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**SUBMISSION ON THE FAMILY LAW AMENDMENT
(DE FACTO FINANCIAL MATTERS AND OTHER
MEASURES) BILL 2008**

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FAMILY ISSUES COMMITTEE

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LAW SOCIETY OF NSW SUBMISSION

Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

General comments

The general structure of the bill is not user friendly. At the risk of there being some repetition it would be easier for users if there was a separate division containing the provisions relating to de facto matters in one place. It may also be an opportunity to renumber the *Family Law Act* ("the *FLA*") to avoid having numbers which have triple letters after them.

Definitions - sections 1 to 27

Item 1 to 27 - The significant definitions here do not depart substantially from those found in the *Property (Relationships) Act 1984* ("the *PRA*"). The circumstances to be considered in determining if persons have a relationship as a couple are similar, word for word in many instances, with those set out in section 4 of the *PRA* with the addition of a criteria relating to whether the relationship is registered. Similarly no particular finding is required in relation to any particular one of the circumstances listed when the court decides whether the persons have a de facto relationship. The court has a significant discretion. This is consistent with the *PRA*. The Family Issues Committee supports this approach.

The *PRA* enables family members (eg. siblings; parents and children; etc) to enter into Domestic Relationship Agreements or Termination Agreements and to seek orders for property adjustment. If the *PRA* no longer applies, such parties are not covered by the new Act. The committee hopes that the *PRA* will continue to cover these types of relationships.

Jurisdiction - sections 28 to 50

s39A addresses instituting proceedings. It does not have the same residence requirements as s39 in that there is no domicile requirement and a party does not need to be ordinarily resident for 12 months before the application. However, as there are other geographical requirements that will avoid any uncertainty that this provision alone may have otherwise created.

Section 45 adds a new sub-section after s79 (10) (a) giving a de facto partner of a party to a marriage the right to become a party in proceedings between the party to a marriage and his or her spouse.

Section 49 adds a new sub-section after s90K(1)(aa) which provides a new ground for setting aside a financial agreement being if the agreement was entered into for a purpose which included defrauding a person who is a party to a de facto relationship with the spouse party.

Part VIIIAB financial matters relating to de facto relationships

S90RA defines participating jurisdictions. Each referring state and the territories are participating jurisdictions. It makes it clear that a state is not a referring state if it only refers a limited class of matters (this is clearly a reference to Western Australia).

The Family Issues Committee welcomes the inclusion of s90RB which defines a child of a de facto relationship and makes specific reference to s60H(1) applying to same sex relationships. This in line with the recent amendments introduced by the NSW Government to the *Status of Children Act* and the *Births, Deaths and Marriages Registration Act*.

S90RC deals with the relationships with State and Territory laws. Generally the intention is that the federal law prevails over state and territory law. Presumably this is intended to avoid parties forum shopping. The section provides a few examples as to how it will operate. A couple enters into a financial agreement pursuant to the laws of a non-referring state early in their relationship. They spend enough of the later part of their relationship in a participating jurisdiction to for the federal provisions to apply. Consequently their agreement is not enforceable under state law but is enforceable as a Part VIIIAB agreement.

The Family Issues Committee is concerned about the potential impact of this section on the validity of agreements made before the commencement of this Bill. Many parties have entered into agreements pursuant to the requirements of the *PRA* which include the requirement that each party received independent legal advice before entering into the agreement. Those agreements should remain enforceable under state law as would have been contemplated by the parties at the time of entering into those agreements.

The difficulty with s90RC turning agreements made under non-referring states to agreements under Part VIIIAB later is that potentially very different provisions applied to that state agreement. How will these differences be applied under Part VIIIAB?

S90SB this deals with the length of the relationship. Parties must have been a de facto relationship for 2 years unless there is a child or the applicant has made substantial contributions. The wording of s90SB(1) "that the period or the total periods of the de facto relationship ..." will avoid the problems that have occurred in cases under the *PRA* about whether relationships with a break should be considered to separate de facto

relationships or the aggregated periods should count as a single relationship.

