
- (b) the District Court; or*
- (c) a Magistrates Court -*

for an order or relief under this Act.

This clause confers upon the Supreme Court, District Court and Magistrates Court the power to grant orders and give relief under this legislation.⁵²

This clause confers upon the Magistrates Court jurisdiction which it would not otherwise have.

The courts are given power under the Act to adjust property rights on application by a party. This power is discussed in more detail later in the Discussion Paper.⁵³

The declaratory powers conferred on the courts are discussed later.⁵⁴ In short, the courts are empowered to declare who currently has title to property, without consideration of entitlements which may exist under this legislation.

⁵² In New South Wales and the Northern Territory, jurisdiction has been conferred upon the Supreme and Local Courts by the respective legislation. In Victoria, the Supreme, County and Magistrates Courts have jurisdiction under that State's legislation.

⁵³ See the commentary to Part III, clause 3.7.

⁵⁴ See the commentary to Part IV.

The Act also deals with the enforcement of orders made by a court. These powers are discussed at a later stage.⁵⁵

Q7 *Should the Magistrates Court be given power to adjust property rights and to declare interests in property based on equitable principles, as proposed in clause 2.1?*

2.2 Staying and transfer of proceedings (s.11 NSW; s.299 Vic; ss.7 & 8 NT)

- (1) *Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the first mentioned court -*
- (a) *may stay the proceedings pending before it for such time as it thinks fit; or*
 - (b) *may dismiss the proceedings.*
- (2) *Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.*

This clause mirrors the New South Wales, Victorian and Northern Territory legislation.

Clause 2.2(1) empowers the court to stay or dismiss proceedings where proceedings are instituted in two different courts at the same time.

Clause 2.2(2) provides for the transfer of proceedings. A transfer could be ordered if proceedings have been commenced at an inconvenient or inappropriate location. Alternatively, if proceedings about property valued at \$5,000 are commenced in the Supreme Court, this clause allows the Court to transfer these proceedings to a Magistrates Court.

⁵⁵ See the commentary to Part VI.

2.3 Transfer of proceedings (s.12 NSW; s.298 Vic; s.6 NT)

- (1) *Where proceedings are instituted in the Magistrates Court or District Court with respect to an interest in property, being an interest of a value or amount in excess of the court's jurisdictional limit under the Magistrates Courts Act 1921 or the District Courts Act 1967 respectively, the court must transfer the proceedings to a court where the value is within the jurisdictional limit unless the parties agree to the first mentioned court hearing and determining the proceedings.*
- (2) *A court may transfer the proceedings under sub-section (1) of its own motion even if the parties agree to the court hearing and determining the proceedings.*
- (3) *Before transferring proceedings, the court may make any orders it considers necessary pending the disposal of the proceedings by the court to which the proceedings are transferred.*
- (4) *If proceedings are transferred to another court, that court must proceed as if the proceedings had been originally instituted in that 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 proceedings.*

This clause is similar to the New South Wales, Victorian and Northern Territory provisions.

The clause gives a court the power to hear a matter involving property although the claim exceeds the court's jurisdictional limit, provided both parties consent. The Magistrates Court jurisdiction is limited to claims where the monetary limit does not exceed \$20,000.⁵⁶ The District Court jurisdiction is limited to claims where the monetary limit does not exceed \$200,000.⁵⁷ There is further provision (clause 2.3(2)) for the court of its own motion to transfer proceedings even if both parties agree to the court hearing it.

The clause enables a Magistrates Court (rather than a District or Supreme Court) to adjust an interest in property valued at \$40,000 if both of the parties

⁵⁶ Section 4 Magistrates Courts Act 1921 (Qld).

⁵⁷ Section 66 District Courts Act 1967 (Qld).

to the application agree. This facilitates savings in costs, time, expense and professional fees. Further, the Magistrates Courts are more accessible throughout the State than the District and Supreme Courts.

The proposed legislation would also allow settlements of property disputes to be formalised by a consent order in the Magistrates Court. This function is already exercised by the Magistrates Court in disputes under the Family Law Act.

In exercising this function in family law matters, however, the following criticisms have been levelled at Magistrates⁵⁸ -

- * the Magistrates' lack of expertise to supervise the settlement of complex property settlements; and
- * the fact that Magistrates do not require full disclosure of material facts before making consent orders.⁵⁹

The same criticisms may apply if the Magistrates Court is given this jurisdiction under the Act.

The Commission believes that the increased accessibility to relief which will result from giving Magistrates jurisdiction under this legislation outweighs the alleged difficulties which will also follow. The Commission is interested in obtaining views on the proposed conferral of jurisdiction on the Magistrates Courts.

Q8 *Should the parties, by consent, be able to increase the jurisdictional limit of the Magistrates Court and District Court?*

2.4 Courts to act in aid of each other (s.13 NSW; s.300 Vic; s.9 NT)

All courts having jurisdiction under this Act must act in aid of and be auxiliary to each other in all matters under this part.

This clause mirrors the New South Wales, Victorian and Northern Territory legislation.

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⁵⁸ CCH Australian De Facto Relationships Law [7-630].

⁵⁹ The duty of disclosure and its importance is discussed later in the Discussion Paper in the commentary to clause 3.7.

Part III - Proceedings for property adjustments

Division 1 - Preliminary

3.1 Prerequisites for making of order - living within the State, contributions made (s.15 NSW; s.280 Vic; s.15 NT)

A court may make an order under this Part only if it is satisfied -

- (a) that one or both of the sharers lived in Queensland on the day on which the application was made; and*
- (b) that -*
 - (i) both sharers have lived together in Queensland for at least one third of the period of their relationship; or*
 - (ii) substantial contributions of the kind referred to in section 3.7(3) [or 3.7(4)] have been made in Queensland by the sharer making the application.*

This clause sets out the connection with Queensland that the applicant must show before an application can be made for property adjustments.⁶⁰ This clause is based on the equivalent New South Wales, Victorian and Northern Territory sections.

There is no definition of "substantial contributions" as used in clause 3.1(b)(ii). Whether a contribution is a substantial one is a question of degree and depends on the facts of the case.

It has been suggested to the Commission that this threshold requirement could be too restrictive. The following fact situation would not satisfy this clause and relief could therefore not be provided by the legislation.

Example A

A de facto couple lived in Tasmania for 5 years in a house owned by the de facto husband. There are 2 children of the relationship. The couple shift to Queensland so that the de facto husband can accept a promotion. The couple sell the house in Tasmania and buy a house in

⁶⁰ The words in brackets will be included in clause 3.1(b)(ii) if option 2 (as discussed in the commentary to clause 3.7 below) is chosen.

Queensland in the de facto husband's name. Three months after the couple arrive in Queensland, they separate.

Q9 *Should clause 3.1 be widened so that the legislation will apply if one of the parties is resident in Queensland and a substantial part of the couple's assets is situated in Queensland?*

3.2 Relevant facts and circumstances (s.16 NSW; s.283 Vic; s.17 NT)

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.

In an application to adjust property rights, this clause specifically allows the court to take into account matters which occurred outside Queensland and before the commencement of the Act. It mirrors the equivalent New South Wales, Victorian and Northern Territory provisions.

3.3 Prerequisites for making of order - length of relationship, care of child (s.17 NSW; s.281 Vic; s.16 NT)

- (1) *A court may only make an order under this Part if it is satisfied that the sharers have lived together under the one roof for a period of at least 2 years, except as provided by subsection (2).*
- (2) *A court may make an order if it is satisfied -*
 - (a) *that there is a child of the sharers; or*
 - (b) *that failure to make the order would result in serious injustice to the sharer who applied for the order and that sharer -*
 - (i) *has made substantial contributions of the kind referred to in section 3.7(3) [or 3.7(4)] for which the sharer would otherwise not be adequately compensated if the order were not made; or*
 - (ii) *has the care and control of a child of the other sharer.*

Before making an application to adjust property interests, the applicant (who must be a "sharer" as defined in clause 1.5) must also satisfy the requirements of clause 3.3. Under this clause, the applicant must prove one of the following 4 things -

- (i) the sharers have lived together under the one roof for at least 2 years;
- (ii) there is a child of the sharers;
- (iii) the sharer has made "substantial contributions" (of the kind set out in section 3.7(3) [or 3.7(4)]) and a "serious injustice" would result if an order were not made; or
- (iv) the sharer has the care and control of a child of the other sharer and a "serious injustice" would result if an order were not made.

These prerequisites are also based on the New South Wales, Victorian and Northern Territory legislation.

On a strict analysis of clause 3.3(2)(b)(i), it may be difficult for an applicant to satisfy the requirements. To be successful, the following 3 things must be proved by the applicant.

The applicant must show that "substantial contributions" have been made. As mentioned, this is a matter of degree and depends on the circumstances of each individual case.⁶¹

Secondly, the applicant must show that he or she would not otherwise be adequately compensated for the contribution made. In other words, the sharer must prove that the common law remedy is inadequate in the circumstances.⁶²

Finally, the applicant must prove that a serious injustice would occur if the order is not made. This presumably requires the applicant to assess what is the entitlement under the proposed legislation and compare it with the entitlement under common law. The applicant would satisfy this requirement only if the estimated entitlement under common law is substantially less than that under the legislation.

⁶¹ "Substantial contributions" were held to be made in Reilly v Gross (1986) DFC 95-035 where a woman sold her house and moved in with her male de facto partner. She spent \$25,000 on her partner's house and another \$5000 on a joint holiday and paying off her partner's debts. In that case, the couple had not been living together for 2 years. If "substantial contributions" could not be proved, the woman could not satisfy the jurisdictional requirements of the Act.

⁶² Since the decision in Baumgartner v Baumgartner (1987) 164 CLR 137, it may be more difficult to prove that the common law remedy is inadequate in the circumstances.

On a practical level, however, it is unlikely that the courts would take such a strict view of the clause. Provided that there has been a substantial contribution, in most cases it is likely that the jurisdiction will be invoked.⁶³

3.4 Prerequisites for making an order - compulsory conference (s.79(9) Cwth)

A court may only make an order under this Part if -

- (a) (i) *the parties to the proceedings have attended a conference in relation to the matters in dispute with an officer appointed by the court; and*
- (ii) *the parties have made a bona fide attempt to reach agreement on relevant matters in issue between them;*
- (b) *the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order although the parties to the proceedings have not attended a conference mentioned in paragraph (a); or*
- (c) *the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).*

One of the major criticisms of the existing law on property disputes in non-marital relationships is the cost of obtaining an order of the court. Even if the applicant can establish an equitable interest in property, for example through equitable principles of unconscionability, it is expensive to litigate to obtain an order which would give the applicant a beneficial entitlement to property.

When there is a property dispute between a married couple, section 79 of the Family Law Act allows the Family Court to alter property interests. Before an order can be made under that section, however, the parties are required to attend a compulsory conference (unless one of the exceptions in section 79(9) applies).

These conferences are referred to as "Order 24 conferences". In an Order 24 conference, the parties to the proceedings must meet in person, either with or without representation, with a Registrar or Deputy Registrar of the Family Court.

⁶³ In *Reilly v Gross* (1986) DFC 95-035 at 75,405 Powell J held that the plaintiff had satisfied section 17(2) of the NSW equivalent because "the plaintiff's contributions far outweigh those made by the defendant".

The parties who attend the conference must make a "bona fide endeavour to reach agreement on relevant matters in issue between them".⁶⁴

In 1989/1990, the Order 24 conferences in the Brisbane Registry of the Family Court had a 58.3% resolution rate.⁶⁵

Under Part II of our proposed legislation, proceedings can be brought in any court of competent jurisdiction. To facilitate an inexpensive and speedy resolution of property disputes in non-marital situations, it is recommended that there be some compulsory form of conciliation or mediation as a prerequisite to trial.

The proposed clause 3.4 is a combination of section 79(9) of the Family Law Act and Order 24 of the Family Court Rules.

The Commission appreciates that the Supreme, District and Magistrates Courts currently do not have officers suitably qualified to conduct such conferences. The proposals would require the appointment of people trained in mediation. The success of compulsory conferences largely depends on the quality of the mediation process.⁶⁶

The Commission understands that a practice direction on case management has been drafted by the Chief Justice of the Supreme Court of Queensland. At this stage, however, the Commission is unaware of the contents of that practice direction. If the effect of the practice direction is to make pre-trial conferences mandatory, it may achieve the objectives of the Commission in its proposed clause 3.4.

3.5 Time limit for making applications (s.18 NSW; s.282 Vic; s.14 NT)

(1) If sharers have stopped living together under the one roof, an application to a court for an order under this Part must be made within 2 years from the day on which they stopped living together.

⁶⁴ Order 24 Rule 1(3) Family Law Rules (Cwth).

⁶⁵ The Commission was given these statistics by the Registrar of the Family Court in Brisbane. Although the Order 24 conferences are not limited to property disputes, it is estimated that approximately 90% of the Order 24 conferences relate to property. The Commission was further advised that of 2,480 applications concerning property disputes filed in the Brisbane Registry in the 1990-1991 financial year, only 271 (10.93%) proceeded to trial. This means that many property disputes settle between the Order 24 conference and hearing.

⁶⁶ Concern has been expressed to the Commission on one aspect of the Order 24 conferences. Although there is a 58.3% resolution rate, "resolution" cannot necessarily be equated with "success". The Commission was advised of many clients who felt that they had been pressured into settling the matter at an Order 24 conference. In recommending or implementing compulsory conference procedures, these concerns should not be overlooked.

(2) *A court may grant leave to a sharer to apply for an order at any time after the end of the period referred to in subsection (1) if the court is satisfied that greater hardship would be caused to the sharer applying if that leave were not granted than would be caused to the other sharer if that leave were granted.*

As in the New South Wales, Victorian and Northern Territory legislation, the Commission recommends that the financial relationship between the sharers be finalised as soon as possible. For this reason, it is recommended that an application for an order be made within 2 years from the day on which the sharers stopped living together.⁶⁷

Clause 3.5(2) gives the court a discretion to make an application out of time if greater hardship would be caused to the applicant if leave were not granted than would be caused to the other sharer if leave were granted.⁶⁸

3.6 Duty of court to end financial relationships (s.19 NSW; s.284 Vic; s.35 NT)

So far as is practicable a court must make orders that will end the financial relationships between the sharers and avoid further proceedings between them.

Section 81 of the Family Law Act and sections 19, 284 and 35 of the New South Wales, Victorian and Northern Territory legislation respectively, all encapsulate the "clean break" principle. The legislation requires the courts to make orders that will finally determine the financial relationships between the parties and avoid further proceedings between them. The philosophy behind the clean break principle is that the parties are best able to recover from the former relationship by settling financial disputes and beginning new lives.

It is necessary for the clean break principle to be enshrined in the Family Law Act and the legislation in New South Wales and the Northern Territory because these Acts deal with maintenance rights as well as property rights. A

⁶⁷ Note the equivalent provision in section 44(3) of the Family Law Act 1975 (Cwth) which requires property and maintenance disputes to be commenced within 12 months of the date on which the decree nisi became absolute. This will be a period of at least two years from the date of separation.

⁶⁸ Compare section 44(4)(a) Family Law Act 1975 (Cwth) which allows the Court to grant an extension of time if satisfied that "hardship" would be caused to a party of the marriage or a child if leave were not granted. To be granted leave, the applicant will have to show that he or she would probably succeed if the substantive application were heard on its merits (*In the Marriage of Whitford* (1979) 4 FamLR 754 at 759). Secondly, the applicant must prove that "hardship" existed. "Hardship" has been interpreted as having its "usual, though not necessarily its most stringent connotations" (per Full Court of Family Court in *In the Marriage of Whitford* (1979) 4 FamLR 754 at 760). Whether hardship exists will depend on the facts of each case.

maintenance order, in broad terms, depends on the applicant's needs. If the applicant's needs vary after a maintenance order is made, that order can be varied to take into account the changed circumstances. The clean break principle enshrines the objective of finally settling property and maintenance matters between the parties so far as is possible.

Under the proposed legislation for Queensland, periodic maintenance cannot be awarded.⁶⁹ Nevertheless, the court has power under clause 3.14, for example, to order payment of a lump sum in one amount or by instalments. The Commission considers it necessary, therefore, to enshrine in the legislation the desirability to end financial relations between the parties.

⁶⁹ Note, however, that the needs of the applicant can be taken into account in special circumstances in adjusting the property interests (clause 3.8).

