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# Reforms for de facto relationships

“The division of property: rights, obligations and entitlements for de facto relationships including same sex couples”

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## INTRODUCTION

### **REFORMS FOR DE FACTO RELATIONSHIPS – THE DIVISION OF PROPERTY: RIGHTS, OBLIGATIONS AND ENTITLEMENTS FOR DE FACTO RELATIONSHIPS INCLUDING SAME SEX COUPLES**

Reforms passed by the Victorian Parliament in April 2008 will, in many ways, bring de facto relationships, including those of same sex couples, into line with marriage relationships. It represents a dramatic change to the law. Following the commencement of the new State law in Victoria on 1 December 2008 de facto relationships will be called “domestic partner relationships”.

As part of the reforms introduced by the Relationships Act 2008 (Victoria), same sex and de facto couples are able to formally register their relationship. Registration will prevent parties from denying the existence of a relationship if it breaks down and the need to distribute property or seek maintenance.

Relationship agreements will mainly deal with financial and property matters between de facto partners after separation but can be made either in contemplation of entering into a relationship or as a consequence of it ending. Relationship agreements entered into prior to the commencement of a relationship will be similar to pre-nuptial agreements for parties contemplating marriage.

The new Victorian Act makes provision for the division of property between de facto partners after separation and, in certain circumstances, the payment of spousal maintenance. Property settlement and spousal maintenance rights of de facto partners who separate and who are not already involved in legal proceedings will become similar to those of married couples. De facto spouses who have restricted their careers to be primary homemakers will almost certainly be treated more generously than currently.

Furthermore, amendments to the Family Law Act have now commenced on 1 March 2009 whereby the entitlements of de facto partners are closely aligned to those of married couples, including the provision for spousal maintenance, superannuation splitting orders and binding financial agreements.

## DE FACTO STATUS – STATE OF A NATION

Domestic (De Facto) Relationships Including Same Sex Couples

	STATE (VIC)	COMMONWEALTH
<b>Previous Law</b>	<b>Property Law Act 1958 (Vic)</b>  Property – assessment by contribution only <ul style="list-style-type: none"> <li>▪ No spousal maintenance</li> <li>▪ No super splitting</li> <li>▪ No financial agreement</li> <li>▪ State Courts</li> </ul>	<b>Family Law Act 1975 (Children Only)</b>  Federal Magistrates' Court, Family Court and State Magistrates' Courts.
	↓	↓
<b>New Law</b>	<b>Relationships Act 2008 (Vic)</b> <ul style="list-style-type: none"> <li>▪ Registered relationship</li> <li>▪ Property – assessed by contribution <u>and future needs</u></li> <li>▪ Spousal maintenance</li> <li>▪ Relationship agreements</li> <li>▪ <b>No</b> super splitting</li> </ul> <b>Commencement date</b> <b>1 December 2008</b>	<b>Family Law Amendment (De facto financial matters and other measures Act 2008 (C'th))</b> <ul style="list-style-type: none"> <li>▪ Property distribution – assessed by contributions and future needs</li> <li>▪ Spousal maintenance</li> <li>▪ Third parties</li> <li>▪ Binding financial agreements</li> <li>▪ Super splitting</li> </ul> <b>Commencement date</b> <b>1 March 2009</b>

### STATE LAW – VICTORIA

The property settlement entitlements of de facto couples, whether heterosexual or same sex, are currently dealt with under legislation the Relationships Act 2008 or under the Common Law.

#### Previous Property Law Act (Vic) distribution - Who got what - a three step process

- ▶ Step 1 - Identify the asset pool
- ▶ Step 2 - An assessment of entitlements based solely on contributions:
  - ▶ financial and non-financial
  - ▶ direct and indirect
  - ▶ as homemaker and parent
- ▶ Step 3 - Have regard to any written agreement entered into by the domestic partners.

## COMMON LAW

### ▶ Resulting trust

If parties who are not married to each other purchase a property together, then, regardless of the legal title, equity presumes that they hold their legal interest on a resulting trust in accordance with their respective contributions to the purchase price.