S90SD sets out the geographical requirements in relation to maintenance. Either or both parties must be ordinarily resident in participating jurisdiction when the application is made and that either both parties were ordinarily resident of the for a least a third of the relationship (it does not matter if the state was a participating jurisdiction at the time or not) or the applicant made substantial contributions. This is similar to s15 of *PRA*. However the Family Issues Committee is concerned that the reference to one third rather than a substantial period may lead to situations where parties are unable to avail themselves of this legislation because of their relationship being conducted across several states. People have become increasingly mobile. By referring to a substantial period rather than a set period the Court still has a discretion.

S90UA provides for the geographical requirement for agreements made in participating jurisdictions. The parties must be ordinarily resident in a participating jurisdiction when they make the agreement.

Subdivision B - Maintenance - Part VIIIAB 90Sa to 90SJ

Part VIIIAB Division 2 - Maintenance, declarations of property interests and alterations of property interests

The legislation will radically depart from the *PRA* in that the concept of "no general right to maintenance" (s26 *PRA*) and the "requirements" to make an order, eg- of a child being under 12 or handicapped child under 16 etc (see s27 *PRA*) are all abolished. In place of that scheme, maintenance matters for de facto partners will now largely mirror the matters set out in *FLA*.

90SA - Division does not apply to certain matters

The division will NOT apply re maintenance or property matters if there is a BFA under Part VIIIAB that binds the parties.

However, that exclusion does not apply to proceedings between a de facto partner and a bankruptcy trustee.

A de facto partner may still bring proceedings if the BFA is not binding on them.

90SB - When the Division applies

Court may make order under ss 90SE (power to make order), 90SG (urgent maintenance), 90SM (alteration of property interests) and 90SL (declaration of interests in property) only if:

- o De facto relationship is at least 2 years; or

- o there is a child; or
- o there have been substantial contributions by a party, AND
- o there would otherwise be a serious injustice; or
- o the relationship is otherwise registered under a law of state/territory.

This essentially repeats the existing s17 PRA, but adds the concept of "registration" of a relationship.

90SC - Section does not apply on marriage

The division will not apply if the de facto parties marry. However, prior orders/declarations/injunctions that were made in this division previously may be enforced or varied. If they are aside, another can be made in substitution.

90SD - Geographic requirement

For an order to be made under 90SE or 90SG, either or both parties were ordinarily resident in participating jurisdiction when the application for the order was made, AND both parties were ordinarily resident for at least one third of the relationship OR there must have been "substantial contributions" by the applicant.

This essentially mirrors s15 PRA.

90SE - Power of Court in maintenance proceedings

After the breakdown of the relationship, a court may make an order for maintenance for a party to a de facto relationship "as it considers proper".

The court must join any bankruptcy trustee or trustee of personal insolvency agreement if certain conditions are satisfied.

The provisions in relation to maintenance essentially mirror the provisions in the FLA in relation to the matters to be taken into account, urgent maintenance, modification and cessation of maintenance orders.

Subdivision C - declarations and alteration of property interests

The property settlement provisions are largely mirrored on the existing provisions which apply to parties to a marriage. There are some additional provisions which deal with the concurrent determination of proceedings where a party to a marriage is also a party to a de facto relationship that has broken down. The determination of the latter cases will be novel, at least for an initial period of time. It is noted that the drafting of these sections does not attempt to establish any criteria by which the Court determines the priority between a de facto property settlement claim and ceremonial marriage claim, whether based on the nature of the relationship, the length of the relationship or marriage, or the

date of separation in either case. It is implicit in the drafting of these provisions that the legislature intends to leave it to the Courts to develop precedents and principles to guide the determination of just and equitable outcomes in such disputes.

It is noted that subsection (9) of section 90SM replicates section 79(9) of the existing Act which provides that the Family Court (or a Family Court of a State) must not make an order in property settlement proceedings (other than an interim order or a final order made by consent) unless the parties to the proceedings have attended a conciliation conference with a Registrar or Deputy Registrar or unless the Court is satisfied that there is some need to make an order urgently and it is appropriate to make the order or alternatively that it is not practicable to require the party to attend such a conference. It is suggested that rather than prescribing the conciliation conferences in the Act, this draft provision and subsection 79(9) of the Act could be amended to provide that the Courts exercising jurisdiction under the Act may make rules of Court which allow for parties to proceedings to be directed to a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar or such other confidential dispute resolution procedures as the case management procedures of the Court may include.