Division 2 - Adjustment of property interests

3.7 Application for property adjustment (s.20 NSW; s.285 Vic; s.18 NT)

- (1) *A sharer may make an application to a court for an order to adjust interests with respect to the [shared] property of the sharers or any of them.*
- (2) *The applicant sharer must join all other sharers in the application unless the court orders otherwise in the case of a sharer whose whereabouts the applicant sharer has not been able to establish after reasonable enquiry.*
- (3) *After hearing the applicant sharer and all other sharers appearing before it the court may make such order adjusting the interests of the sharers in the property as seems to it to be just and equitable having taken into consideration the following -*

OPTION 1

- (a) *the contribution, whether financial or not, made directly or indirectly by or on behalf of any sharer to the acquisition, conservation or improvement of any of the [shared] property the subject of the application or to the financial resources of any of the sharers;*
- (b) *the contributions, including contributions made in the capacity of homemaker made by any of the sharers to the welfare of any other sharer; or where the sharers are de facto partners, contributions including contributions made in the capacity of homemaker or parent, to the welfare of the family constituted by the partners and one or more of the following namely -*
 - (i) *a child of the partners;*
 - (ii) *a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.*
- (c) *nature and duration of the relationship;*
- (d) *whether in all the circumstances it would be unconscionable to deny the applicant a share in the property.*

OPTION 2

- (a) *the contribution, whether financial or not, made directly or indirectly by or on behalf of any sharer to the acquisition, conservation or improvement of any of the [shared] property the subject of the application or to the financial resources of any of the sharers;*
 - (b) *services provided by the applicant because of expectations induced in the applicant by another sharer as to the applicant's future entitlement to property;*
 - (c) *nature and duration of the relationship;*
 - (d) *whether in all the circumstances it would be unconscionable to deny the applicant a share in the property.*
- (4) *If the applicant in section 3.7(1) is a de facto partner, the court shall also take into account the contributions including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other partner or to the welfare of the family constituted by the partners and one or more of the following namely -*
- (a) *a child of the partners;*
 - (b) *a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.*

Clause 3.7 is central to Part III of the legislation. Under clause 3.7(1), a sharer may apply to the court for an order adjusting an interest in property.

A. Against which property can an application be made?

As discussed earlier in the commentary on the definition of "shared property" (in clause 1.5), the draft legislation outlines 2 proposals. Under option A, the application for property adjustment relates to "shared property". In other words, the property must be shared between the parties for the purpose of, or in the course of, their living together. Under this option, it is doubtful whether an application could be made for an order giving the applicant an interest in someone's superannuation entitlements or investment property.

Under option B, the word "shared" is not used before the word "property" in clause 3.7 and the definition of "shared property" will not appear in clause 1.5 of the legislation. This will allow a claim to be made against a person's

investment property or superannuation entitlements. Option B is therefore wider than option A.

B. Extent of the application

The application under clause 3.7(1) to adjust interests in property is based on the equivalent legislation in other jurisdictions.⁷⁰ Under these regimes, application can only be made against a person's property. If the respondent no longer owns property, the applicant will be unable to make an application under the legislation.

Consideration was given by the Commission to widening the scope of the application that can be made. The Commission considered inserting the following to become clauses 3.7(1) to (3) -

- " (1) *Where there is a dispute between sharers respecting [shared] property a sharer may apply to the court for an order under this Act.*
- (2) *(unchanged)*
- (3) *After hearing the applicant sharer and all other sharers appearing before it the court shall make such order as seems to it to be just and equitable to dispose of the application having taken into consideration the following -*
- (remainder of clause unchanged)"*

Under these clauses, the application would not have to be limited to property of the respondent sharer. For example, if the respondent had substantial amounts of money but no physical property, an application could be made against the funds. Even if the respondent did not have any property or money, the court would be able to order the payment of money to the applicant sharer.

The Commission is reluctant to widen clause 3.7 to allow applications to extend beyond adjusting interests in existing property. If the clause is widened in the manner suggested, issues of fault (for example, why there is no longer any property in existence) may become relevant. Furthermore, as a matter of policy, the legislation is designed to resolve disputes about property in existence on the basis of contributions made during the period of sharing. To implement the suggested alternatives would be to take the legislation beyond the original policy objectives.

⁷⁰ Section 20 De Facto Relationships Act 1984 (NSW); section 285 Property Law (Amendment) Act 1987 (Vic); section 18 De Facto Relationships Act 1991 (NT).

Q10 Should the applications for relief under Part III be limited to property of the respondent sharer? Should clause 3.7 be phrased more widely and extend to all financial resources of the respondent sharer?

C. Application to adjust debts

The focus of this legislation is to adjust interests in property which is shared; adjustment is on the basis of contributions made by the applicant sharer. In an application made under the equivalent New South Wales legislation for adjusting interests in property, the trend is for the court to -

- (a) identify and value the assets of the parties;
- (b) determine what contributions of the type contemplated by the New South Wales equivalent of clause 3.7(3) have been made and by which partner;
- (c) determine whether in all of the circumstances of the case the contributions of the applicant have already been sufficiently recognised and compensated for; and
- (d) determine what order is called for to sufficiently recognise and compensate the applicant.⁷¹

In assessing the value of the assets owned by each party, liabilities (including personal debts) will be taken into consideration by the court. In other words, it is the net value of the assets which is of interest to the court.

Difficulties arise, however, if, on the dissolution of a relationship, the parties own assets of little or no value but have incurred debts. The following fact situation illustrates the point.

Example B

A couple have been living in a de facto relationship in rented accommodation for 5 years. There is a child of the relationship and the de facto wife provides full-time care for the child. During that period, the parties purchase on hire purchase terms a second-hand car in the de facto wife's name. The de facto husband loses his job, the parties default in their hire purchase repayments and the finance company repossesses the car. The relationship breaks down. The de facto wife retains custody of the child.

⁷¹ Roy v Sturgeon (1986) 11 FamLR 271 and D v McA (1986) 11 FamLR 214.

Comment

There are no assets against which the de facto wife can seek a property adjustment. The proposed legislation does not provide for her to make an application to the court to seek a transfer of the debt into the name of the de facto husband.

Q11 *Should the legislation provide relief where the assets owned by the sharers are of little or no value, but there are liabilities incurred by the sharers?*

D. Matters for consideration by the court

Clause 3.7(3) and clause 3.7(4) (in option 2 discussed below) list the matters that the court should consider in deciding whether an adjustment of property interests should be made.

As mentioned earlier in the commentary, clause 3.7 contains two options - 1 and 2 respectively.

Paragraphs (a), (c) and (d) of clause 3.7 (3) are the same under both options.

Paragraph (b) of clause 3.7 (3) in option 1 deals with contributions made to the welfare of the other sharer and, if the sharers are de facto partners and there is a child of the relationship or accepted into the relationship, to the welfare of the family. The focus in paragraph (b) is on contributions made in the capacity of homemaker. Contributions to the welfare of the other sharer referred to in paragraph (b) in option 1 will be relevant regardless of the relationship of the sharers.

Option 2 is more limited. Contributions to the welfare of a sharer in the capacity of homemaker will only be relevant where the sharers are de facto partners (clause 3.7(4)). Paragraph (b) of option 2 will provide relief where services are provided in other types of relationship. To be entitled to relief under this category, however, the respondent sharer must have induced in the applicant an expectation of an interest in the property.

These two options will be discussed in more detail later.

As mentioned, the matters listed in clause 3.7(3) must be considered by the court in making its order. Paragraphs (a), (c) and (d) are the same for both options 1 and 2. The paragraphs will now be considered in turn.

1. Contribution to the acquisition, conservation or improvement of property (paragraph (a))

This paragraph is based on the equivalent New South Wales, Victorian and Northern Territory legislation. It deals with the contribution to the acquisition, conservation or improvement of [shared] property or the financial resources of the sharers. This contribution can be direct or indirect and either financial or non-financial.

(i) Direct financial contributions - acquisition, conservation and improvement

The meaning of these terms is straightforward. As an example of the "direct financial contributions to the acquisition", consider a dispute about the beneficial ownership of a house. If two friends contribute to the purchase of a house in the proportions of 60% and 40% but the house is registered in one name only, the court would take into consideration the direct financial contribution (60%:40%) of each friend.

Direct financial contribution to the conservation of a house would include outlays for ordinary costs of repairs to and maintenance of the house. This would include replacement of broken roof tiles and painting the exterior and interior of the house.

A direct financial contribution to the improvement of a house also speaks for itself. This would include, for example, the construction of a deck, adding an inground pool and building a garage.

(ii) Indirect financial contributions - acquisition, conservation and improvement

A classic example of indirect financial contribution is when parties pool their resources. The sharers may live off the income of one partner so that the other partner's income can be used to pay off the mortgage over the house bought in that person's name.

(iii) Non-financial contributions - acquisition, conservation and improvement

Non-financial contributions would cover the provision of some resource other than money. For example, 2 sharers may decide to add a deck to their house. One sharer may supply the financial resources. The other sharer may provide the labour and expertise to construct the deck. The latter contribution can be considered under the head of non-financial contribution when determining the beneficial entitlement to the house.

2. Nature and duration of the relationship (paragraph (c))

Unlike other legislation, the proposed Queensland legislation requires the court to consider the nature and duration of the relationship. This factor is essential under the Queensland proposals because of the wide range of personal relationships which will fall within the legislation. For example, it would be expected that a greater entitlement to an interest in property would arise in a 10 year de facto relationship where one party provided all of the homemaking contributions than in a 2 year tenancy situation where one tenant claimed an interest in the other tenant's stereo because the former did more than half the lawn mowing during that 2 years.

Although the nature and duration of the relationship will undoubtedly be relevant in assessing the contributions made under paragraphs (a) and (b), the Commission considers it appropriate to emphasise that these features are relevant in assessing the beneficial entitlement, if any, to property.

Concern has been expressed to the Commission that this clause will mean that evidence of fault will have to be brought before the court. For example, the applicant will be inclined to bring evidence that he or she had to perform all of the homemaking duties because of the laziness or incompetence of the respondent sharer.

In drafting these proposals, the "nature" of the relationship was intended to be a reference to the capacity in which the parties were sharing. In other words, it was intended that the court focus on whether they were de facto partners, tenants, sisters or merely friends who jointly own the real property. The Commission is interested in obtaining comments on the breadth of paragraph (c) as it is currently drafted.

Q12 Is there a need to qualify what is meant by the words "nature ... of the relationship" in paragraph (c) of clause 3.7 ?

3. Conduct making it unconscionable to deny an interest (paragraph (d))

This clause effectively is a catch-all. It does not have an equivalent in the legislation of the other jurisdictions. It is intended to ensure that a person is not deprived of a beneficial interest in property if it would be unconscionable for that to happen. "Unconscionability" is a term being used increasingly by the High Court decisions on equitable interests.⁷²

⁷² See, for example, Baumgartner v Baumgartner (1987) 164 CLR 137.

The disadvantage of inserting this kind of paragraph in which the concept of "unconscionability" is relevant is that the court is directed back to common law principles. This may mean that all of the evidence which currently is relevant at common law to prove the existence of an equitable interest will also be relevant to an application under Part III of this Bill.

The Commission invites submissions on whether a catch-all provision such as paragraph (d) should appear in the legislation. Will this paragraph be of use to a court so that it can consider matters which do not fall squarely within paragraphs (a) to (c)? Alternatively, does it introduce more problems than it solves by resorting to the more flexible equitable principles?

Q13 Should paragraph (d) which focuses on unconscionability be inserted as one of the matters to be considered by the court in an application under Part III?

4. Contributions to the welfare (paragraph (b) - option 1); services provided (paragraph (b) - option 2)

(i) OPTION 1 - contributions to welfare

Paragraph (b) is based on the equivalent paragraphs in the New South Wales, Victorian and Northern Territory provisions.⁷³ It differs slightly from the New South Wales provision which is as follows -

"(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely:-

- (i) a child of the partners;*
- (ii) a child accepted by the partners of either of them into the household of the partners, whether or not the child is a child of either of the partners."*

In the Commission's proposed paragraph (b), there is no reference to the contribution to the welfare of another made in the capacity of parent. This kind of contribution will, of course, only be relevant where there is a child of the partners or a child accepted into their household. Whether there should be a

⁷³ Section 20 De Facto Relationships Act 1984 (NSW); section 285 Property Law (Amendment) Act 1987 (Vic); section 18 De Facto Relationships Act 1991 (NT).

specific reference in paragraph (b) to contributions made in the capacity of a parent is discussed below.

There are two distinct considerations in the proposed paragraph (b). The first consideration is the contributions made to the welfare of the other sharer. The second consideration is the contribution made to the welfare of the family. Under the Commission's proposals, this second consideration will only be relevant where the parties are de facto partners and there is a child of the partners or a child accepted by the partners into the household of the partners.

The contributions are expressed in clause 3.7(3)(b) to include contributions made in the capacity of homemaker and parent.

(1) Contribution as homemaker

The contribution as "homemaker" encompasses the responsibility for domestic arrangements, including maintenance of linen, cleaning, washing and cooking. This contribution would also cover gardening, maintenance of, and minor repairs to, the house.⁷⁴

There are cases where the courts have credited the contributing party with a sum equal to the cost of a housekeeper.⁷⁵

A policy question which must be addressed is whether the contribution as homemaker should be a relevant consideration in all relationships involving sharers (as in option 1). Alternatively, should this kind of contribution only be relevant in de facto relationships (as in option 2 - clause 3.7(4))?

If the former option is chosen, there is potential for the proposed legislation to be very intrusive. It could interfere in relationships (such as 2 tenants sharing a house) where neither sharer would expect nor want relief. If the more restrictive option is chosen, however, serious injustice could occur.

Perhaps examples may illustrate the difficulties that can arise.

⁷⁴ CCH Australian De facto Relationships Law [8-197].

⁷⁵ See, for example, D v McA (1986) 11 FamLR 214 at 229-230 and Wilcock v Sain (1986) 11 FamLR 302 at 311-312. Compare with comments of Hodgson J. in Dwyer v Kaljo (1987) 11 FamLR 785 at 794 and McClelland J. in Devey v Lee (1990) 13 FamLR 688 at 689.

Example C

X and Y have been in a de facto relationship for 10 years. For the last 5 years, X has brought in an income and Y has stayed at home and assumed the homemaking role.

Example D

C and D are friends and are living in the house owned by Friend C. Friend D is unable to obtain employment. Because he has much time on his hands, Friend D makes a substantial contribution as homemaker. Friend D does all of the washing, cooking and ironing for both himself and Friend C, and also takes care of the garden. This is not done at the request of Friend C.

Comment

Should the de facto partner, Y, in the first example and Friend D in the second example have the same rights under legislation? Alternatively, should the nature of the relationship have an influence over the entitlements of a sharer to property because of homemaking contributions?

The de facto partner, Y, would be entitled to the same contribution under paragraph (b) in option 1 as the unemployed friend, D, in the second example.⁷⁶

In contrast, under option 2 in the legislation, the contribution to the welfare of a sharer in the capacity of homemaker is only relevant in a de facto relationship.⁷⁷ The unemployed friend would not be entitled to a contribution on this ground.

As mentioned earlier, however, the Commission is concerned that if the more restricted option 2 is chosen, hardship could result in some instances. Take the following as an example.

Example E

S is a 40 year old unmarried woman. To provide companionship and assistance to her ageing mother, she moved in with her 10 years ago. S has performed all the domestic duties for her mother during that time for no financial reward.

⁷⁶ This is subject, however, to the court taking into account the nature and duration of the relationship under paragraph(c).

⁷⁷ Clause 3.7(4).

Comment

It seems harsh to deny S an entitlement to claim against the property of the mother in these circumstances. Under option 2, however, S cannot claim a contribution as homemaker (as she is not living in a de facto relationship as required by clause 3.7(4)). It is also doubtful whether paragraph (b) in option 2 will apply. Frequently in these kinds of cases, the services are provided without any expectation of a future entitlement to property.

Perhaps a combination of paragraphs (b), (c) and (d) may give a court sufficient opportunity to consider this contribution under option 2.

The Commission invites comments on whether the legislative regime proposed in option 1 is too intrusive. Should legislative intervention go beyond assessing the contribution to a person's welfare where those sharers are in a de facto relationship? Is it appropriate to compensate people for contributions of the kind made by S in example E above? The Commission welcomes submissions on this issue.