### ▶ Constructive trust

This requires proof of a common intention that the claimant has an interest in the property in question and also that the claimant has acted to his or her detriment in reliance on that intention.

### ▶ Equitable estoppel (equity of acquiescence)

Where a party has by representation (express or implied) induced another to believe a state of affairs (ie. that they have or will have an interest in a property) and in reliance on that assumption the other party has acted to their detriment.

## PROBLEMS UNDER THE OLD STATE LAW

- ▶ No assessment of the parties' respective future needs.
- ▶ No provision for spousal maintenance.
- ▶ No ability to split superannuation.
- ▶ No legislative framework around "any written agreement" between the parties.
- ▶ Cohabitation agreements are merely a factor to be taken into account.
- ▶ Children's matters are dealt with in a different jurisdiction.
- ▶ No capacity to bind third parties.
- ▶ Different rights of de facto parties between State legislation.
- ▶ Common law claims involve significant burdens of proof and cost.

## NEW STATE REFORM IN VICTORIA

### RELATIONSHIPS ACT 2008 (VICTORIA)

- ▶ Commenced 1 December 2008.
- ▶ Repeals Part IX of the Property Law Act 1958.
- ▶ Its purpose is to :
  - ▶ establish a register for the voluntary registration of domestic relationships
  - ▶ provide for relationship agreements
  - ▶ provide for adjustment of property interests
  - ▶ provide for rights of domestic partners to maintenance
  - ▶ define domestic relationships

### Registration of Domestic Relationships

- ▶ Between two adults irrespective of gender where either or both provides personal or financial commitment and support of a domestic nature for the material benefit of the other.
- ▶ Need not be living together.
- ▶ Does not include a relationship in which a person simply provides domestic support and personal care for reward.
- ▶ Parties must live in Victoria and cannot be married or in another relationship that is or could be registered.
- ▶ A party can apply for revocation of registration (a de facto equivalent of divorce).
- ▶ Registration is also revoked by the death of a party or marriage.
- ▶ No grounds are specified but the registrar must revoke registration after ninety days of the lodging of an application.

- ▶ A Court can also order revocation, eg. the conclusion of a settlement of property matters between the parties.

### Relationship agreements by domestic partners

- ▶ Domestic partners can enter into relationship agreements :
  - ▶ in contemplation of their pending domestic relationship
  - ▶ during the relationship
  - ▶ in contemplation of the termination of their domestic relationship
  - ▶ after the termination of their domestic relationship
- ▶ The agreement :
  - ▶ can provide for the both property settlement and maintenance
  - ▶ can deal with the income, property or financial resources of one or both of them
  - ▶ cannot split superannuation
  - ▶ contemplates third parties
  - ▶ is regulated by the laws of contract
  - ▶ can also be set aside on the grounds of fraud or duress
  - ▶ can be varied or set aside by a Court where circumstances have changed and "serious injustice" would arise from enforcing the agreement
- ▶ A Court must comply with the terms of a relationship agreement provided :
  - ▶ agreement is in writing
  - ▶ agreement is signed
  - ▶ each partner was given a legal practitioner's certificate before signing
- ▶ The legal practitioner's certificate must be signed, and confirm having given independent legal advice as to :
  - ▶ the effect of the agreement
  - ▶ the advantages and disadvantages of the agreement at the time of the advice

### Property settlement / maintenance – general requirements

- ▶ A domestic partner :
  - ▶ can apply for property settlement or maintenance or both
  - ▶ can make application as of right if the relationship is a registered domestic relationship
- ▶ If not in a registered domestic relationship the following jurisdictional preconditions apply :
  - ▶ one of the parties must be living in Victoria; and
  - ▶ both partners must have lived in Victoria for at least one third of the period of their relationship, or
  - ▶ the applicant must have made substantial contributions in Victoria;
  - ▶ the parties "lived together" for a period of at least two years; or
  - ▶ there is a child of the relationship or there is a child accepted by the parties "as one of the family".
- ▶ The application must be made within two years after the relationship ends unless the refusal to make a later order would result in a "serious injustice" to one of the parties in which event the time may be extended.

