

FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) BILL 2008

COMMENTS AND RECOMMENDATIONS BY THE FAMILY LAW SECTION OF THE LAW COUNCIL OF AUSTRALIA

The Family Law Section of the Law Council of Australia strongly supports the policy objectives of the proposed legislation. However, there are a number of areas where the drafting could be improved to provide greater clarity and to rectify what are largely technical defects which may lead to unintended consequences or unnecessary complications. While not wishing to delay the passage of this legislation – and acknowledging the limitations imposed by the referral of powers by the States - the Family Law Section believes it is important that the provisions in the Bill be carefully examined to ensure clarity, particularly in relation to their impact on arrangements already entered into by de facto couples under current State and Territory laws, to minimise complexity and to ensure that the policy intentions are accurately reflected in this very important legislation. In the limited time and resources available we have identified the following areas for consideration. The Family Law Section is happy to continue working with the Attorney-General's Department and the Parliament to ensure that the legislation is workable and effective.

1. *Restructuring the Family Law Act 1975*

- 1.1 As a result of numerous amendments over the last 30 years the structure and numbering in the *Family Law Act 1975* have become unwieldy and unnecessarily complicated.
- 1.2 The Family Law Section recommends that the Act be renumbered, and its provisions be rearranged in a more logical and accessible form.

2. *Terminology - Binding Financial Agreements*

2.1 The Bill introduces the terminology '*binding financial agreement*' in:

- The heading to section 90A
- Subsection 90DA(1)
- Subsections 90DB(1) and (2); and
- Paragraph 90SM(10)(e).

2.2 In the current provisions of the *Family Law Act 1975* '*binding financial agreement*' is used only in sect 71A in relation to married couples [s71A is the provision which excludes Part VIII where there is a financial agreement].

- 2.3 There is inconsistency in the use of the term '*binding financial agreement*' between the existing provisions of the Act and within the proposed new provisions.
- 2.4 No definition is currently provided for '*binding financial agreement*' in either the current Act or the amendments proposed in the Bill.
- 2.5 The Family Law Section is concerned that the term '*binding financial agreement*' may lead to confusion. With the commencement of the new provisions there will be '*financial agreement*' which relates to married couples and is defined, as well as '*Part VIIIAB financial agreement*' which relates to de facto couples and is also defined, and *ad hoc* references to '*binding financial agreement*' which is not defined.
- 2.6 The Family Law Section recommends that the terminology be defined and used consistently to ensure clarity of meaning.

3. *Terminology – Distribution*

- 3.1 Paragraph (ca) of the definition of matrimonial cause refers to '*proceedings with respect to the property of the parties to the marriage or either of them*'. Paragraph (c) of the definition of '*de facto financial cause*' refers to '*proceedings...with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them*'. The Family Law Section understands that the term '*distribution*' has been imported from the State reference Acts for consistency with the definition of '*financial matters*' in those Acts.
- 3.2 The Family Law Section queries why the term '*distribution*' has not been used in the definitions of '*de facto property settlement or maintenance proceedings*' when it is used in the definitions for '*de facto financial cause*' and '*financial matters*'.
- 3.3 The Family Law Section recommends that the term be used consistently to ensure clarity of meaning.

4. *Terminology – Financial Resources*

- 4.1 The Family Law Section is concerned at the potentially inconsistent use of the words '*financial resources*' in the definitions section. The term does not currently appear in the definition of '*matrimonial cause*'. Whilst paragraph (c) of the definition of '*de facto financial cause*' refers to the distribution of property only, the definition of '*distribution*' refers to property and financial resources. Conversely, the definition of '*de facto property settlement or maintenance proceedings*' refers only to proceedings with respect to the property of the parties. The inconsistency is most stark in the definition of '*financial matters*' where financial resources are only referred to in relation to parties to a de facto relationship and not in relation to parties to a marriage.

4.2 Similarly, the new definitions of '*property*' and '*property settlement proceedings*' do not refer to '*financial resources*' in relation to de facto couples.

4.3 The Family Law Section recommends that the reference to '*financial resources*' be applied consistently. It is noted that there is no definition of '*financial resources*' in section 4. Whilst it is understood that the inclusion of the term '*financial resources*', where it appears in relation to de facto relationships, is intended to reflect the terminology used in the reference of powers legislation, the Family Law Section is concerned that the inconsistent use of '*financial resources*' – and its inconsistent application to married couples and de facto couples - may create unnecessary confusion.