Q14 *To what extent should the legislation compensate people for contributions to a person's welfare made in the capacity of homemaker?*

(2) Contribution as parent

In the New South Wales legislation,⁷⁸ the court is expressly required to consider contributions made in a person's capacity as parent. This focuses on the contribution made in raising a child of the parties or a child accepted into their relationship.⁷⁹

Under the New South Wales provision, contribution in the capacity of parent is relevant only where the de factos have a child or there is a child accepted by the partners into their household.

Raising of the child by its parents is traditionally considered by the courts to be the parenting role. However, a wider interpretation of parenting is illustrated by the following example.

⁷⁸ Section 20(1)(b) De Facto Relationships Act 1984 (NSW).

⁷⁹ While this kind of contribution is easy to identify, the valuation of this contribution creates difficulties: Roy v Sturgeon (1986) 11 FamLR 271 at 288 and Dwyer v Kallio (1987) 11 FamLR 785 at 794.

Example F

A grandfather has lived with his daughter and son-in-law for 5 years. The daughter and son-in-law have 2 small children. As the parents are both in full-time employment, the grandfather feeds the children in the morning, takes them to pre-school and school, picks them up at the end of the day, feeds them and gets them ready for bed in the evening. He has assisted in this way for 3 years.

Comment

Should the grandfather be entitled to claim for a contribution to the welfare of the daughter and son-in-law? He has clearly contributed to the welfare of his grandchildren. Could the grandfather's contribution be classified as one of parenting?

As in example E above where the daughter cared for her mother for many years, it would seem unfair to say that the grandfather has not made a contribution to the welfare of the other sharers.

The Commission seeks comment on whether people making contributions such as the grandfather in example F should be entitled to relief under the proposed legislation.

Q15 *Should sharers other than parents be entitled to compensation for contributions made in the capacity of raising (or parenting) a child?*

(ii) OPTION 2 - provision of services

Option 2 was introduced as an alternative to the broad considerations that can be taken into account in paragraph (b) of option 1.

As discussed earlier, under option 2, contributions to a sharer's welfare will only be relevant if the sharers live in a de facto relationship⁸⁰. In any other kind of relationship, where contributions have been made in the capacity of homemaker, the applicant will have to rely on paragraph (b).

Where contributions have been made in the capacity of homemaker, under paragraph (b), the court is entitled to consider the services provided by a sharer because of expectations induced as to that sharer's future entitlement to property.

⁸⁰ Clause 3.7(4).

As paragraph (b) in this option is currently drafted, services provided by a sharer cannot be considered by a court unless two requirements are satisfied.

First, the applicant must have an expectation of a future entitlement to the property in exchange for providing the services. Secondly, this expectation must be induced by the sharer receiving the services.

Are these requirements too harsh? Should the applicant be entitled to an interest in property although the services were performed with no such expectation in mind? It seems unfair to deny an applicant an interest when the services were performed for altruistic reasons, yet allow another applicant's claim because he or she extracted a promise that the services would only be performed if promised an interest in the property.

The Commission would be interested in obtaining community input on these matters.

Q16 *Should paragraph (b) be limited by the requirement of an expectation of a future entitlement to property?*

A further concern raised by paragraph (b) is that it reintroduces subjective elements which are currently considered by courts in imposing constructive trusts. The following questions may still be relevant. Did the applicant intend to obtain an interest in the property by performing the services? Were those expectations induced by some conduct of the respondent sharer? What evidence can be given of the inducement?

To avoid the subjective component and the corresponding bulk of evidentiary material, it would be preferable to focus only on the services provided by the applicant. However, this option of requiring an expectation of entitlement to property was drafted to limit the contributions which would entitle a person to an interest in the property.

The Commission invites suggestions on how to limit paragraph (b) in option 2 without reintroducing the subjective elements of expectation.

Q17 *Will paragraph (b) reintroduce unacceptable evidentiary problems concerning the applicant's expectations?*

Q18 *If yes, how can paragraph (b) be phrased to avoid these evidentiary difficulties?*

E. Valuing the contributions listed

Clause 3.7(3) (and clause 3.7(4) in option 2) list the matters that the court can consider in hearing an application under Part III. However, as those clauses are currently drafted, no assistance is provided concerning the value to be given to the different categories of contributions.

Take as an example paragraph (b) in option 2.

No guide is given in paragraph (b) about how to value the services provided by the applicant. Should the services be valued according to the cost of obtaining them on a commercial basis? Should they be valued based on the detriment suffered by the applicant in providing the services?

The following examples illustrate the point.

Example G

A mother in her 70's is having difficulties taking care of herself. At her mother's request, her unmarried daughter who is a solicitor in a small suburban legal practice leaves her job and moves in with her mother to care for her. The daughter looks after the mother for 10 years prior to the mother's death.

Example H

A mother in her 70's is having difficulties taking care of herself. Her unmarried son who is currently unemployed offers to move in with the mother to care for her. After two years, the son and mother argue and the son leaves the home.

Comment

In examples G and H, the services provided by the applicants may be the same. Should they therefore be entitled to the same interest in, for example, the house?

Alternatively, should the applicant's entitlement depend on the detriment suffered to provide the service? If this is the approach, clearly the daughter in example G who gave up her legal career and prospects of partnership in the firm would be entitled to a larger percentage of the home than the unemployed son in example H.

The tentative view of the Commission is that the focus of the court in assessing an applicant's entitlement should be on the contributions made. In paragraph (b), what is relevant is the nature of the service provided. The logical conclusion is that the value of the service will be unaffected by the detriment suffered by the applicant in supplying that service.

The Commission seeks submissions on whether the legislation should specifically detail how this calculation of the value of the service is to be made.

Similar concerns arise when looking at the contributions made to the welfare of another sharer in the capacity of homemaker or parent. How should the court assess this contribution?

As the New South Wales, Victorian and Northern Territory legislation are currently drafted, no guide is given to the courts in this regard. The matter is left to the discretion of the courts.

All legislation should strive to make the law certain. There has been considerable litigation since the passing of the New South Wales legislation. However, there have been instances of marked variations in the approach taken by judges in valuing the contributions made by the parties.⁸¹ The value awarded to the homemaking contribution may depend on the particular Judge or Magistrate hearing the matter.

Q19 To introduce certainty into the proposed legislation, should guidelines be inserted in the legislation to calculate the value of contributions made?

Q20 If so, what should those guidelines be?

Of particular concern to the Commission is the value to be attributed to the contribution of "homemaker" and "parent" in clause 3.7. As mentioned earlier in the commentary to clause 3.7, in some of the New South Wales decisions assessing the "homemaking" contribution, the courts have credited the applicant with the commercial cost of obtaining a housekeeper.⁸²

The Commission is interested in obtaining public comment on what is a fair property adjustment in the following example.

Example I

A man and woman have been living in a de facto relationship for five years. There are two children of the relationship. The woman is the full-time carer of the children. At the beginning of their relationship, the man buys an investment property and meets the mortgage repayments

⁸¹ See, for example, D v McA (1986) 11 FamLR 214 at 229-230 and Wilcock v Sain (1986) 11 FamLR 302 at 311-312. Compare with comments of Hodgson J. in Dwyer v Kallio (1987) 11 FamLR 785 at 794 and McClelland J. in Davey v Lee (1990) 13 FamLR 688 at 689.

⁸² D v McA (1986) 11 FamLR 214 and Wilcock v Sain (1986) 11 FamLR 302.

throughout the term of the relationship. The property substantially increases in value during the five years.

Comment

What monetary contribution should the woman in the above example be credited with? Should it be limited to the commercial value of a housekeeper? Should she be entitled to share in the increase in the value of the investment property?

Q21 *What is the value which should be attributed to the contributions made in the capacity of homemaker and parent?*

F. Duty of disclosure

The final issue which needs to be raised here is the duty of each party to disclose assets. Under the current proposals, there is no requirement that the parties make full disclosure of their assets in an application for an order adjusting property interests under Part III.⁸³

By comparison, an application to alter property interests under the Family Law Act must be accompanied by a statement of financial circumstances.⁸⁴ It is considered fundamental to the operation of the Family Law Act that in financial proceedings between spouses, each party make a full and frank disclosure of all material facts.⁸⁵

One exception to this requirement, however, relates to consent orders. If the parties to the dispute consent to orders being made, there is no requirement to file a statement of financial circumstances.⁸⁶ Moreover, in these cases, the Court is not required to review the proposed order to ensure that the terms are proper and that the order is just and equitable.⁸⁷

⁸³ Clause 3.17(a), however, may be relevant. If a court is satisfied that there has been a miscarriage of justice because of the giving of false evidence or the suppression of evidence, that clause allows the court to set aside an order made under Part III.

⁸⁴ Order 17 rules 2 and 3 Family Law Rules (Cwth).

⁸⁵ Per Smithers J. in In the Marriage of Briese (1985) 10 FamLR 642, approved by the Full Court of the Family Court in Oriolo and Oriolo (1985) 10 FamLR 665 at 667.

⁸⁶ Order 17 rule 4 Family Law Rules (Cwth).

⁸⁷ Smith and Smith (1984) FLC 91-512

Should full disclosure be required in a contested hearing under Part III?
Should full disclosure be required where a court is requested to make a consent order?

The advantage of full disclosure is that it should lead to fairer orders being made as no assets of the sharers can be concealed. This will be the case both in contested hearings and with consent orders. In the latter case, the Magistrate or Judge will be in a better position to ensure that the order is fair to both parties if all of the assets of the parties are disclosed.

If there is such a requirement, however, additional time and expense will attach to the litigation process. Will the gains justify the costs? The Commission invites submissions on whether legislation should impose a duty of full disclosure in an application under Part III of the legislation.

Q22 Should there be a duty on parties to disclose their assets in an application to adjust property interests under Part III?

3.8 Application for property adjustment - additional considerations for de facto partners (s.27 NSW; s.25 NT)

(1) In making an order under section 3.7(1), the court may also consider the matters in clause 3.8(2) if the applicant is a de facto partner and the court is satisfied that -

(a) the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the de facto partners or a child of the respondent being a child who is, on the day on which the application is made -

(i) under the age of 12 years; or

(ii) in the case of a physically or mentally disabled child under the age of 16 years; or

- (b) *the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and -*
- (i) *an order under section 3.7(1) would increase the applicant's earning capacity by enabling the applicant to undertake a course or program of training or education; and*
 - (ii) *it is, having regard to all the circumstances of the case, reasonable to make the order.*
- (2) *If the court is satisfied of the matters in section 3.8(1), in making an order under clause 3.7(1) the court shall also take into consideration the following -*
- (a) *the income, property and financial resources of each de facto partner and the physical and mental capacity of each partner for appropriate gainful employment;*
 - (b) *the financial needs and obligations of each de facto partner;*
 - (c) *the responsibilities of either de facto partner to support any other person;*
 - (d) *any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.*
- (3) *The matters listed in section 3.8(2) must only be considered for the period until-*
- (a) *the child in section 3.8(1)(i) reaches 12 years;*
 - (b) *the child in section 3.8(1)(ii) reaches 16 years; or*
 - (c) *the shorter of the following periods -*
 - (i) *3 years from the making of the order under section 3.7(1); or*
 - (ii) *4 years from the day the de factos ceased, or last ceased, living together,**whichever period is longest.*
- (4) *In making an order under section 3.7, the court shall disregard any entitlement of a child, or a partner applying for the order, to a pension, allowance or benefit.*

A. Should the legislation provide for maintenance orders?

In the New South Wales⁸⁸ and the Northern Territory⁸⁹ legislation, maintenance may be awarded to a de facto partner. Maintenance may be awarded either in the form of periodic maintenance or as a lump sum.⁹⁰

As the proposed Queensland legislation deals with beneficial entitlements to property and not with maintenance questions, the Commission's tentative view is that it would be inappropriate to provide for periodic maintenance to be awarded against a de facto partner (or indeed any other sharer).

The contrary view has also been put to the Commission. It has been suggested that legislation of this kind should provide for maintenance orders to be made.⁹¹ It is not uncommon for people who have been in de facto relationships to require some form of maintenance. This is particularly the case where there are children of the relationship. Frequently such people have very little property which could be the subject of an application under Part III of the legislation. Nevertheless, the other partner may be in stable employment and in a position to make periodic maintenance payments. For these reasons, it was suggested that any proposed legislation should facilitate the making of periodic or lump sum maintenance orders.

Q23 *Should legislation of the kind proposed by the Commission provide for the making of periodic or lump sum maintenance orders?*

B. Prerequisites for additional relief

Although the proposed legislation does not specifically empower the court to make maintenance orders, under clause 3.8, matters relevant to making maintenance orders may be considered by the court in making a property order under clause 3.7.⁹² At this stage, it should be emphasised that only

⁸⁸ Sections 26-37 De Facto Relationships Act 1984 (NSW).

⁸⁹ Sections 24-34 De Facto Relationships Act 1991 (NT).

⁹⁰ Although this is not specifically stated in the legislation, it is implied in the introductory words of section 27(1) De Facto Relationships Act 1984 (NSW). (See also section 25 De Facto Relationships Act 1991 (NT)).

⁹¹ It has also been suggested to the Commission that if the legislation provides for maintenance orders to be made, there should be introduced a regime for the enforcement of such orders.

⁹² See also section 79(4)(e) Family Law Act 1975 (Cwth) which requires the Family Court in determining a property dispute to consider factors which are relevant to a court in deciding whether maintenance should be ordered.

sharers living in a de facto relationship may obtain additional relief under this clause.

Clause 3.8(1) sets out the circumstances which must exist before matters relevant to maintenance can be considered. In short, clause 3.8 provides that unless the de facto partner is unable to support himself or herself adequately because he or she is responsible for the care and control of a child of the partners or because his or her earning capacity has been adversely affected by the de facto relationship, that de facto partner will be unable to claim an additional beneficial entitlement to property as set out in clause 3.8(1).

1. Inability to adequately support oneself

Additional relief will only be available under clause 3.8 if the person is "unable to support himself or herself adequately" for the reasons set out in clause 3.8.

The Commission is interested in obtaining input on whether the words "unable to support himself or herself adequately" provides the appropriate test for relief. Take as an example a de facto couple who lived together for 20 years and had a high standard of living. There are many assets in the de facto husband's name. On the breakdown of the relationship, the woman is able to "adequately" support herself. However, she is certainly unable to support herself in the same fashion as she would have before the separation. As clause 3.8 is currently drafted, she would not be entitled to additional relief.

Q24 *Is the requirement of inability to support oneself "adequately" too harsh for relief under clause 3.8?*

2. Relevant time period to be considered

It should be noted that the additional property entitlements of a de facto spouse under clause 3.8 will be very limited. The relevant time period which may be considered to assess the additional relief which may be given is set out in clause 3.8(3). This approach accords with the general trend under the Family Law Act away from awards for the lifelong maintenance of a spouse.

The relevant time period in clauses 3.8(3)(a) and (b) requires explanation. Under the proposed legislation, if the person is unable to adequately support herself or himself because she or he has the care and control of a child, the court is only able to consider compensating the applicant for the time until the child reaches 12 or, if the child is disabled, 16.

These are the ages in the New South Wales and Northern Territory legislation. By contrast, in an application for spousal maintenance under the Family Law

Act, the Court can take into account whether a person has the care or control of a child less than 18.⁹³

The New South Wales legislation in this regard reflects the recommendations of the New South Wales Law Reform Commission. The New South Wales Commission explains its choice of ages as follows -

"This age was regarded as a reasonable upper limit, because it is the age at which a child usually enters secondary school. At that time the impact of child-care responsibilities on the custodial parent's opportunities for paid employment should be significantly reduced, although we acknowledge that the impact will not be eliminated altogether. In times of economic hardship a parent who has been out of the workforce for a period may not find it easy to re-enter, even though the burden of child care has been eased. In this sense there may continue to be a need for support indirectly attributable to the relationship which endures beyond the child's entry into secondary education. However, we think that a balance must be struck between public and private responsibility for the maintenance of an adult. We have argued that the private responsibility of a person to maintain a former de facto partner should be more limited than that of a married person and that the criteria for maintenance should be strictly based on needs directly attributable to the relationship. It seems to us reasonable to expect the community to accept responsibility for the support of a person whose inability to find employment is no longer directly attributable to day-to-day child care responsibility arising out of a de facto relationship."⁹⁴

Concern has been expressed to the Commission that the ages proposed are too low. Even though child care responsibilities may lessen when the child reaches 12, it has been argued that because the partner has been out of the workforce for a considerable time, it could be difficult to find employment. If the former de facto is financially able to pay spousal maintenance, it is appropriate to require such payment to be made beyond the period suggested in the legislation.