### What factors relevant to distribution of Property?

- ▶ Property orders must be "just and equitable" having regard to :
  - ▶ financial and non-financial contributions to acquiring, conserving or improving property or financial resources

- ▶ contributions made to the welfare of the other partner or to the family unit
- ▶ nature and duration of the domestic relationship
- ▶ relevant matters being future needs considerations

### **What factors are relevant to the payment of spousal maintenance?**

- ▶ A Court may make an order for maintenance if satisfied that the applicant is unable to support himself or herself adequately because :
  - ▶ the partner's earning capacity has been adversely affected by the circumstances of the domestic relationship
  - ▶ any other reason arising in whole or part from the circumstances of the domestic relationship
  - ▶ once the threshold issue is determined the relevant considerations are almost identical to the Family Law Act
  - ▶ an application cannot be made if the applicant is in a domestic relationship with another person or has married

### **Court powers**

- ▶ A Court may make orders in property and maintenance proceedings to :
  - ▶ to transfer property
  - ▶ to sell and divide property
  - ▶ for lump sum payments
  - ▶ for periodic payments
  - ▶ to appoint or remove trustees
  - ▶ to grant injunctions

### **Transitional provisions**

- ▶ If there are no orders or proceedings issued under the old Property Law Act then the new Act will apply.

## COMMONWEALTH REFORM

Various States have referred powers in respect to domestic partners and include:

- ▶ New South Wales
- ▶ Queensland
- ▶ Tasmania
- ▶ Victoria

## FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) ACT 2008.

An amending Act commenced on 1 March 2009 and reforms the Commonwealth legislation in respect to domestic partners who reside in those states which have referred their powers and thus become part of the proposed participating jurisdiction.

### The new features of this amending Act are:

- ▶ Creates a "de facto financial cause".
- ▶ De facto couples will be able to access the Family Court and Federal Magistrates Court for proceedings concerning :
  - ▶ property settlement
  - ▶ maintenance
  - ▶ third parties
  - ▶ binding financial agreements
- ▶ Definition of a "de facto relationship" :
  - ▶ applies whether or not the relationship is or was registered under a prescribed law of the State or Territory
  - ▶ includes same sex couples
  - ▶ persons must not be relatives

### In proceedings concerning property settlement and maintenance

- ▶ Either or both parties were ordinarily resident in a participating jurisdiction.
- ▶ Either :
  - ▶ both parties were ordinarily resident during at least a third of the de facto relationship, or
  - ▶ the applicant made substantial contributions (financial or otherwise) to the acquisition, conservation or improvement of property or as a homemaker or parent.

### Which Court?

- ▶ Family Court
- ▶ Federal Magistrates Court.
- ▶ Supreme Court of the Northern Territory or a Court of Summary Jurisdiction of a participating jurisdiction

### Length of the relationship?

- ▶ The period, or the total of the periods of the de facto relationship is at least two years, **OR**
- ▶ There is a child of the de facto relationship, **OR**
- ▶ That :
  - ▶ the applicant made substantial contributions;
  - ▶ a failure to make an order would result in serious injustice to the applicant; or
  - ▶ the relationship is registered under a prescribed law of the State or Territory.

- ▶ Registering a relationship under the Relationship Act (Vic) 2008 will automatically overcome the requirement for a minimum of two years.

### Applications for spousal maintenance

- ▶ Within two years of the end of the relationship.
- ▶ Leave may be granted to apply out of time, or
- ▶ The applicant was at the date of separation unable to support themselves without an income tested pension, allowance or benefit.
- ▶ After the breakdown of a de facto relationship a Court may make such order as it considers proper for the maintenance of one of the parties to the de facto relationship.
- ▶ The relevant matters to be taken into account by the Court replicate precisely the provisions applicable to married couples :
  - ▶ age and state of health
  - ▶ capacity of each of them for gainful employment
  - ▶ commitments necessary to support any child
  - ▶ standard of living that is in all the circumstances reasonable
  - ▶ need to protect a party who wishes to continue that party's role as a parent
  - ▶ financial circumstances surrounding any subsequent cohabitation with another person