In relation to s90ST Duty of Court to end Financial Relations, there is a strong argument that the section is superfluous. Family Law academics have long doubted the public policy basis and need for s81 Duty of Court to end Financial Relations under the existing Act which is drafted in the following terms:

Section 81

In proceedings under this part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the Court shall, as far as practicable, make such orders as will finally determine the financial relationship between the parties to the marriage and avoid further proceedings between them.

S81 does not fetter the exercise of the Court's discretion under the existing Act to adjourn proceedings under section 79(5) where in property settlement proceedings a Court is of the opinion that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings.

S90ST of the Bill (and s81 of the existing Act) would have greater meaning if the words in italics (below) were added to the draft section:

Section 90ST

In proceedings under this division, other than proceedings under s90SL, the Court must, as far as practicable, *when making a final order determining the issues between the parties* make such orders as will finally determine the financial relationship between the parties to the de facto relationship and avoid further proceedings between them.

Overall, the reform proposed by the de facto property settlement provisions is consistent with the changes in attitudes within the community reflected in the viewpoint that the law should treat the economic consequences of the breakdown of de facto opposite sex relationships and same sex relationships in the same way as the economic consequences of the breakdown of marital relationships. (See the NSW Law Reform Commission Report 113 (2006) at page 192, including its use of questionnaires and focus groups to measure community attitudes.)

Division 4 and Schedule 2 - financial agreements

s90UA contains the geographical requirement - spouse parties can only enter into an agreement if they are ordinarily resident in a participating jurisdiction when they make the agreement.

It is noteworthy that the Bill contains no equivalent provision to s44(2) of the PRA - ie s 44(2) relates to termination agreements only qualifying as a "domestic relationship agreement if the relationship is not terminated within 3 months after the agreement was made".

Section 90UB (2) (ii): of the Bill expands the definition of "financial matters" in section 44 of the PRA by elaborating on the meaning of "financial resources" to include "financial resources; of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed.

The inclusion of s 90UH in the Bill (Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children) and absent from the PRA is consistent with the FLA. Similarly there are other inclusions which are not contained in the PRA.

Notably the Bill has incorporated and where applicable replicated the provisions contained in the FLA. The inclusion of provisions which recognise the rights and interests of creditors and superannuation interests in s90UM and the provisions of s90UJ (When financial agreements are binding) are notable examples albeit the transitional provisions in relation to existing agreements cannot be ignored.

The consistency in approach is endorsed.

Section 90UL Termination of financial agreement: subsection (1) (b) of Section 90UL of the 2008 Bill, again places emphases on making a written agreement that terminates the initial financial agreement, which is contrast to section 50(a) of the PRA which states that "the parties to the relationship have, by their words or conduct, revoked or consented to the revocation of the agreement."

Additionally, subsection (3) of section 90UL of the 2008 Bill recognises the rights of "interested persons".

Section 90UM Circumstances in which court may set aside a financial agreement or termination agreement: you will find that this section of the 2008 Bill is a lot more comprehensive than s41 of the PRA (Variation and setting aside of orders). There are notable inclusions, namely the recognitions of the rights and interests of creditors in subsection (1) (b) of section 90UM. S49 of the PRA limits the court's power to vary the terms of a domestic relationships agreement but not a termination agreement. Another significant inclusion are subsections (1) (i) - (k) that look at superannuation interest.

S90UJ deals with when an agreement is binding it is phrased in the same terms as s90G of the FLA which means *Black and Black* will apply.

It is then necessary to turn to the transitional provisions in relation to the existing agreements.

Part 2 Transitional provisions - Division 3 deals with de facto relationships linked to earlier participating jurisdictions.

Section 87 (d) (iii) deals with pre-commencement agreements made in contemplation of de facto relationships (i.e. agreements made before commencement by couples contemplating entering into a de facto relationship. The words at the end of that Clause "with one or more other people" are inconsistent with the wording of Clause (i) (a) where reference is made to "2 people (the couple)".

This Clause in its current form implies that, an agreement between a de facto couple can be made "with one or more other people" which makes no sense.

Section 87 (3) deals with "eligible agreed matters" (i.e. how property, financial resources and matters incidental to same; and maintenance of either party) is dealt with upon the breakdown of the de facto relationship, in respect to agreements covered in s87. For consistency and clarity the words "eligible agreed" should be inserted in between the words "the" and "matters" so that the beginning of sub-section (3) reads "The eligible agreed matters referred to in paragraph (a) of sub-item (1) are the following:"

This way it is consistent with the description of "eligible agreed matters" set out in sub-section (1) (a).