It has also been suggested that where spousal maintenance is awarded on the grounds of having the care of a child, the relevant period to consider is the time in which the child is a dependant of that carer.

⁹³ Section 75(1)(c).

⁹⁴ Pages 163-164 Report 36 on De Facto Relationships, New South Wales Law Reform Commission, 1983.

Q25 What upper age limit of a child is appropriate for a court's determination under Part III?

3. Variation of order

The legislation will contain no provision for the variation of property orders based on clause 3.8 considerations even if there has been a change of circumstances (except as provided for in clause 3.16).

3.9 Adjournment of application - likelihood of significant change in circumstances (s.21 NSW; s.286 Vic; s.19 NT)

- (1) *A court may adjourn an application by a sharer for an order to adjust interests with respect to the property of one or more of the sharers, if the court is of the opinion -*
 - (a) *that there is likely to be significant change in the financial circumstances of one or more of the sharers and that it is reasonable to adjourn the proceedings having regard to the time when that change is likely to take place; and*
 - (b) *that an order that the court could make with respect to the property if that significant change in financial circumstances occurs is more likely to do justice between the sharers than an order that the court could make immediately.*
- (2) *The court may adjourn the application -*
 - (a) *at the request of either sharer, and*
 - (b) *until any time, before the end of a period specified by the court, that the sharer requesting the adjournment applies for the application to be determined.*
- (3) *Before a court adjourns an application it may make any order that it considers appropriate with respect to the property.*

- (4) *In forming an opinion as to whether there is likely to be significant change in the financial circumstances of one or more of the sharers a court may have regard to any change in the financial circumstances of a sharer that may occur because of a financial resource of one or more of sharers being vested in or used for the purposes of one or more of sharers.*
- (5) *Nothing in this section -*
- (a) *limits the power of the court to grant an adjournment in relation to any proceedings before it; or*
 - (b) *requires the court to adjourn any application in any particular circumstances; or*
 - (c) *limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of one or both of the sharers.*

This clause is based on equivalent sections in the New South Wales, Victorian and Northern Territory legislation.⁹⁵

It facilitates the adjournment of an application for property adjustment if there is likely to be a significant change in the future in the financial circumstances of one or both of the sharers.⁹⁶ The application can be adjourned until the time the significant change occurs. Even if there is likely to be such a change in circumstances, clause 3.9(1)(b) provides that the adjournment will not be ordered unless giving an order later is more likely to do justice between the sharers than giving the order immediately.⁹⁷

⁹⁵ Compare also section 79(5) of the Family Law Act 1975 (Cwth).

⁹⁶ A significant change in financial circumstances could be the result of a superannuation payout.

⁹⁷ As an example, see *In the Marriage of O'Shea* (1987) 12 FamLR 537 on the equivalent section of the Family Law Act 1975 (Cwth). In that case, an application to adjourn a property settlement was brought in May 1987. The application was brought so the property settlement could be delayed until the husband received his superannuation payout. The value of the assets of the parties at the date of the application (besides the superannuation entitlement) was only \$12,000. It was possible that the adjournment would be for as long as 21 years, until the husband reached 60. At that time his superannuation entitlement would be in excess of \$227,000. The Court granted the adjournment although it was possibly for a long period. Because of the amount of the husband's prospective entitlement as compared with the extremely small pool of assets currently available, the injustice that the wife would suffer unless the adjournment was granted significantly outweighed the prejudice to the husband of an adjournment.

3.10 Adjournment of application - proceedings in Family Court of Australia
(s.22 NSW; s.287 Vic; s.20 NT)

- (1) *If proceedings in relation to the property of one or more of the sharers are commenced in the Family Court of Australia at any time before a court has made a final order to adjust interests with respect to the property of one or more of the sharers the court may adjourn its hearing.*
- (2) *If the hearing of the application has been adjourned, the applicant for the order may apply to the court for the hearing to proceed if the proceedings in the Family Court are delayed.*
- (3) *Nothing in this section limits the power of the court to grant or refuse an adjournment in relation to any proceedings before it.*

As with the previous section, this provision appears in the New South Wales, Victorian and Northern Territory legislation. It simply gives the court hearing an application for property adjustment the discretion to adjourn proceedings if there is a dispute about property of one or more of the parties commenced in the Family Court.

3.11 Deferment of order *(s.23 NSW; s.288 Vic; s.21 NT)*

If a court is of the opinion that a sharer is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order made under section 3.7 the court may defer the operation of the order until the date of the occurrence of the event specified in the order.

This section is extracted from the New South Wales, Victorian and Northern Territory legislation. It allows the court to defer the operation of an order adjusting property entitlements if the court is satisfied that a sharer will become entitled to property within a short period. An order to defer would then enable this property to be applied later to satisfy the order made.

3.12 Effect of death of party on application (s.24 NSW; s.289 Vic; s.22 NT)

- (1) *If either party to the application dies before an application under section 3.7 is determined, the application may be continued by or against, the legal personal representative of the deceased party.*
- (2) *A court may make an order if it is of the opinion -*
 - (a) *that it would have adjusted interests in respect of property if the deceased party had not died; and*
 - (b) *that, notwithstanding the death of the deceased party, it is still appropriate to adjust those interests.*
- (3) *The order may be enforced on behalf of, or against the estate of the deceased party.*

This section has been extracted from the New South Wales and Victorian legislation and is similar to the equivalent section in the Northern Territory Act. Provided an application has commenced for an adjustment of property rights, the application may be continued notwithstanding the death of either of the parties.

3.13 Effect of death of party on order (s.25 NSW; s.290 Vic; s.23 NT)

If a party to an application under section 3.7 dies after an order is made in favour of or against that party, the order may be enforced by or against the estate of the deceased party.

The proposed Queensland provision differs slightly from the New South Wales, Victorian and Northern Territory provisions. In the other jurisdictions, the sections simply provide that an order made against a party may be enforced against that party's estate upon death. These sections are silent about what happens when a party in whose favour an order has been made dies.

Clause 3.13 specifically allows the estate of the deceased to enforce the order.

Division 3 - General**3.14 Powers of the court (s.38 NSW; s.291 Vic; s.36 NT)**

- (1) *A court, in exercising its powers under Division 2, may do any one or more of the following -*
- (a) *order the transfer of property;*
 - (b) *order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;*
 - (c) *order that any necessary deed or instrument be executed and that documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;*
 - (d) *order payment of a lump sum, whether in one amount or by instalments;*
 - (e) *order that payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;*
 - (f) *appoint or remove trustees;*
 - (g) *make an order or grant an injunction -*
 - (i) *for the protection of or otherwise relating to the property of one or more of the parties to an application; or*
 - (ii) *to aid enforcement of any other order made in respect of an application;**or both;*
 - (h) *impose terms and conditions;*
 - (i) *make an order by consent;*
 - (j) *make any other order or grant any other injunction to do justice.*

- (2) *A court may, in relation to an application under Division 2 -*
- (a) *make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and*
 - (b) *make any order or grant any remedy or relief under Division 2 in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.*
- (3) *This section does not take away any other power of the court under this or any other Act or any other law.*

This clause has been extracted from the New South Wales and Victorian legislation. It is also very similar to section 36 in the Northern Territory Act.

Clause 3.14 gives the court very wide powers in a dispute about a sharer's entitlement to property. This means that the courts can be very flexible in the kind of relief which can be offered under the Act.

For example, in the case of Parker v McNair⁹⁸ the male partner was awarded a sum of money which was secured by a charge over the home in which the couple lived. The female de facto partner was allowed to occupy the home. It was a condition of the charge that it not be enforceable until the youngest child of the parties reached 18 years or the property was sold by the female partner.

Clause 3.14 does not specifically empower the court to grant an injunction allowing a party to have the sole use or occupancy of the home in which the sharers are living. There is specific provision for these kinds of injunctions to be made under the Family Law Act.⁹⁹ This kind of relief is most commonly given by the Family Court as an interim measure until a final property order is made. It is of particular importance where there has been a breakdown of a relationship and one party is responsible for the care of a child of the relationship.

⁹⁸ (1990) DFC 95-087.

⁹⁹ Section 114(1)(f).

The Commission invites comment on whether Queensland legislation should specifically make provision for these kinds of orders.¹⁰⁰

Q26 Should the court have power to grant injunctions for sole use and occupancy of a home under this legislation?

3.15 Execution of instruments by order of court (s.39 NSW; s.293 Vic; s.37 NT)

(1) *If -*

- (a) *a person has refused or neglected to comply with an order directing the person to execute a deed or instrument; or*
- (b) *for any other reason, a court thinks it necessary to exercise the powers conferred on it under this subsection -*

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

- (2) *The execution of the deed or instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.*
- (3) *A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.*

This clause has been extracted from the equivalent New South Wales, Victorian and Northern Territory legislation.

This clause is necessary where a person refuses or neglects to execute a deed or instrument as ordered by the court. Clause 3.15 allows the court to appoint someone else to execute the deed or instrument in these circumstances.

¹⁰⁰ Arguably there is power under clause 3.14(1)(g) of the proposed legislation for this kind of relief to be granted by the court. It could also be argued, however, that a court may be reluctant to grant such an injunction unless given express statutory power to do so.

Under the current proposed legislation, if a party fails to execute an instrument as required by a court order, clause 3.15 allows the court to appoint someone else to execute the instrument. It has been suggested to the Commission that the court should have the power to make these default appointments at the time it makes its original order for the execution of an instrument. This would avoid the need to return to the court for a further order.

Q27 *Should the legislation allow the court to make default appointments when ordering a person to execute an instrument?*

3.16 Orders and injunctions in the absence of a party (s.40 NSW; s.293 Vic; s.38 NT)

- (1) *In the case of urgency, a court in the absence of a party may make an order or grant an injunction for either or both of the purposes specified in section 3.14(1)(g).*
- (2) *An application under this section may be made orally or in writing or in any form the court considers appropriate.*
- (3) *If an application under this section is not made in writing, the court must not make an order or grant an injunction unless it considers that it is necessary to do so because of the extreme urgency of the case.*
- (4) *The court may give any directions with respect to the filing, serving and further hearing of a written application.*
- (5) *An order or injunction must be expressed to operate or apply only until a specified time or the further order of the court.*
- (6) *The court may give directions with respect to -*
 - (a) *the service of the order of injunction and any other documents it thinks fit; and*
 - (b) *the hearing of an application for a further order.*

This clause is based on the New South Wales, Victorian and Northern Territory legislation.

It empowers the court to make an order or grant an injunction for the reasons stated in section 3.14(1)(g) even in the absence of the other party. Any order or injunction granted under clause 3.16 will only operate up until a specified time or until a further order of the court is made.

3.17 Variation and setting aside of orders (s.41 NSW; s.294 Vic; s.39 NT)

If, on the application of a person in respect of whom an order under section 3.7 has been made, a court is satisfied that -

- (a) there has been a miscarriage of justice by the reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;*
- (b) in the 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*
- (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order -*

the court may vary or set the order aside and, if it thinks fit, make a substitute order in accordance with Division 2.

This clause has been modelled on the New South Wales, Victorian and Northern Territory legislation.

Clause 3.17 sets out the circumstances in which an order for the adjustment of interests in property under section 3.7 can be varied. This clause is modelled on section 79A(1) of the Family Law Act.

There are three circumstances which will justify variation of the order under this clause. First, the order may be varied or set aside if there has been a miscarriage of justice. This can arise through fraud, duress, suppression of evidence,¹⁰¹ giving of false evidence or any other circumstance. Secondly, the Court may exercise this power if circumstances have made it "impracticable"

¹⁰¹ Suppression of evidence is a ground for varying or setting aside an order. Whether or not this will imply a full duty of disclosure in an application under Part III is not clear. (There have been no cases on the equivalent New South Wales provision.) The duty of full disclosure was discussed earlier in the commentary to clause 3.7.

for the order to be carried out.¹⁰² Thirdly, the order may be varied if there has been default in carrying out an obligation and it is just and equitable to vary or set aside the order.

3.18 Transactions to defeat claims (s. 42 NSW; s.295 Vic; s.40 NT)

- (1) *In this section "disposition" includes a sale and a gift.*
- (2) *On an application for an order under Division 2 a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application or which, irrespective of intention, is likely to defeat any such order.*
- (3) *The court may, without limiting section 3.14, order that any property dealt with by an instrument or disposition referred to in subsection (2) may be taken in execution or used or applied in, or charged with the payment of any sums payable under an order adjusting interests with respect to the property of one or more of the parties or for costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.*
- (4) *The court may order a party or a person acting in collusion with a party to pay the costs of any other party or of a purchaser in good faith or other person interested of and incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.*

This clause is modelled on the New South Wales, Victorian and Northern Territory legislation.

¹⁰² The meaning of the word "impracticable" in the equivalent provision in Family Law Act 1975 (Cwth) was discussed by the Family Court in *Parker and Parker* (1983) FLC 91-364. The court made a consent order in a property application that the wife reside in half of the former matrimonial home (converted into a flat). The husband was to reside in the other part. After separation, the husband allowed the property to fall into a dilapidated condition. The Court was prepared to vary the order in these circumstances because it was impracticable for the order to be carried out. That is, given the husband's failure to maintain the premises, it was impracticable for the wife to remain in occupation.

Clause 3.18 enables the court, on application, to set aside a transaction where the other party is attempting to dispose of property.¹⁰³

Before a disposition will be set aside, it appears that the applicant will have to prove the following -

- (a) the existence of proceedings under clause 3.7;
- (b) a disposition has occurred, or is going to occur, which will impact upon actual or anticipated orders under clause 3.7;
- (c) proceedings under clause 3.7 should have been anticipated by the party disposing of the property at the time of the disposition; and
- (d) the third party was sufficiently affected by actual or deemed notice of the anticipated proceedings that an order under clause 3.18 would be justified.

3.19 Interests of other parties (s.43 NSW; s.296 Vic; s.41 NT)

- (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 bona fide purchaser or any other person.*
- (2) *A court may order that a person be given notice of the proceedings or be made a party to the proceedings 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 the attempted disposition by one of the parties of the property in dispute. The clause is, with slight modification, based on the equivalent New South Wales, Victorian and Northern Territory legislation.

¹⁰³

A transaction was set aside under the Family Law Act 1975 (Cwth) equivalent (section 85) in *Loder v Aysom* (1987) 12 FamLR 644. After the wife instituted proceedings for property adjustment, the husband executed a deed of charge and associated guarantees as well as exercising a power of sale over assets held by his companies. On an application by the wife under section 85, the trial judge set aside these transactions. On appeal to the Full Court, this order was upheld as the transactions, whether or not they were shams, were likely to defeat at least in part, the wife's pending claim under section 79. (Leave to appeal to the High Court against the Full Court's decision was not granted by the High Court: *Loder v Aysom* (1987) 12 FamLR 659.) It may also be appropriate to vary the order under this head where there has been a Family Court order relating to some of the property after an order is made under this legislation. The later order may make the party unable to carry out an order made under the proposed legislation.

Part IV - Declaring interests in property

4.1 Declaring interests in property (s.8 NSW; s.278 Vic; s.12 NT)

- (1) *In proceedings between sharers with respect to existing title or rights in property, a court may declare the title or rights, if any, that a sharer has in that property.*
- (2) *The court may make orders to give effect to the declaration, including orders about possession.*
- (3) *An order under this Part is binding on the sharers.*

Clause 4.1 allows the court to declare existing property rights. Existing property rights means existing property rights at common law without regard to a person's entitlement under the proposed legislation.

This clause mirrors the New South Wales, Victorian and Northern Territory provisions.

The jurisdictional requirements in Part III which must be satisfied before applying for an adjustment of an interest in property do not apply to Part IV. Accordingly, the power of the court in clause 4.1 to make a declaration may be exercised even although the jurisdictional requirements in Part III have not been satisfied.¹⁰⁵

It may still be necessary to obtain declaratory relief about existing property entitlements if -

- (a) neither party wishes to invoke the jurisdiction of the court to adjust property rights;
- (b) neither party is able to invoke the jurisdiction because they are unable to meet the jurisdictional requirements; or
- (c) a third party claims an interest in the disputed property.