5. *Definition – Spouse Party*

5.1 The proposed new definition of '*spouse party*', which will commence with the other provisions relating to de facto relationships, provides:

(a) *in relation to a financial agreement—a party to the agreement who is a party to the contemplated marriage, marriage or former marriage to which the agreement relates; or*

(b) *in relation to a Part VIIIAB financial agreement—a party to the agreement who is a party to the contemplated de facto relationship or de facto relationship to which the agreement relates.*

5.2 Is it intended that a former de facto partner (unlike a former marriage partner) is excluded from the definition?

6. *Arbitration*

6.1 The Explanatory Memorandum provides that the Bill '*expands the definition of 'section 13E arbitration' in paragraph 10L(2)(a) to apply also to Part VIIIAB proceedings, other than proceedings relating to a Part VIIIAB financial agreement.*

6.2 The Family Law Section queries why Part VIIIA financial agreements have been excluded from '*section 13E arbitration*', when '*financial agreements*' relating to married relationships are included. In respect of married persons, agreements approved under s87 are excluded from the arbitrator's jurisdiction for the very sound reason that they had been approved by a court so only a court should entertain disputes arising in relation to such agreements. This principle has no application to Financial Agreement either under Part VIIIA or VIIIAB.

6.3 The Family Law Section recommends that both classes of agreement be included.

7. Section 90K – Geographical requirement

7.1 The proposed sections 90SD and 90SK contain similar provisions in relation to residence and contribution. The Explanatory Memorandum provides, in relation to s90SK:

'The residence contribution described in paragraph 90SK(1)(b) must be in a State that is a participating jurisdiction when the application was made, however it is not necessary that the State was a participating jurisdiction during the de facto relationship. This allows for residence or contributions to be accumulated for the purpose of paragraph 90SK(1)(b) in a State that referred powers to qualify as a participating jurisdiction after the commencement of the Bill but before the application for an order or declaration was made under sections 90SM or 90SL'.

7.2 The Family Law Section queries what will happen in the circumstances where the contribution was made in a non-referring State if the parties end up living in a referring State?

8. Relationship with State and Territory laws

8.1 Section 90RC(2) expresses the Parliament's intention that the de facto financial provisions are to apply to the exclusion of a State law to the extent that the State law deals with financial matters relating to the breakdown of de facto relationships. The subsection does not refer specifically to participating jurisdictions, nor to the ability of relevant parties to seek relief under the *Family Law Act 1975* – although the 'note' to the subsection sets out an example.

8.2 Section 90RC(3) sets out an exception to the effect that if orders cannot be made in a particular case under the Family Law Act for reasons to do with sections 90SB [length of relationship etc], 90SD [geographical requirement re maintenance] or 90SK [geographical requirement re declaration and alteration of property interests], and there is no binding part VIIIAB Financial Agreement, the State law still applies.

8.3 The Family Law Section is concerned that that drafting of these critical provisions is unsatisfactory and rely too heavily on the note and example to enable them to be understood.

8.4 The Family Law Section recommends that section 90RC be re-drafted to ensure that the precise meaning and intention are clearly articulated in the provisions and not in the supplementary note or example.

9. *Cessation of spousal maintenance*

9.1 The proposed s90SJ provides that a maintenance order ceases to have effect upon:

- The death of the party (s90SJ(1)(a))
- The death of the person liable to make payments under the order (s90SJ(1)(b))
- The marriage of the party, unless in special circumstances a court otherwise orders (s90SJ(2)).

9.2 Similar provisions exist for married couples by virtue of s82 of the *Family Law Act 1975*. However, s82(4) of the Family Law Act provides that a maintenance order ceases on the *re-marriage* of the party (unless a court otherwise orders in special circumstances). The proposed provisions in relation to de facto couples do not specifically provide for maintenance orders to cease if a party re-partners by entering into another de facto relationship.

9.3 This provision is also inconsistent with section 90SI(3)(a) which provides for modification of maintenance orders when a party has entered into '*a stable and continuing de facto relationship*'.

9.4 The Family Law Section recommends that entering a new de facto relationship should be included as a terminating event for spousal maintenance (unless a court otherwise orders in special circumstances) in the same way that re-marriage is a terminating event for married couples.

10. *Part VIIIAB Financial Agreements – geographical requirements*

10. The proposed s90UA provides that a financial agreement under s90UB (before de facto relationship), 90UC (during de facto relationship) and 90UD (after breakdown of de facto relationship) can only be made if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement.

10.2 It is not clear whether the provision as drafted contemplates the requirement that both parties reside in the same participating jurisdiction; or whether they can be in separate jurisdictions; or if it is necessary for only one party to be in a participating jurisdiction.