### Property settlement

- ▶ Property settlement entitlements mirror precisely section 79(4) of the Family Law Act which applies to married couples.
- ▶ Most importantly it imposes the "future needs" aspect to property settlement entitlements of de facto parties.
- ▶ Property settlements will be determined as follows :
  - ▶ identify and value the asset pool
  - ▶ determine an appropriate division based on contributions financial and non-financial
  - ▶ further adjustment necessary to take account of any disparity in future needs

### Third parties

- ▶ Enables a Court to bind persons other than a party to a marriage to give effect to property settlements.

### Financial agreements

- ▶ Provides for binding financial agreements between parties to a de facto relationship providing for property settlement and/or maintenance issues.
- ▶ Must be ordinarily resident in a participating jurisdiction when they make the agreement.
- ▶ They can be entered into :
  - ▶ before the relationship
  - ▶ during the relationship
  - ▶ after the breakdown of the relationship
- ▶ Another person or persons can be a party to the agreement.
- ▶ No force or effect until a separation declaration is made.
- ▶ Can include agreement regarding child support.
- ▶ Cannot "contract out" of future spouse maintenance entitlements if at the time of the agreement a party was unable to adequately support himself or herself without social security support.
- ▶ Agreement ceases to be binding if parties subsequently marry.
- ▶ Continues and is binding on the Estate if a party dies.
- ▶ Court can however set aside an agreement :

- ▶ fraud including non-disclosure
- ▶ the purpose of defrauding a creditor
- ▶ to defeat the claim of another de facto partner of husband/wife
- ▶ common law principles
- ▶ since the agreement a "material change in circumstances has occurred" relating to the care and responsibility for a child or a party who will otherwise suffer "hardship"
- ▶ a party has engaged in "unconscionable conduct"
- ▶ None of the following is subject to any duty or change under any law of a State or Territory :
  - ▶ the deed or instrument
  - ▶ financial agreement
  - ▶ termination agreement

### **Superannuation Splitting orders or Agreements**

- ▶ Proceedings dealing with a superannuation interest of a party to a de facto relationship.
- ▶ Superannuation agreements are permissible as part of a general financial agreement or as a stand alone agreement.
- ▶ A split of a future superannuation payment only operates if the de facto relationship has broken down at the time the agreement commences to operate.
- ▶ A superannuation agreement included in a financial agreement made in contemplation of a de facto relationship will have no effect until the parties enter into that relationship.
- ▶ There can now be multiple splitting orders in respect of the one interest between successive married partners and de facto partners.

### **Transitional provisions**

- ▶ New provisions do not apply to relationships breaking down before 1 March 2009 being the commencement of the Act.
- ▶ Current State and Territory law will continue to apply after the commencement of the Act to enforce existing orders and in respect of pending proceedings.
- ▶ The Family Law Act amendments will apply to agreements made in contemplation of a de facto relationship.

## **CONSEQUENTIAL AMENDMENTS**

### **Bankruptcy Act 1996**

- ▶ Financial agreements between de facto partners are not maintenance agreements under the Bankruptcy Act.
- ▶ Where a party to a de facto relationship is bankrupt and the trustee is a party the Family Court will acquire jurisdiction with respect to the bankruptcy.

### **Income Tax Assessment Act 1997**

- ▶ CGT rollover relief applies to transfers of assets under a binding agreement between de facto couples.
- ▶ CGT rollover relief now applies to the transfer of an asset reflecting the personal interest of a party to a de facto relationship in a small superannuation fund.

### **OTHER AMENDMENTS (NOT RELATED TO DE FACTOS)**

- ▶ Binding Financial Agreements (BFAs) between spouses can include a third party.
- ▶ BFAs can make provision on other matters beyond those ancillary to property settlement or maintenance issues.
- ▶ BFAs cannot make a third party liable for maintenance.
- ▶ A third party to a BFA is not required to obtain prior legal advice.

- ▶ The court can set an agreement aside where the agreement was entered into for the purpose of defrauding or defeating a creditor of the party.

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