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¹⁰⁵ See clauses 3.1, 3.3, 3.4 and 3.5. For example, the court may make an order under clause 4.1 although the parties have not lived together under the one roof for 2 years, do not have a child and the applicant has not made substantial contributions (as required by clause 3.3).

Part V - Cohabitation and separation agreements

A. General policy considerations

Under Part III of the draft legislation, a person can make an application to the court for an order over property of one of the sharers. Whether, and to what extent, the applicant will be successful in obtaining an interest in the property depends on the values that the court attributes to the contributions made by the applicant.

In today's society, many people would rather regulate their own financial affairs than have a court impose its solution on them. It is for this reason that cohabitation and separation agreements are entered into. Cohabitation agreements regulate financial affairs¹⁰⁶ and are made by the parties before they begin living together or at any stage during the course of their living together. As the name suggests, a separation agreement embodies a financial settlement between parties who are contemplating separation or who have already separated.

Traditionally, the terms "cohabitation agreement" and "separation agreement" are used in relation to de facto couples. However, the advantages of these kinds of agreement would equally apply to all people who live together and share property.

In Queensland, as in all common law jurisdictions, people can enter into agreements concerning property. For example, a mother may enter into a contract with her daughter and son-in-law to give them \$30,000 to build an extra room onto the house of the daughter and son-in-law. In return, the daughter and son-in-law agree to allow the mother to reside in the home rent-free for the rest of her life. Two friends may decide to pool their funds to purchase a house in both names. Their agreement may provide that their respective interests in the house will depend on the amount of money contributed to the purchase price and spent on renovations.

Provided that these contracts comply with ordinary contractual principles,¹⁰⁷ then the contracts will be enforceable.¹⁰⁸

Agreements in which de facto couples attempt to regulate their financial affairs are becoming increasingly common. A de facto couple, for example, may enter into an agreement which provides that the assets held by each party at the beginning of the relationship or acquired by him or her during the relationship, should remain the property of that person. The agreement could also contain non-financial (or "lifestyle")

¹⁰⁶ Cohabitation agreements may also regulate lifestyle issues such as working hours and household and parenting duties.

¹⁰⁷ For example, that the contract is in writing if it relates to real property (section 11 Property Law Act 1974 (Qld)).

¹⁰⁸ Note, however, the lingering public policy concerns about cohabitation agreements entered into by de facto couples (discussed below).

clauses. An example of such a clause would be one requiring an equal division of all household duties such as the cooking, washing, cleaning and ironing.

One complicating factor concerning cohabitation agreements for de facto couples which is not a concern for other kinds of relationships is the possible public policy concerns.¹⁰⁹

Historically, the courts were unprepared to enforce an immoral promise. It has been suggested in dicta that an agreement between a man and a woman to live together without being married would be unenforceable for being an immoral promise.¹¹⁰ These promises were supposed to offend public policy by discouraging entry into the traditional institution of marriage.

If the parties are already living in a de facto relationship when entering into the cohabitation agreement, it appears that this will not offend the public policy argument stated above.¹¹¹

If the agreement does not offend public policy where the parties are already living together, it seems illogical that a cohabitation agreement entered into immediately before the parties begin cohabiting will be held to be invalid on public policy grounds. It could hardly be argued that the entry into the cohabitation agreement itself encourages the parties not to marry.

In any event, the Commission believes that in the 1990's, public policy should no longer be a ground for not enforcing cohabitation agreements between de facto couples.

Leaving aside the public policy argument, there are a number of other concerns which have been raised by people regulating their own financial affairs through cohabitation and separation agreements. In its report in 1983 on de facto relationships, the New South Wales Law Reform Commission discussed the arguments for and against the enforceability of these kinds of agreements. These arguments are still largely applicable today, and apply to sharers as defined in this legislation as well as to de facto couples. In making its tentative recommendation (below), the Queensland Law Reform Commission considered the following factors -

¹⁰⁹ The public policy concern does not apply to separation agreements. In contrast to cohabitation agreements, separation agreements between de facto couples could not be said to discourage people from marrying (see discussion below).

¹¹⁰ Fender v St. John Mildmay [1938] AC 1 at 42.

¹¹¹ Seidler v Schallhofer [1982] 2 NSWLR 80; note, however, Powell J's inability in Hargenfelds v Saffron (1986) DFC 95-025 at 75,321-75,322, to accept that Seidler v Schallhofer established by 1982 that a cohabitation contract would not be void on public policy grounds. However, His Honour at 75,322 did think that if the legal promise is ancillary to the main purpose of the agreement, then the agreement may be preserved.

1. Advantages of enforcing cohabitation and separation agreements

(i) Freedom to regulate financial arrangements

As mentioned, parties may wish to avoid having their financial affairs regulated by statute. Preliminary research by the Commission indicates that some couples enter into de facto relationships rather than a formal marriage because they do not want their financial obligations regulated by the Family Law Act. Under the proposed legislation, sharers (including de factos) will be regulated by Part III. Sharers should be able to make their financial arrangements free from intervention by the courts.

(ii) Certainty

Sharers will be able to plan their financial future with a degree of certainty.¹¹² Sharers will know the financial obligations of each party under the terms of the agreement. This will increase the reliance people can place on the cohabitation and separation agreements.

(iii) Avoidance of litigation

Because the cohabitation or separation agreements will contain the terms governing their financial relationship, there should be fewer disputes arising from uncertainty about their respective financial obligations. Less litigation should result.

2. Disadvantages of enforcing cohabitation and separation agreements

(i) Hardship and injustice

In the overwhelming majority of cases, people living as sharers will have an emotional bond with each other. The strength of this emotional bond will vary depending on the nature of the relationship. Because of this bond, one sharer may be able to convince the other to sign an agreement which is unfair or oppressive to the party asked to sign. If enforced, the agreement would cause hardship and injustice.

The more intimate the relationship, the more likely it is for a person to be coerced into signing an agreement. Pressure, including statements that failure to sign shows a lack of trust in the partner, can be applied.

Similar problems could arise in relation to a separation agreement. One party may accept responsibility for the break-down of the relationship and may agree to sign an unfavourable separation agreement. Alternatively, one party may

¹¹² Under the proposed legislation, there are considerable limits on the power of the court to interfere with their agreements. (See the commentary on clause 5.5 below.)

agree to unjust, unfair or oppressive terms because of threats by the other party. Although these considerations will usually be more applicable in relationships of a sexual nature, they can apply to all cases where people share property.

(ii) A degree of inflexibility

If the parties enter a cohabitation agreement in the earliest stages of the relationship, the nature of their relationship may develop in a manner not reflected by the agreement. The parties may not be diligent in altering the written terms of the original agreement to reflect changed intentions.¹¹³ This could lead to contested proceedings about what terms the parties had actually agreed upon.

(iii) Necessity for financial planning

The entry into a cohabitation or separation agreement can result in -

- (1) the disposal and acquisition of property; and
- (2) a transfer of an interest in property from one person to another.

Where there is a disposal and acquisition of property, capital gains tax considerations may be relevant. Transfers of property from one spouse to another on a property settlement upon a marriage breakdown on ordinary principles would be caught by the capital gains tax provisions. However, special provisions exist which defer capital gains tax or grant an exemption from it.¹¹⁴

Where there is a transfer of an interest in property from one person to another, there may also be stamp duty implications. Ad valorem duty will apply to a transfer of legal or equitable property which does not fall within the specified exemptions in the Stamp Act 1894 (Qld). If the transfer is by deed of gift, a market value is placed upon the property.

In entering into a cohabitation or separation agreement, parties must be careful of tax and stamp duty implications.

The capital gains tax and stamp duty implications are currently being examined by the Commission. Consideration will be given by the Commission to

¹¹³ Under clause 5.5 of the proposed legislation, the court has power to vary or set aside cohabitation agreements. See also clause 5.6 which allows the court to disregard a cohabitation or separation agreement if it is of the view that it has ceased to have effect.

¹¹⁴ For example, section 160 ZM (1) provides that where a taxpayer disposes of an asset to his or her spouse pursuant to an order of the court or a maintenance agreement, that disposal will not be caught by the capital gains tax provisions. This capital gains tax relief for a 'spouse' does not extend to a de facto spouse.

recommend exemptions from stamp duty liability. Submissions are invited on the tax and stamp duty implications and the desirability of granting exemptions for cohabitation or separation agreements.

(iv) Appropriateness of regulation by formal contract

It can be argued that it is inappropriate for parties in a close relationship to be regulated by a formal contract. The necessity for contracts of this kind may indicate a lack of trust between the parties which could ultimately undermine their relationship. Today, however, an increasing number of people enter into cohabitation agreements. This is not necessarily a result of lack of trust. It is more likely to result because of the uncertainties of the law in this area and the desire of the parties to clarify their financial entitlements at an early stage in the relationship.

3. Tentative conclusions

The tentative conclusion of the Commission is that it is important for parties to be able to regulate their own financial arrangements through binding cohabitation and separation agreements. This recommendation is reflected in Part V of the draft Bill.

The draft legislation attempts to minimise the risk of parties signing an agreement which will cause hardship and injustice. First, the cohabitation or separation agreement will only be binding on a court, in an application for property adjustment under Part III, if that agreement is "certified". To become certified, each party to the agreement must have obtained independent legal advice before signing the agreement. There are strict guidelines in Part V on the information and advice that solicitors are required to give their client.

Secondly, the court is given power in clause 5.5 to vary the cohabitation agreement where there is an application for property adjustment under Part III. This power may be exercised if there has been a change in circumstances of the sharers since signing the agreement and, as a result, enforcement of the agreement would result in serious injustice.

The third matter which is relevant in this context is that ordinary contractual principles will apply to cohabitation and separation contracts. This is enshrined in clause 5.1(2). If undue influence has been exercised over a party or if there has been unconscionable conduct, the agreement will be voidable on ordinary contractual principles.

Provided parties to an agreement can adequately be protected from entering into unjust and oppressive agreements and the courts retain power to vary the agreement in the circumstances mentioned, the Commission's tentative view is that parties should be able to regulate their own affairs by agreement.

B. Content of cohabitation and separation agreements

Cohabitation and separation agreements are enforceable in so far as they relate to "financial matters". "Financial matters" is defined in clause 1.5. As the legislation is currently drafted, any provision for maintenance in a cohabitation or separation agreement will not be enforceable because maintenance provisions do not fall within the definition of "financial matters".

As discussed earlier, the focus of the proposed legislation is adjusting interests in property. There is no provision for a court to make maintenance orders. In this context, the Commission's tentative view is that cohabitation and separation agreements should be limited to dealing with entitlements to property, rather than making provision for maintenance. As mentioned earlier, the Commission has received submissions strongly disagreeing with this approach. Further submissions on this topic are invited.

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5.1 Validity of agreements (ss.45-46 NSW; s.43 NT)

- (1) *Sharers may enter into a cohabitation agreement or separation agreement.*
- (2) *A cohabitation agreement or separation agreement shall be subject to and enforceable in accordance with the law of contract.*
- (3) *Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to -*
 - (a) *the right to custody or maintenance of;*
 - (b) *the right of access to; or*
 - (c) *any other matter relating to -*

the children of the parties to the agreements.

Clause 5.1 is modelled on the equivalent New South Wales and Northern Territory legislation.

This clause removes any doubt which may still exist about cohabitation agreements being void for offending public policy. Clause 5.1 clearly provides that the parties may enter into a cohabitation or separation agreement. Those agreements will then be subject to ordinary contractual principles such as frustration. Similarly, the contract will be voidable on the grounds of innocent, negligent or fraudulent misrepresentation, mistake, undue influence or unconscionability.¹¹⁵

Although the cohabitation agreement dealing with financial matters will not be void on public policy grounds, other clauses of the cohabitation agreement may still be void as offending public policy.¹¹⁶

The effect of clause 5.1 is that these agreements can be enforced on ordinary contractual principles. To enforce an agreement on default by one of the parties, the other party will be required to obtain a court order for specific performance.

¹¹⁵ Unconscionability may be relevant if one of the parties to a cohabitation or separation agreement fails to disclose some of his or her assets. In certain circumstances, the consequence of failing to disclose may be so great that the party's conduct will be unconscionable, allowing the contract to be avoided. (The issue of full disclosure is discussed in the commentary to clause 5.5.)

¹¹⁶ CCH Australian De Facto Law [32-190] gives examples of clauses which may still offend public policy. One example is a clause which provides for the parties to terminate a pregnancy which occurs during their relationship.

If the other party does not comply with the court order, then the party must begin further proceedings to enforce that court order.

In contrast, section 86 of the Family Law Act allows parties to register a maintenance agreement¹¹⁷ entered into by the parties. Once registered, the agreement may be enforced as if it were an order of that court.¹¹⁸ There are specific enforcement mechanisms available to the Family Court.

It has been suggested that the Commission should consider a similar facility of registering agreements in the proposed legislation. Comments are invited on this proposal.

Q28 *Should the legislation provide for cohabitation and separation agreements to be registered and, on registration, to be enforceable as an order of the court?*

The exception in clause 5.1(3) should be noted. For policy reasons, it is necessary that a cohabitation agreement or separation agreement cannot oust the power of a court to make an order with respect to the right to custody or maintenance of, the right of access to, or any other matter relating to the children of the parties to the agreement.

5.2 Separation agreement where relationship continues (s.44 NSW; cl 44 NT)

Where, in relation to a separation agreement made in contemplation of the termination of their relationship as sharers, the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement shall be deemed to be a cohabitation agreement.

This clause mirrors the New South Wales and Northern Territory provisions.

The clause deems a separation agreement to be a cohabitation agreement if the parties do not terminate their relationship as sharers within 3 months of signing the agreement.

¹¹⁷ Although the agreement is referred to as a 'maintenance agreement', the agreement may govern all financial matters between the parties, including the adjustment of property (section 4(1) Family Law Act 1975 (Cwth)).

¹¹⁸ Section 86 Family Law Act 1975 (Cwth). Although registration makes these agreements enforceable as an order of the court, the Family Law Act provides for the alteration of such agreements. For example, the Court may alter the agreement if a person's circumstances have changed since the agreement was registered (sections 86(2A) and 83(2) Family Law Act 1975 (Cwth)).

The reason for this clause is as follows.

Under clause 5.5, a court may set aside or vary the cohabitation agreement if the circumstances of the sharers have so changed since the agreement was entered into that the enforcement of the agreement would lead to a serious injustice for one of the parties. The power of the court to vary in these circumstances does not apply to a separation agreement. (The reason for this difference is discussed in the commentary to clause 5.5.)

As a result of this difference, a separation agreement will have a more certain status than a cohabitation agreement. Clause 5.2 prevents the parties from obtaining this degree of certainty by simply calling a cohabitation agreement a separation agreement.

5.3 Effect of agreements in proceedings for adjustment of property rights (s.47 NSW; s.45 NT)

- (1) *Where, on an application by a sharer for an order under Part III, a court is satisfied -*
- (a) *that there is a cohabitation agreement or separation agreement between the sharers;*
 - (b) *that the agreement is in writing;*
 - (c) *that the agreement is signed by the sharer against whom it is sought to be enforced;*
 - (d) *that each sharer was, before signing the agreement furnished with a certificate in or to the effect of the prescribed form by a solicitor which states that the solicitor had previously advised that sharer, independently of the other sharer, as to the following matters -*
 - (i) *the effect of the agreement on the rights of the sharer to apply for an order under Part III;*
 - (ii) *whether or not, at that time, it was to the advantage, financially or otherwise, of that sharer to enter into the agreement;*

- (iii) *whether or not, at that time, it was prudent for that sharer to enter into the agreement;*
- (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; and*
- (e) *that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement,*

the court may make an order under Part III, but (except as provided by sections 5.5 and 5.6) shall not make an order which is in any respect inconsistent with the provisions on financial matters in the agreement.

- (2) *Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1) (b), (c), (d) or (e), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part III, may have regard to the terms of the cohabitation agreement or separation agreement.*
- (3) *A court may make an order under this section notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make that order.*

This clause is based on the New South Wales equivalent. It differs in an important respect from the Northern Territory legislation. This difference will be discussed below. Clause 5.3 details the effect of a cohabitation or separation agreement where proceedings are brought by one of the sharers for an adjustment of property rights under clause 3.7.