Section 88 (1) refers to pre-commencement agreements which applies to agreements made before commencement whilst in a de facto relationship. The same comments apply to this section as set out above, in respect to Section 87 (d) (iii) which sets out the same provisions.

Section 88 (3) deals with "eligible agreed matters" in respect to agreements covered in section 88. The same comments apply to this section as set out above regarding Section 87 (3) which sets out the same provisions.

Division 4 deals with de facto relationships linked to later participating jurisdictions.

Section 89 makes provisions setting out when this division applies and set out some examples in the notes. The section is somewhat unclear if read without the notes. The application of this section could be clarified if part of the "Note" immediately following this section was amended so as to form part of the section. That is, the first sentence of the first "Note" following this section, could form part of the section.

Section 90 deals with de facto relationships which break down before transition time for a later participating jurisdiction and states that Parts VIIIAB and VIII B of the New Act does not extend to the de facto relationship if it broke down before the transition time for the State.

Section 91 (1) refers to pre-transition time agreements which applies to agreements made before commencement in contemplation of entering into a de facto relationship. The same comments apply to this section as set out above, in respect to Section 87 (d) (iii) which sets out the same provisions.

Section 91 (3) deals with "eligible agreed matters" in respect to agreements covered in section 91. The same comments apply to this section as set out above regarding Section 87 (3) which sets out the same provisions.

Section 92 (1) refers to pre-transition time agreements which applies to agreements made before commencement by couples who are already in a de facto relationship. The same comments apply to this section as set out above, in respect to Section 87 (d) (iii) which sets out the same provisions.

Section 92 (3) deals with "eligible agreed matters" in respect to agreements covered in section 92. The same comments apply to this section as set out above regarding Section 87 (3) which sets out the same provisions.

Division 5 deals with the application of the new Act to transitioning agreements.

Section 93 (1) deals with how the new Act applies to agreements covered by sections 87, 88, 91 and 92 and refers to how Sections 90UA to 90UM are relevant.

These provisions are somewhat unclear and re-wording same so that the intention of legislature is clarified would assist in minimizing disputes over such matters.

It is of concern to the Committee that the aim of these provisions appears to be to treat financial agreements made under state laws of participating jurisdictions before the introduction of this bill as agreements made under this bill. This does not recognise the fact that different provisions applied to these agreements and that there are different grounds for setting aside these agreements.

For example under the PRA there is no equivalent to s75 (2) of the FLA. Will the fact that a s75 (2) equivalent will now apply mean that s90UM (f) could apply as ground for setting it aside.

If these agreements are to be treated as Part VIIIAB agreements and therefore enforceable as such then there should be specific provision to ensure that a party will not be able to set aside the agreement simply because the legislation has changed.

If there is not a provision stating this then there could be a rise in applications seeking to set old agreements aside.

90VA and 51 to 84 and 112AA

90WA dealing with instruments with are not liable to duty - is different but is better and covers what it should.

Paragraph 69 (ss 90MP (5)) refers to subsection 4A which does not seem to exist. Presumably this should refer to subsections 3 and 4.

Paragraph 71 adds to section 90MP a new subsection (10) (as well as others) which introduces a death concept which does not seem to have an equivalent in the Act. There probably should be the same provisions for married couples.

Part 2 Division 1 to Division 5

Section 85 deals with interpretation. In respect to **Commencement** reference to the word "Schedule" would be better if amended so that it reads "Division" or "Act"

Schedule 2

Overall, the amendments logically flow from the introduction of the broader reform (eg extending recognition to proposed Pt VIIIAB financial agreements etc). More specifically, the Bill makes minor amendments to various statutes.

Schedule 3

This schedule makes amendments relating to "financial agreements about marriage".

Overall -

- Part 1 of the schedule clarifies that "other persons can be parties" to financial agreements: see 90B(1)
- While acknowledging that third parties may be parties to financial agreements, any provision that requires a third party to contribute to the maintenance of a "spouse party" during the marriage, is of no force or effect: see s 90DB
- Part 2 makes some changes to the current 'separation declarations' provisions
- Part 3 makes some changes to the definition of 'matrimonial cause'.