10.3 While the necessity for a geographical connection under the referring legislation is recognised, the requirement as drafted seems unduly restrictive and confusing. It is not uncommon for parties to reside in different locations before they enter their relationship – and some may not even live in the same country when an agreement is made. Similarly, many parties also relocate soon after separation and before settling financial arrangements.

10.4 The Family Law Section recommends that, subject to the restrictions contained in the power conferred by the referring legislation, and assuming that the geographical connection mandates that at least one party must be resident in a participating jurisdiction when the agreement is made, s90UA be amended to make that clear so as to provide greater flexibility to parties seeking to settle their financial arrangements by binding financial agreement rather than having to go to court to obtain orders.

11. *Financial Agreements – Relationship with other Part VIIIAB Agreements*

11.1 The proposed paragraphs 90UB(1)(b), 90UC(1)(b) and 90UD(1)(b) – which respectively cover agreements before a defacto relationship, during a defacto relationship, or after the breakdown of a defacto relationship – provide:

(b) at the time of the making of the agreement, the parties to the de facto relationship are not the spouse parties to any other binding Part VIIAB financial agreement with respect to any of those matters; and.

11.2 Does this provision prevent a person who may already be a party to a Part VIIIAB agreement from an earlier relationship, from entering into a new Part VIIIAB agreement with a new de facto partner? There is no similar restriction imposed on married couples who make financial agreements under sections 90B, 90C or 90D.

11.3 Further, it is inconsistent with section 4AA(5) which recognises that a party may be in more than one de facto relationship at the same time.

12. *Part VIIIAB Financial Agreements – Non Referring Jurisdictions*

12.1 The Family Law Section believes that further clarity is required in relation to the effect of the proposed amendments on agreements made in non-referring jurisdictions (i.e. Western Australia and South Australia).

12.2 It is noted that, for example, if a non-referring State does not subsequently refer powers, and the parties to a financial agreement remain in those States then the agreement will remain enforceable under the relevant State law and the position of the parties is unaffected by the proposed amendments.

12.3 The proposed s90UE allows for agreements made under the law of a non-referring State to be a Part VIIIAB Financial Agreement under the Family Law Act if, after the execution of the agreement 'the couple's circumstances change' so that sections 90SB, 90SD and 90SK would not prevent them from seeking relief under the Family Law Act. In other words, if a couple have a financial agreement under the non-referring State law and then move from the non-referring State to a participating jurisdiction, once they meet the 'qualification' requirements under the Family Law Act then the agreement will be a Part VIIIAB Financial Agreement.

12.4 The Family Law Section is concerned about these provisions. By way of example:

- What if the parties have moved to a participating jurisdiction, but have not yet lived there for at least one third of the de facto relationship as required by proposed s90SD? The applicant (if proceedings were to be commenced under the Family Law Act absent a Financial Agreement) would then have to establish substantial contributions made in a participating jurisdiction. That could be problematic.
- In those circumstances, where the parties have executed a Financial Agreement under the State law, then moved to another State but do not 'qualify' under the Family Law Act, their Financial Agreement will not be binding under the Family Law Act, but they will not be able to commence proceedings under the Family Law Act as if there was no Financial Agreement.
- Is the Financial Agreement executed in the non-referring State still enforceable in that State – would this depend on the drafting of any 'applicable law' or similar clauses in the individual agreement?
- Even if the Financial Agreement is not enforceable in the non-referring State the parties may not be able to commence proceedings in that State as they may no longer meet the residence requirements required under the State law.

12.5 The Family Law Section recommends that further work be undertaken to bring greater clarity to the provisions in relation to agreements made in non-referring States if parties move to participating jurisdictions.

14. *Separation Declaration – Declaration Time*

14.1 The Explanatory Memorandum provides that the proposed s90UF replicates the anti-avoidance effect of s90DA of the Family Law Act in relation to Part VIIIA financial agreements (for married couples). Subsection 90UF(6) provides that '*declaration time means the time when the declaration was signed by a spouse party to the Part VIIIAB financial agreement (or last signed by a spouse party to the agreement, if both spouse parties to the agreement have signed)*'.

14.2 The Family Law Section is concerned that this provision, while acknowledging that it replicates a current provision in the Family Law Act, does not make much legal sense, and that the '*declaration time*' should simply be measured from the time that the declaration is first signed by one of the spouse parties, noting that the signature of one party is sufficient.

14.3 The Family Law Section recommends that the proposed subsection 90UF(6) be redrafted to this effect. A similar amendment should be made to the current subsection 90DA(5) of the Family Law Act.