Put simply, if the cohabitation or separation agreement satisfies the requirement of clause 5.3(1), in an application for property adjustment under clause 3.7 the court will not be able to make an order which is inconsistent with the terms of

that agreement. Under clause 5.3(1), the cohabitation or separation agreement must be -

- (a) in writing;
- (b) signed by the sharer against whom it is sought to be enforced; and
- (c) certified by a solicitor (discussed below), the certificate being attached to the agreement.

If the parties have entered into a cohabitation or separation agreement, however, and these requirements have not been complied with, the court is not required to give an order consistent with the agreement in exercising its powers under clause 3.7. Clause 5.3(2), however, allows the court to have regard to the terms of the cohabitation or separation agreement when making its order.

Clause 5.3(3) allows a court to make an order although the cohabitation or separation agreement attempts to exclude the court's jurisdiction under Part III.

The policy behind Part V of the proposed legislation is to allow parties to regulate their own financial affairs through cohabitation and separation agreements. Clause 5.3(1) provides a mechanism to ensure a degree of certainty attaches to their agreement. As Part V is drafted, however, certainty will come at a cost.

For the cohabitation or separation agreement to be binding on the court, the sharer must satisfy paragraphs (b) to (e) of clause 5.3(1). Paragraphs (b), (c) and (e) will not be difficult to comply with. It is arguable, however, that the obligations set out in paragraph (d), are quite onerous.¹¹⁹

A. Obligations on solicitor certifying the agreement

Clause (d) sets out the requirements that the solicitor must satisfy before issuing a certificate.

Paragraph (d) requires the solicitor to advise on the following matters -

- (i) the effect of the agreement on the sharer's right to apply for an order under Part III;

This requires the solicitor to explain to the client that a court will only be able to vary the agreement in the circumstances outlined in clause 5.5. Clause 5.6, which deals with the cessation of the agreement, will also be relevant and should be explained to the client.

¹¹⁹ CCH Australian De Facto Relationships Law [32-450] comments on the potential difficulty that solicitors may experience in complying with the certification requirements in the New South Wales equivalent.

- (ii) whether or not, at that time, it was to the advantage, financially or otherwise, of that sharer to enter into the agreement;

This requires the solicitor to estimate the kind of order that the court would be likely to grant under Part III if a cohabitation agreement had not been entered into. This would require the practitioner to be fully appraised of recent court decisions on the property orders under Part III.¹²⁰ Only after this estimation is made will a solicitor be able to compare the effect of the agreement with the likely order of a court under Part III.

To be able to advise accurately in this way, the solicitor will need detailed information on the relationship between the parties. Obtaining such instructions will be time-consuming for the solicitor and, therefore, costly for the client.

Paragraph (ii) also requires the solicitor to advise on non-financial aspects of the agreement. The solicitor presumably will have to explore the client's non-financial reasons for wanting to enter the agreement. If the client wishes to sign the agreement so that more certainty will attach to the relationship, this will be relevant to the solicitor's advice.

- (iii) whether or not, at that time, it was prudent for that sharer to enter into the agreement;

This could also be an onerous requirement for the solicitor to satisfy. "Prudence" could encompass a wide range of factors. There may be a number of reasons why it is prudent for a particular client to enter into the agreement. Not all of these reasons are necessarily financial ones. As mentioned in the previous paragraph, a party may wish to enter into an agreement to clarify the extent of the non-financial obligations of the parties. To satisfy paragraph (iii), the solicitor should not limit the advice to matters of a financial nature.

- (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.

This could also place an onerous obligation on the solicitor. The solicitor must decide whether matters such as the birth of a child, unemployment, marriage or destruction of property are reasonably foreseeable events. As these matters can occur in a relationship, arguably they are reasonably foreseeable and should have been considered and catered for before the agreement was signed.

¹²⁰ Until case law on the legislation has developed, a solicitor will have little guidance in giving this advice. A review of the case law on equivalent legislation in other jurisdictions may be necessary.

Given the extent to which the solicitor must advise a client, it is probable that there will be a lengthy consultation with the solicitor to give instructions. After the consultation, the solicitor must research the options available to the client based on the instructions. This will be followed by a lengthy consultation with the client advising on the merits of the agreement. To protect the solicitor's professional position, the solicitor's advice should be confirmed in writing. Such legal representation will be expensive.

An alternative to the New South Wales regime has been proposed in the Northern Territory Act. Under section 45 of the Northern Territory Act, the court must not make an order inconsistent with the cohabitation or separation agreement if it is in writing and signed by the de facto partner against whom it is being enforced. There is no certification requirement.

To protect the de facto partner who may have entered into an unfair cohabitation or separation agreement, the Northern Territory legislation give the court wider powers to vary or set aside the agreement. Under the New South Wales legislation and the Commission's proposals, the agreement may only be set aside if there has been a change of circumstances since the agreement was entered into which, if enforced, would lead to serious injustice.¹²¹ Under the Northern Territory legislation,¹²² the court can vary or set aside an agreement if -

- (a) enforcement of the agreement would lead to serious injustice between the parties; or
- (b) circumstances have arisen since the time when the agreement was entered into which would make it impracticable for its provisions to be carried out.

There are two important practical differences between the New South Wales and Northern Territory schemes.

1. Cost

Under the Northern Territory section, it would be cheaper for the parties to enter into a cohabitation or separation agreement because there is no certification requirement. The disadvantage of the Northern Territory scheme, however, is the corresponding decrease in the certainty of those agreements. The court's power to vary the agreement is increased.

¹²¹ Section 49 De Facto Relationships Act 1984 (NSW) and clause 5.5 respectively.

¹²² Clause 46(2).

2. Fairness

Under the New South Wales legislation, if a client enters into an unfair agreement which has been certified by a solicitor, the client will be bound by that agreement. If the solicitor has wrongly advised the client that it is a fair agreement, the client may have an action in negligence against the solicitor. On the other hand, the client may enter into the agreement even after being properly advised that it is unfair on that client. If certified, the court will be unable to make an order inconsistent with the agreement.¹²³ In other words, the client will be bound by the terms of an unfair agreement.¹²⁴

In contrast, under the Northern Territory legislation, the court has more scope not to enforce an unfair agreement. There is no certification provision which makes the agreement binding. As set out above, the court has wider grounds available to it enabling it to set aside the agreement. The court may do so if enforcing the agreement would lead to serious injustice between the parties or if circumstances have altered making it impracticable for the agreement to be carried out.

Q29 Should the legislation contain a requirement that the cohabitation or separation agreement be certified before it will be binding on a court in an application under Part III?

Q30 To ensure justice between the parties, should the grounds for variation of an agreement be widened?

B. Alternative certification provision

The relatively onerous requirements on a solicitor in certifying an agreement were discussed above. If the certification requirements are too onerous or costly, the practical result may be that this procedure is not utilised.

For this reason, comment is sought on the following, less onerous certification alternative to the proposed clause 5.3(1)(d) -

"5.3 (1) Where, on an application by a sharer for an order under Part III, a court is satisfied -

(a) (unchanged)

¹²³ Section 47(1) De Facto Relationships Act 1984 (NSW).

¹²⁴ Unless the agreement is voidable on contractual law principles or may be varied by the court under section 49 De Facto Relationships Act 1984 (NSW).

- (b) *(unchanged)*
- (c) *(unchanged)*
- (d) *that each sharer, before voluntarily signing the agreement, read it and was furnished with a certificate in or to the effect of the prescribed form by a solicitor which states that the solicitor had previously advised that sharer, independently of the other sharer, as to the following matters -*
 - (i) *the legal consequences of the agreement;*
 - (ii) *the fairness or otherwise of the agreement... (unchanged)"*

Submissions are invited on whether this less onerous certification requirement is the preferable option.

Q31 Should the certification requirements of clause 5.3(1)(d) be less onerous?

C. Duty of disclosure

As mentioned, one of the Commission's concerns is to ensure that a cohabitation or separation agreement is fair to both parties. If there is a duty on each party to disclose the extent of their assets, it is more likely that the parties will be able to agree on an equitable distribution of assets.

Under the New South Wales and Northern Territory legislation, there is no express statutory requirement to disclose assets¹²⁵ before entering into an agreement, whether or not that agreement is certified.¹²⁶

While full disclosure should better equip the parties to reach an equitable agreement, this requirement will delay the preparation of such documents and increase the expense of preparation to the client.

¹²⁵ The question arises, however, whether it may be possible to set aside an agreement on grounds of unconscionability. For example, this could arise where the failure to disclose assets by one party causes the parties to enter into a cohabitation or separation agreement which is grossly unfair to that other party.

¹²⁶ Contrast a court approved maintenance agreement under section 87 of the Family Law Act 1975 (Cwth). There is a statutory requirement for the parties to such an agreement to fully disclose their financial circumstances (Order 16 rule 1 Family Law Rules (Cwth)). See also *In the Marriage of Suters* (1983) 9 FamLR 340 where the court set aside the trial judge's approval of a maintenance agreement where the husband had not filed a financial statement.

Q32 *Should there be a statutory duty of disclosure before a cohabitation or separation agreement is entered into?*

5.4 Effect of certain exclusion provisions in agreements (s.48 NSW)

The provisions of a cohabitation or separation agreement may, in proceedings other than an application for an order under Part III, be enforced notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of a court under Part III to make such an order.

This clause is based on the New South Wales provision. It does not appear in the Northern Territory legislation.

The clause preserves the rights of parties to enforce a cohabitation or separation agreement in proceedings other than under Part III, even if the agreement contains a clause purporting to oust the jurisdiction of the court under Part III.

5.5 Variation and setting aside of agreements (s.49 NSW; s.46 NT)

- (1) *On an application by a sharer for an order under Part III, a court may, in the circumstances specified in this section, vary or set aside all or any of the provisions relating to financial matters in a cohabitation agreement made between the sharers, being a cohabitation agreement which satisfies the matters referred to in section 5.3 (1) (b), (c), (d) and (e).*
- (2) *The court may exercise its power under subsection (1) in respect of cohabitation agreement only if circumstances of the sharers have so changed since the time that the agreement was entered into that it would lead to serious injustice if all or any of the provisions of the agreement were whether on the application for the order under any, other Act or any other law, to be enforced.*
- (3) *A court may exercise its power under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement.*

In the discussion of general policy considerations at the beginning of the commentary to this Part, the competing policy goals concerning the enforceability of cohabitation and separation agreements were raised. On the one hand, parties should be encouraged to regulate their own financial affairs. This helps to create certainty in a relationship and hopefully reduces the necessity for litigation. On the other hand, allowing parties to regulate their own financial affairs without court interference could disadvantage a party who is easily influenced by the other party.

As mentioned earlier, the ordinary rules of contract will provide some protection to parties entering into agreements. If there has been undue influence or unconscionable conduct, the agreement can be set aside by the court.

One of the safeguards in the proposed legislation to avoid injustice is to require certification of an agreement as discussed earlier.¹²⁷

Another protection is to give the court power to vary or set aside one or more of the provisions in the cohabitation agreement relating to financial matters. Under clause 5.5, the court has power in an application by a sharer for an order under Part III, to vary or set aside any or all of the provisions in a cohabitation agreement.

Regardless of any clause to the contrary in the agreement,¹²⁸ a court may exercise its powers under clause 5.5(1) to vary or set aside a clause in the agreement if the following two matters are satisfied. First, there must be a change of circumstances since the parties entered into the agreement. Secondly, the change of circumstances must lead to serious injustice if the agreement were enforced.

The following example illustrates how this clause can prevent injustice from occurring. Parties enter into a cohabitation agreement which provides that neither party should have a claim on the property of the other party throughout the course of the relationship. The cohabitation agreement is entered into on the assumption that the couple will not have children. Later in the relationship the woman leaves the workforce to have children. This is clearly a change of circumstances from the time that the agreement was entered into. Serious injustice will result if the provisions of the agreement prevent her from claiming an interest in the property arising out of her homemaking and parenting contributions.

It will always be a question of fact in the circumstances whether serious injustice has resulted from a change in the circumstances.

¹²⁷ See the commentary to clause 5.3.

¹²⁸ Clause 5.5(3).

Whether the grounds for varying or setting aside an agreement should be widened were discussed in the commentary to clause 5.3.

It should also be noted that the powers under clause 5.5 can only be exercised by the court on an application by a sharer for an order under Part III. Therefore, the time restrictions for bringing an order under the legislation will also apply to the ability of a court to vary or set aside an agreement on the grounds of a change of circumstances leading to serious injustice.

In the New South Wales legislation, the court is unable to set aside a separation agreement on the same grounds. The New South Wales approach has been adopted in these proposals.¹²⁹ The New South Wales legislation reflects the recommendation of the New South Wales Law Reform Commission in its Report on De Facto Relationships.¹³⁰ The fundamental difference between the nature of a cohabitation and separation agreement influenced the Commission. A cohabitation agreement may be entered into at the beginning of, or during, the relationship at a time when the relationship is expected to continue for an indefinite period. Circumstances may arise, however, which will change the nature of the relationship. In contrast, separation agreements are made on the assumption that the relationship has ended or will soon end. In the latter case, changes in circumstances should not have the same impact.

Because a separation agreement is entered into when a relationship is ending and to promote certainty between the parties, it was considered essential that partners should be satisfied that the separation agreement finally resolves matters and that the agreement will be binding whatever happens in the future.

It is possible, of course, for injustices to occur when circumstances change after a separation agreement has been entered into. Take as an example a de facto couple who have lived together for seven years. The only major assets on separation are a boat worth \$7,000 and a car worth the same. Under the terms of the separation agreement, the woman is entitled to the car and the man to the boat. Before the parties finally separate, the man has an accident in the car while drink-driving. The car is written off.

It is arguable that in the circumstances of this case, it would lead to serious injustice if the woman would not be entitled to claim an interest in the boat.

Whether a separation agreement should be varied is ultimately a policy decision. The serious injustice which may result from the change of circumstances after a separation agreement has been entered into must be balanced against the desirability of certainty of a separation agreement.

¹²⁹ In contrast, under section 46 De Facto Relationships Act 1991 (NT), the court has power to vary or set aside both cohabitation and separation agreements.

¹³⁰ 1983 at pages 216-217.

Q33 Should the power of the court to vary an agreement extend to separation agreements?

5.6 Effect of revocation or cessation of agreements (s.50 NSW; s.47 NT)

On an application by a sharer for an order under Part III, a court is not required to give effect to the terms of a cohabitation agreement or separation agreement entered into by the sharer where the court is of the opinion -

- (a) that the sharers 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.*

This clause is based on the equivalent New South Wales and Northern Territory legislation.

Under this clause, the courts are not required to give effect to a cohabitation or separation agreement in an application under Part III if the agreement has ceased to have effect. Under clause 5.6, the sharers may have revoked the agreement either expressly or impliedly, by words or conduct.

5.7 Effect of death of sharer - transfer of property and lump sum payments (s.52 NSW; s.49 NT)

Except in so far as a cohabitation agreement or separation agreement otherwise provides, the provision of such an agreement entered into by sharers relating to property and lump sum payments may, on the death of one of the sharers, be enforced on behalf of, or against, as the case may be, the estate of the deceased sharer.

This clause reflects the New South Wales and Northern Territory provisions.

Unless the parties agree to the contrary, clause 5.7 allows a provision in a cohabitation or separation agreement, relating to property and lump sum payments, to be enforced on behalf of, or against, the estate of the deceased sharer.

Part VI - Miscellaneous**6.1 Enforcement of orders and injunctions (s.59 NSW; s.301 Vic; s.42 NT)**

- (1) *If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act, the court may -*
- (a) *order the person to pay a fine not exceeding \$10 000;*
 - (b) *require the person to enter into a recognisance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such a recognisance or until the expiration of 3 months, whichever first occurs;*
 - (c) *order the person to deliver up to the court such documents as the court thinks fit; and*
 - (d) *make any other orders that the court considers necessary to enforce compliance with the order or injunction.*
- (2) *Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.*
- (3) *Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.*

This clause deals with enforcement of orders made and injunctions granted under the Act.

Clause 6.1 is in addition to the ordinary powers of enforcement of the Magistrates, District and Supreme Courts.

While the Supreme Court has an extensive inherent contempt power,¹³¹ the District and Magistrates Courts, being inferior courts,¹³² are able only to punish for contempt committed in the face of the court.¹³³

Under clause 6.1, these powers cannot be exercised unless the court is satisfied that the person knowingly and without reasonable cause contravened or failed to comply with the order or injunction.

The following are the four types of orders a court may make when a person contravenes or fails to comply with an order or injunction under this Act¹³⁴ -

- (a) order the person to pay a fine not exceeding \$10,000;
- (b) require a person to undertake to comply with the order or injunction or order the person be imprisoned until he or she gives such an undertaking or until 3 months expires, whichever first occurs;¹³⁵
- (c) order a person to deliver up documents;
- (d) make any other order to enforce compliance with the order or injunction.

The clause preserves the power of the court to punish for contempt,¹³⁶ but otherwise it is an enlargement and specification of the enforcement powers of the Magistrates and District Courts.

¹³¹ The Supreme Court's inherent power springs from its succession to powers corresponding to the powers of the English superior common law courts. It may, by its inherent power, deal with contempts in and out of court which have a tendency to interfere with the administration of justice: section 21 Supreme Court Act 1967. As well, Order 84 of the Rules of Supreme Court facilitates procedures to deal with various contempts.

¹³² Being courts of record (section 5(1) Magistrates Courts Act 1921 (Qld); section 6(1) District Courts Act 1967 (Qld)), the Magistrates and District Courts have power to fine or imprison for contempt committed in the face of the court. Inferior courts do not, however, have the powers of the English superior common law courts.

¹³³ Rule 227 Magistrates Courts Rules; section 40 The Justices Acts 1886 (Qld); section 105 District Courts Act 1967 (Qld).

¹³⁴ Under the New South Wales and Victorian legislation, the court does not have these powers if the order is one for the payment of money. Sections 57 and 58 De Facto Relationships Act 1984 (NSW) deals with powers of enforcement where the order is for the payment of money.

¹³⁵ The Northern Territory legislation does not specifically include the powers in paragraphs (a) and (b).

¹³⁶ All three courts may punish for contempt committed in the face of court.

This clause differs slightly from the equivalent sections in other jurisdictions. In New South Wales, the powers given to the court are the same,¹³⁷ but only apply to orders and injunctions other than for the payment of money. The New South Wales legislation¹³⁸ provides for orders for the payment of money to be enforced by the Local Court. In this regard, the legislation reflects recommendations by the New South Wales Law Reform Commission that a mechanism was required to enforce Supreme Court orders for the payment of periodic maintenance. Under the New South Wales legislation, such an order can be enforced as if it were a judgment of a Local Court.

In Victoria, the court is given the same powers under its equivalent section.¹³⁹ As in New South Wales, the court's powers are limited in the legislation to orders other than for the payment of money. It should be noted, however, that the Victorian legislation does not provide for the making of maintenance orders.

The Northern Territory equivalent¹⁴⁰ limits the enforcement powers of the court to clauses 6.1(1)(c) and (d) of the Commission's proposals. Unlike Victoria and New South Wales, these powers extend to failures to comply with an order for the payment of money.

Bearing in mind that the powers in clause 6.1(1) are in addition to the power of the courts to punish for contempt, is it necessary or desirable for the courts to be given the powers in clause 6.1(1)? Should these powers extend to failure to comply with an order for the payment of money?

Q34 Should all of the powers in clause 6.1(1) be included in the legislation?

Q35 If so, should these powers extend to failure to comply with an order for the payment of money?

Clause 6.1(3) prevents a person from being punished twice for the same offence. If an act or omission referred to in subsection (1) is an offence against another law, clause 6.1(3) provides that the person will not be prosecuted again.

¹³⁷ The court under section 59(1)(a) De Facto Relationships Act 1984 (NSW), however, can only impose a fine up to \$2,000.

¹³⁸ Sections 57 and 58 De Facto Relationship Act 1984 (NSW).

¹³⁹ Section 301 Property Law Act 1958 (Vic).

¹⁴⁰ Section 42 De Facto Relationship Act 1991 (NT).

6.2 Rules of court (s.60 NSW)

- (1) *For the purpose of regulating any proceedings under this Act in or before the Magistrates, District or Supreme Courts, rules of court may be made under the Magistrates Courts Act 1921, District Courts Act 1967 and Supreme Court Act 1921, respectively, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*
- (2) *Subsection (1) does not limit the rule-making powers conferred by the Magistrates Courts Act 1921, District Courts Act 1967 and the Supreme Court Act 1921.*

This clause is modelled on the New South Wales provision and facilitates the regulation of proceedings under this Act.

This clause is particularly important in relation to the Magistrates Court because the legislation proposed confers on that court a considerable increase in its equitable jurisdiction.¹⁴¹ The power of the Magistrates Court to make rules of court is restricted to the matters in section 14(1) of the Magistrates Courts Act 1921.¹⁴² The matters listed do not include the matters that would come within the jurisdiction to be conferred by the proposed legislation. In these circumstances, it is desirable specifically to give the Magistrates Court power to make rules to govern the procedures for its expanded jurisdiction.

6.3 Declaration as to existence of de facto relationship (s.56 NSW; ss.10 & 11 NT)

- (1) *A person who alleges that a de facto relationship exists or has existed between the person and another named person or between 2 named persons may apply to the Supreme Court for a declaration as to the existence of a de facto relationship between the persons.*

¹⁴¹ Section 4(1)(c) Magistrates Courts Act 1921 (Qld) confers only a limited equitable jurisdiction on the Magistrates Court.

¹⁴² Note that such rules of court can only be made as 'are necessary, desirable or convenient for carrying this Act into full effect': section 14(1).

- (2) *If, on an application under subsection (1), it is proved to the satisfaction of the Court that a de facto relationship exists or has existed, the Court may make a declaration (which shall have effect as a judgment of the Court) that persons named in the declaration have or have had a de facto relationship.*
- (3) *Where the Court makes a declaration under subsection (2), it shall state in its declaration that -*
 - (a) *the de facto relationship existed as at a date specified in the declaration; or*
 - (b) *the de facto relationship existed between dates specified in the declaration,**or both.*
- (4) *Where any person whose interests would, in the opinion of the Court, be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application under subsection (1), the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.*
- (5) *A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.*
- (6) *While a declaration made under subsection (2) remains in force, the persons named in the declaration shall, for all purposes, be presumed conclusively to have had a de facto relationship as at the date specified in the declaration or between the dates so specified, or both, as the case may require.*
- (7) *Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration, it appears to the Court that new facts or circumstances have arisen that have not previously been disclosed to the Court and could not by the exercise of reasonable diligence have previously been disclosed to the Court, the Court may make an order annulling the declaration, and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.*

- (8) *Where any person whose interests would, in the opinion of the Court, be affected by the making of an order under subsection (7) is not present or represented and has not been given an opportunity to be present or represented, at the hearing of an application made under that subsection, the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.*
- (9) *Where the Court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as that person would have been in if the declaration had not been made.*

This clause enables the Supreme Court to declare the existence of a de facto relationship upon the application of an interested person. The declaration can state that the relationship existed at a particular time or during a particular period. The effect of this clause is to reduce the number of times the question of whether a couple are living in a de facto relationship at a particular time or for a particular period can be litigated in different proceedings. It can be resolved once and for all at a single hearing.

The following example illustrates the inconvenience that could result from a multiplicity of court proceedings.

A partner in a de facto relationship is killed at work. The surviving partner may have a claim under the Workers' Compensation Act 1916 (Qld) and the Common Law Practice Act 1867 (Qld) (Lord Campbells Action) and may litigate these claims at different times.

The claims may be opposed on the grounds that the couple were not living in a de facto relationship for a certain period. It would be preferable for this issue to be resolved in one hearing instead of being litigated a number of times.

This clause is modelled on the New South Wales provision. The Northern Territory section differs in the following ways -

- (1) In New South Wales, the Supreme Court is the only court which can grant such a declaration. Under the Northern Territory legislation, both the Supreme Court and Local Court can make the declaration.

Q36 Should the power to declare the existence of a de facto relationship be limited to the Supreme Court?

- (2) In addition to the court being able to declare the existence of a de facto relationship under the Northern Territory Act,¹⁴³ the court can declare that the couple was not in a de facto relationship at a particular time or during a particular period. The same declaratory power does not exist under the New South Wales legislation.

Q37 Should the Court's power be extended to include declarations that a de facto relationship did not exist?

- (3) Clause 6.3 does not limit who is entitled to make an application for a declaration. This is based on the New South Wales equivalent.¹⁴⁴ The Northern Territory legislation restricts the category of persons who can apply. In addition to de facto partners themselves, a person may make an application only if their pecuniary interest or rights or obligations at law or in equity are affected by the existence of a de facto relationship.

Q38 Should the category of persons who can apply for a declaration be limited in the same manner as the Northern Territory legislation?

- (4) There is a presumption that while the declaration is in force it is conclusive.¹⁴⁵ Subsequent proceedings, however, can annul the declaration.¹⁴⁶ This can occur only where new facts or circumstances have arisen that have not been previously disclosed and could not by the exercise of reasonable diligence have previously been disclosed to the court. The annulment has no effect on anything done in reliance on the declaration before the making of the order for the annulment.

¹⁴³ Section 10 De Facto Relationships Act 1990 (NT).

¹⁴⁴ Section 56(1) De Facto Relationships Act 1984 (NSW).

¹⁴⁵ Clause 6.3(6).

¹⁴⁶ Clause 6.3(7).

However, a person affected by the annulment can be placed in the same position as far as practicable as if the declaration had not been made. The ancillary orders are within the court's discretion. They include varying rights with respect to property or financial resources.

The Northern Territory section does not give the courts power to vary rights in relation to financial resources.

Q39 *If a declaration is annulled under clause 6.3(7), should the Court's power to put a person affected by the annulment in the same position as if the declaration had not been made extend to varying financial resources as well as property?*

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4. DRAFT LEGISLATION

SHARED PROPERTY ACT

Part I - Preliminary

1.1 Purposes of this Act

The primary purposes of this Act are to -

- (a) confer rights on sharers to apply for an adjustment of interests in property;
- (b) provide declaratory relief with respect to existing rights to property;
- (c) allow relationships to be regulated by cohabitation and separation agreements;
- (d) provide for the declaration of the existence of a de facto relationship;
- (e) confer on courts the necessary jurisdiction and power required by this Act.

1.2 Title of this Act

This Act may be cited as the Shared Property Act 1992.

1.3 Commencement

- (1) Section 1.2 and this section commence on
- (2) The remaining provisions of this Act commence on

1.4 Regulations

The Governor in Council may make regulations to promote the purposes of this Act and its administration.

1.5 Definitions (s.3 NSW ; s.275 Vic ; s.3 NT)

"child" when used as a "child of the sharers" means -

- (a) a child born as a result of sexual relations between the sharers;
- (b) a child of the woman of whom her de facto partner is presumed, pursuant to the Status of Children Act 1978-1988, to be the father; or
- (c) a child adopted by the sharers.

"cohabitation agreement" means an agreement between sharers, whether or not there are other parties to the agreement -

- (a) which is made (whether before, on or after the commencement of this Act) -
 - (i) in contemplation of their becoming sharers; or
 - (ii) during the time that they are sharers; and
- (b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes an agreement which varies an earlier cohabitation agreement;

"de facto partner" means -

- (a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and
- (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

"financial matters" in relation to sharers, means matters with respect to either or both of the following -

- (a) the property of those sharers or either of them;
- (b) the financial resources of those sharers or either of them;

"financial resources" in relation to sharers or shared property means -

- (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;

- (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the benefit of the sharers or any of them;
- (c) property the alienation or disposition of which is wholly or partly under the control of the sharers or any of them and which is lawfully capable of being used or applied by or on behalf of the sharers or any of them in or towards their his or her own purposes; and
- (d) any other valuable benefit.

"property" in relation to sharers or any of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.

"separation agreement" means an agreement between sharers, whether or not there are other parties to the agreement -

- (a) which is made (whether before, on or after the commencement of this Act) -
 - (i) in contemplation of the termination of their relationship as sharers; or
 - (ii) after the termination of their relationship as sharers; and
- (b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

OPTION A

["shared property" means property shared by two or more persons, including de facto partners, for the purpose or in the course of their living or residing together under the one roof and includes a shared motor vehicle.]

OPTION B

No definition of "shared property" to be inserted.

"sharers" means persons who are sharing or who have shared property, including de facto partners, not being persons married to each other, who live

or reside or have lived or resided together under the one roof, at least one of whom has made contributions of the kind referred to in section 3.7(3) [or 3.7(4)].

1.6 Application (s.6 NSW ; s.276 Vic ; s.50 NT)

This Act applies to a person who has been a sharer whether before or after the commencement of this Act but does not apply to a sharer who has stopped living with another sharer under the one roof before the commencement of this Act.

1.7 Other rights of applicant not affected (s.7 NSW ; s.277 Vic ; s.51 NT)

Nothing in this Act affects any right of a sharer to apply for any remedy or relief under this Act or any other Act or any other law.

Part II - Jurisdiction

2.1 Courts having jurisdiction under this Act (s.9 NSW; s.297 Vic; s.4 NT)

A person may apply to -

- (a) the Supreme Court;
- (b) the District Court; or
- (c) a Magistrates Court -

for an order or relief under this Act.

2.2 Staying and transfer of proceedings (s.11 NSW; s.299 Vic; ss.7 & 8 NT)

- (1) Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the first mentioned court -
 - (a) may stay the proceedings pending before it for such time as it thinks fit; or
 - (b) may dismiss the proceedings.
- (2) Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.

2.3 Transfer of proceedings (s.12 NSW; s.298 Vic; s.6 NT)

- (1) Where proceedings are instituted in the Magistrates Court or District Court with respect to an interest in property, being an interest of a value or amount in excess of the court's jurisdictional limit under the Magistrates Courts Act 1921-1989 or the District Courts Act 1967-1989 respectively, the court must transfer the proceedings to a court where the value is within the jurisdictional limit unless the parties agree to the first mentioned court hearing and determining the proceedings.
- (2) A court may transfer the proceedings under sub-section (1) of its own motion even if the parties agree to the court hearing and determining the proceedings.
- (3) Before transferring proceedings, the court may make any orders it considers necessary pending the disposal of the proceedings by the court to which the proceedings are transferred.

- (4) If proceedings are transferred to another court, that court must proceed as if the proceedings had been originally instituted in that 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 proceedings.

2.4 Courts to act in aid of each other (s.13 NSW; s.300 Vic; s.9 NT)

All courts having jurisdiction under this Act must act in aid of and be auxiliary to each other in all matters under this part.

Part III - Proceedings for property adjustments

Division 1 - Preliminary

3.1 Prerequisites for making of order - living within the State, contributions made (s.15 NSW; s.280 Vic; s.15 NT)

A court may make an order under this Part only if it is satisfied -

- (a) that one or both of the sharers lived in Queensland on the day on which the application was made; and
- (b) that -
 - (i) both sharers have lived together in Queensland for at least one third of the period of their relationship; or
 - (ii) substantial contributions of the kind referred to in section 3.7(3) [or 3.7(4)] have been made in Queensland by the sharer making the application.

3.2 Relevant facts and circumstances (s.16 NSW; s.283 Vic; s.17 NT)

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.

3.3 Prerequisites for making of order - length of relationship, care of child (s.17 NSW; s.281 Vic; s.16 NT)

- (1) A court may only make an order under this Part if it is satisfied that the sharers have lived together under the one roof for a period of at least 2 years, except as provided by subsection (2).
- (2) A court may make an order if it is satisfied -
 - (a) that there is a child of the sharers; or
 - (b) that failure to make the order would result in serious injustice to the sharer who applied for the order and that sharer -
 - (i) has made substantial contributions of the kind referred to in section 3.7(3) [or 3.7(4)] for which the sharer would otherwise not be adequately compensated if the order were not made; or

- (ii) has the care and control of a child of the other sharer.

3.4 Prerequisites for making an order - compulsory conference (s.79(9) Cwth)

A court may only make an order under this Part if -

- (a)
 - (i) the parties to the proceedings have attended a conference in relation to the matters in dispute with an officer appointed by the court; and
 - (ii) the parties have made a bona fide attempt to reach agreement on relevant matters in issue between them;
- (b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order although the parties to the proceedings have not attended a conference mentioned in paragraph (a); or
- (c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

3.5 Time limit for making applications (s.18 NSW; s.282 Vic; s.14 NT)

- (1) If sharers have stopped living together under the one roof, an application to a court for an order under this Part must be made within 2 years from the day on which they stopped living together.
- (2) A court may grant leave to a sharer to apply for an order at any time after the end of the period referred to in subsection (1) if the court is satisfied that greater hardship would be caused to the sharer applying if that leave were not granted than would be caused to the other sharer if that leave were granted.

3.6 Duty of court to end financial relationships (s.19 NSW; s.284 Vic; s.35 NT)

So far as is practicable a court must make orders that will end the financial relationships between the sharers and avoid further proceedings between them.

Division 2 - Adjustment of property interests**3.7 Application for property adjustment (s.20 NSW; s.285 Vic; s.18 NT)**

- (1) A sharer may make an application to a court for an order to adjust interests with respect to the [shared] property of the sharers or any of them.
- (2) The applicant sharer must join all other sharers in the application unless the court orders otherwise in the case of a sharer whose whereabouts the applicant sharer has not been able to establish after reasonable enquiry.
- (3) After hearing the applicant sharer and all other sharers appearing before it the court may make such order adjusting the interests of the sharers in the property as seems to it to be just and equitable having taken into consideration the following -

OPTION 1

- (a) the contribution, whether financial or not, made directly or indirectly by or on behalf of any sharer to the acquisition, conservation or improvement of any of the [shared] property the subject of the application or to the financial resources of any of the sharers;
- (b) the contributions, including any contributions made in the capacity of homemaker made by any of the sharers to the welfare of any other sharer, or where the sharers are de facto partners, to the welfare of the family constituted by the partners and one or more of the following namely -
 - (i) a child of the partners;
 - (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.
- (c) nature and duration of the relationship;
- (d) whether in all the circumstances it would be unconscionable to deny the applicant a share in the property.

OPTION 2

- (a) *the contribution, whether financial or not, made directly or indirectly by or on behalf of any sharer to the acquisition, conservation or improvement of any of the [shared] property the subject of the application or to the financial resources of any of the sharers;*
 - (b) *services provided by the applicant because of expectations induced in the applicant by another sharer as to the applicant's future entitlement to property;*
 - (c) *nature and duration of the relationship;*
 - (d) *whether in all the circumstances it would be unconscionable to deny the applicant a share in the property.*
- (4) *If the applicant in section 3.7(1) is a de facto partner, the court shall also take into account the contributions including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners, as appropriate, to the welfare of the other partner or to the welfare of the family constituted by the partners and one or more of the following namely -*
- (a) *a child of the partners;*
 - (b) *a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.*

3.8 Application for property adjustment - additional considerations for de facto partners (s.27 NSW; s.25 NT)

- (1) In making an order under section 3.7(1), the court may also consider the matters in clause 3.8(2) if the applicant is a de facto partner and the court is satisfied that -
- (a) the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the de facto partners or a child of the respondent being a child who is, on the day on which the application is made -
 - (i) under the age of 12 years; or
 - (ii) in the case of a physically or mentally disabled child under the age of 16 years; or

- (b) the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and -
 - (i) an order under section 3.7(1) would increase the applicant's earning capacity by enabling the applicant to undertake a course or program of training or education; and
 - (ii) it is, having regard to all the circumstances of the case, reasonable to make the order.
- (2) If the court is satisfied of the matters in section 3.8(1), in making an order under clause 3.7(1) the court shall also take into consideration the following -
- (a) the income, property and financial resources of each de facto partner (including the rate of any pension, allowance or benefit paid to either partner or the eligibility of either partner for a pension, allowance or benefit) and the physical and mental capacity of each partner for appropriate gainful employment;
 - (b) the financial needs and obligations of each de facto partner;
 - (c) the responsibilities of either de facto partner to support any other person;
 - (d) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.
- (3) The matters listed in section 3.8(2) must only be considered for the period until-
- (a) the child in section 3.8(1)(i) reaches 12 years;
 - (b) the child in section 3.8(1)(ii) reaches 16 years; or
 - (c) the shorter of the following periods -
 - (i) 3 years from the making of the order under section 3.7(1); or
 - (ii) 4 years from the day the de factos ceased, or last ceased, living together,
- whichever period is longest.

3.9 Adjournment of application - likelihood of significant change in circumstances (s.21 NSW; s.286 Vic; s.19 NT)

- (1) A court may adjourn an application by a sharer for an order to adjust interests with respect to the property of one or more of the sharers, if the court is of the opinion -
 - (a) that there is likely to be significant change in the financial circumstances of one or more of the sharers and that it is reasonable to adjourn the proceedings having regard to the time when that change is likely to take place; and
 - (b) that an order that the court could make with respect to the property if that significant change in financial circumstances occurs is more likely to do justice between the sharers than an order that the court could make immediately.
- (2) The court may adjourn the application -
 - (a) at the request of either sharer, and
 - (b) until any time, before the end of a period specified by the court, that the sharer requesting the adjournment applies for the application to be determined.
- (3) Before a court adjourns an application it may make any order that it considers appropriate with respect to the property.
- (4) In forming an opinion as to whether there is likely to be significant change in the financial circumstances of one or more of the sharers a court may have regard to any change in the financial circumstances of a sharer that may occur because of a financial resource of one or more of sharers being vested in or used for the purposes of one or more of sharers.
- (5) Nothing in this section -
 - (a) limits the power of the court to grant an adjournment in relation to any proceedings before it; or
 - (b) requires the court to adjourn any application in any particular circumstances; or
 - (c) limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of one or both of the sharers.

3.10 Adjournment of application - proceedings in Family Court of Australia (s.22 NSW; s.287 Vic; s.20 NT)

- (1) If proceedings in relation to the property of one or more of sharers are commenced in the Family Court of Australia at any time before a court has made a final order to adjust interests with respect to the property of one or more of sharers the court may adjourn its hearing.
- (2) If the hearing of the application has been adjourned, the applicant for the order may apply to the court for the hearing to proceed if the proceedings in the Family Court are delayed.
- (3) Nothing in this section limits the power of the court to grant or refuse an adjournment in relation to any proceedings before it.

3.11 Deferment of order (s.23 NSW; s.288 Vic; s.21 NT)

If a court is of the opinion that a sharer is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order made under section 3.7 the court may defer the operation of the order until the date of the occurrence of the event specified in the order.

3.12 Effect of death of party on application (s.24 NSW; s.289 Vic; s.22 NT)

- (1) If either party to the application dies before an application under section 3.7 is determined, the application may be continued by or against, the legal personal representative of the deceased party.
- (2) A court may make an order if it is of the opinion -
 - (a) that it would have adjusted interests in respect of property if the deceased party had not died; and
 - (b) that, notwithstanding the death of the deceased party, it is still appropriate to adjust those interests.
- (3) The order may be enforced on behalf of, or against the estate of the deceased party.

3.13 Effect of death of party on order (s.25 NSW; s.290 Vic; s.23 NT)

If a party to an application under section 3.7 dies after an order is made in favour of or against that party, the order may be enforced by or against the estate of the deceased party.

Division 3 - General**3.14 Powers of the court (s.38 NSW; s.291 Vic; s.36 NT)**

- (1) A court, in exercising its powers under Division 2, may do any one or more of the following -
- (a) order the transfer of property;
 - (b) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;
 - (c) order that any necessary deed or instrument be executed and that documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
 - (d) order payment of a lump sum, whether in one amount or by instalments;
 - (e) order that payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;
 - (f) appoint or remove trustees;
 - (g) make an order or grant an injunction -
 - (i) for the protection of or otherwise relating to the property of one or more of parties to an application; or
 - (ii) to aid enforcement of any other order made in respect of an application;or both;
 - (h) impose terms and conditions;
 - (i) make an order by consent;
 - (j) make any other order or grant any other injunction to do justice.
- (2) A court may, in relation to an application under Division 2 -
- (a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and

- (b) make any order or grant any remedy or relief under Division 2 in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.
- (3) This section does not take away any other power of the court under this or any other Act or any other law.

3.15 Execution of instruments by order of court (s.39 NSW; s.293 Vic; s.37 NT)

- (1) If -
 - (a) a person has refused or neglected to comply with an order directing the person to execute a deed or instrument; or
 - (b) for any other reason, a court thinks it necessary to exercise the powers conferred on it under this subsection -

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

- (2) The execution of the deed or instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.
- (3) A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

3.16 Orders and injunctions in the absence of a party (s.40 NSW; s.293 Vic; s.38 NT)

- (1) In the case of urgency, a court in the absence of a party may make an order or grant an injunction for either or both of the purposes specified in section 3.14(1)(g).
- (2) An application under this section may be made orally or in writing or in any form the court considers appropriate.
- (3) If an application under this section is not made in writing, the court must not make an order or grant an injunction unless it considers that it is necessary to do so because of the extreme urgency of the case.

- (4) The court may give any directions with respect to the filing, serving and further hearing of a written application.
- (5) An order or injunction must be expressed to operate or apply only until a specified time or the further order of the court.
- (6) The court may give directions with respect to -
 - (a) the service of the order of injunction and any other documents it thinks fit; and
 - (b) the hearing of an application for a further order.

3.17 Variation and setting aside of orders (s.41 NSW; s.294 Vic; s.39 NT)

If, on the application of a person in respect of whom an order under section 3.7 has been made, a court is satisfied that -

- (a) there has been a miscarriage of justice by the reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
- (b) in the 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
- (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order -

the court may vary or set the order aside and, if it thinks fit, make a substitute order in accordance with Division 2.

3.18 Transactions to defeat claims (s. 42 NSW; s.295 Vic; s.40 NT)

- (1) In this section "disposition" includes a sale and a gift.
- (2) On an application for an order under Division 2 a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application or which, irrespective of intention, is likely to defeat any such order.

- (3) The court may, without limiting section 3.14, order that any property dealt with by an instrument or disposition referred to in subsection (2) may be taken in execution or used or applied in, or charged with the payment of any sums payable under an order adjusting interests with respect to the property of one or more of parties or for costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.
- (4) The court may order a party or a person acting in collusion with a party to pay the costs of any other party or of a purchaser in good faith or other person interested of and incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.

3.19 Interests of other parties (s.43 NSW; s.296 Vic; s.41 NT)

- (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 bona fide purchaser or any other person.
- (2) A court may order that a person be given notice of the proceedings or be made a party to the proceedings 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.

Part IV - Declaring interests in property

4.1 Declaring interests in property (s.8 NSW; s.278 Vic; s.12 NT)

- (1) In proceedings between sharers with respect to existing title or rights in property, a court may declare the title or rights, if any, that a sharer has in that property.
- (2) The court may make orders to give effect to the declaration, including orders about possession.
- (3) An order under this Part is binding on the sharers.

Part V - Cohabitation agreements and separation agreements

5.1 Validity of agreements (ss.45-46 NSW; s.43 NT)

- (1) Sharers may enter into a cohabitation agreement or separation agreement.
- (2) A cohabitation agreement or separation agreement shall be subject to and enforceable in accordance with the law of contract.
- (3) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to -
 - (a) the right to custody or maintenance of;
 - (b) the right of access to; or
 - (c) any other matter relating to -
the children of the parties to the agreements.

5.2 Separation agreement where relationship continues (s.44 NSW; s.44 NT)

Where, in relation to a separation agreement made in contemplation of the termination of their relationship as sharers, the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement shall be deemed to be a cohabitation agreement.

5.3 Effect of agreements in proceedings for adjustment of property rights (s.47 NSW; s.45 NT)

- (1) Where, on an application by a sharer for an order under Part III, a court is satisfied -
 - (a) that there is a cohabitation agreement or separation agreement between the sharers;
 - (b) that the agreement is in writing;
 - (c) that the agreement is signed by the sharer against whom it is sought to be enforced;
 - (d) that each sharer was, before signing the agreement furnished with a certificate in or to the effect of the prescribed form by a

solicitor which states that the solicitor had previously advised that sharer, independently of the other sharer, as to the following matters -

- (i) the effect of the agreement on the rights of the sharer to apply for an order under Part III;
 - (ii) whether or not, at that time, it was to the advantage, financially or otherwise, of that sharer to enter into the agreement;
 - (iii) whether or not, at that time, it was prudent for that sharer to enter into the agreement;
 - (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; and
- (e) that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement.

the court may make an order under Part III, but (except as provided by sections 5.5 and 5.6) shall not make an order which is in any respect inconsistent with the provisions on financial matters in the agreement.

- (2) Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1) (b), (c), (d) or (e), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part III, may have regard to the terms of the cohabitation agreement or separation agreement.
- (3) A court may make an order under this section notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make that order.

5.4 Effect of certain exclusion provisions in agreements (s.48 NSW)

The provisions of a cohabitation agreement or separation agreement may, in proceedings other than an application for an order under Part III, be enforced notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of a court under Part III to make such an order.

5.5 Variation and setting aside of agreements (s.49 NSW; s.46 NT)

- (1) On an application by a sharer for an order under Part III, a court may, in the circumstances specified in this section, vary or set aside all or any of the provisions relating to financial matters in a cohabitation agreement made between the sharers, being a cohabitation agreement which satisfies the matters referred to in section 5.3 (1) (b), (c), (d) and (e).
- (2) The court may exercise its power under subsection (1) in respect of cohabitation agreement only if circumstances of the sharers have so changed since the time that the agreement was entered into that it would lead to serious injustice if all or any of the provisions of the agreement were whether on the application for the order under any, other Act or any other law, to be enforced.
- (3) A court may, exercise its power under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement.

5.6 Effect of revocation or cessation of agreements (s.50 NSW; s.47 NT)

On an application by a sharer for an order under Part III, a court is not required to give effect to the terms of a cohabitation agreement or separation agreement entered into by the sharer where the court is of the opinion -

- (a) that the sharers 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.

5.7 Effect of death of sharer - transfer of property and lump sum payments (s.52 NSW; s.49 NT)

Except in so far as a cohabitation agreement or separation agreement otherwise provides, the provision of such an agreement entered into by sharers relating to property and lump sum payments may, on the death of one of the sharers, be enforced on behalf of, or against, as the case may be, the estate of the deceased sharer.

Part VI - Miscellaneous**6.1 Enforcement of orders and injunctions (s.59 NSW; s.301 Vic; s.42 NT)**

- (1) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act, the court may -
 - (a) order the person to pay a fine not exceeding \$10 000;
 - (b) require the person to enter into a recognisance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such a recognisance or until the expiration of 3 months, whichever first occurs;
 - (c) order the person to deliver up to the court such documents as the court thinks fit; and
 - (d) make any other orders that the court considers necessary to enforce compliance with the order or injunction.
- (2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.
- (3) Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.

6.2 Rules of court (s.60 NSW)

- (1) For the purpose of regulating any proceedings under this Act in or before the Magistrates, District or Supreme Courts, rules of court may be made under the Magistrates Courts Act 1921, District Courts Act 1967 and Supreme Court Act 1921, respectively, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Subsection (1) does not limit the rule-making powers conferred by the Magistrates Courts Act 1921, District Courts Act 1967 and the Supreme Court Act 1921.

6.3 Declaration as to existence of de facto relationship (s.56 NSW; ss.10 & 11 NT)

- (1) A person who alleges that a de facto relationship exists or has existed between the person and another named person or between 2 named persons may apply to the Supreme Court for a declaration as to the existence of a de facto relationship between the persons.
- (2) If, on an application under subsection (1), it is proved to the satisfaction of the Court that a de facto relationship exists or has existed, the Court may make a declaration (which shall have effect as a judgment of the Court) that persons named in the declaration have or have had a de facto relationship.
- (3) Where the Court makes a declaration under subsection (2), it shall state in its declaration that -
 - (a) the de facto relationship existed as at a date specified in the declaration; or
 - (b) the de facto relationship existed between dates specified in the declaration,
 or both.
- (4) Where any person whose interests would, in the opinion of the Court, be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application under subsection (1), the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.
- (5) A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.
- (6) While a declaration made under subsection (2) remains in force, the persons named in the declaration shall, for all purposes, be presumed conclusively to have had a de facto relationship as at the date specified in the declaration or between the dates so specified, or both, as the case may require.
- (7) Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration, it appears to the Court that new facts or circumstances have arisen that

have not previously been disclosed to the Court and could not by the exercise of reasonable diligence have previously been disclosed to the Court, the Court may make an order annulling the declaration, and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.

- (8) Where any person whose interests would, in the opinion of the Court, be affected by the making of an order under subsection (7) is not present or represented and has not been given an opportunity to be present or represented, at the hearing of an application made under that subsection, the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.
- (9) Where the Court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as that person would have been in if the declaration had not been made.

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