SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE FAMILY LAW AMENDMENT
(DE FACTO FINANCIAL MATTERS & OTHER MEASURES) BILL 2008

SUBMISSION OF DR DOROTHY KOVACS, BARRISTER, 19 AUGUST 2008

Law Council of Australia and Victorian Bar support for the objectives of the Bill

1. I am aware that the Victorian Bar, of which I am a practising member, through the Law Council of Australia, supports the objectives of nationally consistent laws covering the consequences of the breakdown of de facto relationships and of exclusive jurisdiction in the Family Court of Australia and Federal Magistrates Court. – that the specialist courts, namely the Family Court of Australia and the Federal Magistrates Court, which already have jurisdiction over ex nuptial children, should also have exclusive jurisdiction over maintenance and property claims and disputes arising out of the breakdown of domestic or de facto relationships.

There has been significant delay already in this legislation being prepared and coming to the Parliament, but that should not lead to passage of this Bill without careful review of the significant practical and policy issues it raises.

2. However, there are significant difficulties with this Bill and, in my submission, the frustrations in further delay should not lead to passage of this Bill which will not achieve the national consistency that is foundational to the reforms sought.

3. For more than 10 years, the Law Council of Australia Family Law Section has been striving, through the Standing Committee of Attorneys-General, to persuade State and Commonwealth authorities to address "the inconsistency and inequities resulting from different de facto regimes in the various States and

Territories" – see the Law Council of Australia 1 August 2008 submission to this Committee referring to the issue first being taken up by the Standing Committee of Attorneys-General at its meeting in April 1998.

4. The State section 51(xxxvii) referral of powers legislation dates back very nearly 5 years to the *Commonwealth Powers (De Facto Relationships) Act* 2003 (NSW) assented to on 23 October 2003, with the Victorian Act a year later – assented to 23 November 2004.

5. It is a matter of significant frustration that with, as I understand the situation, bi-partisan political support; near-unanimous support in the legal profession and legal academy – the Bill that is now before the Parliament and under inquiry by this Committee not only falls short of achieving the national consistency that is the very foundation of all these efforts – but, has the potential of adding another level of complications – with State laws still operating, not only in the non-referring States, but in all States in relation to the registration of domestic relationships, and potentially also in relation to some disputes – which would still be subject to State court jurisdiction.

If the Commonwealth and referring States have legal advice on the Constitutional issues raised by the Bill, such advice should be made public.

6. It is said that both the Commonwealth and the referring States have the highest level of legal advices as to the Constitutional viability of all that is proposed. So far as I am aware, no such advices have been publicly disclosed or reported. The Committee's consideration of the Constitutional issues would, I suggest, be assisted were it able to see and review any such advices.

7. There are, in my opinion, serious issues in relation to the Constitutional imperative that the Bill "extend only to the States by whose Parliaments the matter is referred or which afterwards adopt the law"[1]; and in the Bill covering matters that seem to be beyond the limited powers that have been referred to the Commonwealth by the four States that have made referrals.

Summary of concerns

8. The Bill sets up a framework in which the legal consequences of marriage will be imposed on people who, in some cases, may well have made the conscious, considered and very deliberate decision not to marry. No formal signed-up commitment is required. The Bill provides for the consequences of marriage to be imposed on a retrospective determination.

   (a) There should be some legal framework, other than private contract, for people who wish to make a marriage-like commitment to one another that will carry legal recognition and consequences in situations of both heterosexual and same-sex unions in which, for whatever reason, marriage is not possible or appropriate.

   (b) This Bill does not do that – nor could it, based on the limited section 51(xxxvii) referrals of power to the Commonwealth from the four States that have made referrals.

[1] Constitution section 51(xxxvii).

(c) Rather, proposed section 4AA defines "de facto relationship" by reference to a list of circumstances which includes, but does not require, registration under a prescribed State or Territory law.

(d) It establishes, effectively an after-the-event determination – which, in most cases, will only be made after the relationship has broken down – based on a range of circumstances set out in proposed section 4AA(2).

(e) The bases for determination that there is (or was) a de facto relationship are unavoidably vague and open-ended – see, in particular, proposed sub-sections 4AA(3) & (4):

> 4AA(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether persons have a de facto relationship.
>
> 4AA(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(f) The section 4AA definition is unspecific as to how long a claimed relationship has to have continued – sub-section 4AA(2)(b) merely makes "the duration of the relationship" one of the nine circumstances to which a court is to have regard.

(g) It is only in proposed section 90SB in relation to making an order or declaration that there is a requirement (amongst other alternatives, such as that there is a child of the relationship) that the relationship have lasted "at least 2 years" – and even that is mitigated by being "the period, *or the total of the periods*, of the de facto relationship" (emphasis added).

9. It is not that only signed-up and registered committed relationships should be brought into the Commonwealth *Family Law Act* and exclusive jurisdiction of the Family Court of Australia. The principle that there should be nationally consistent treatment of the parties to de facto relationships, and that there should be exclusive jurisdiction in the specialist Family Court of Australia and Federal Magistrates Court is sound. And such legal framework should extend beyond signed-up and registered de facto relationships. There is a point at which, however conscious, considered and deliberate the decision not to marry and not to sign-up to and register a de facto relationship, the parties should be held to be in-fact in a de facto relationship to which, legal consequences should attach.

10. Rather, the concern is that those sorts of de facto relationships should be differentiated from marriage and a signed-up and registered domestic or de facto relationship.

11. In marriage, and in signed-up and registered domestic or de facto relationships, the legal framework applies and legal consequences flow from the parties' conscious commitment and attach from the moment of that commitment.

12. The retrospective, after-the-event determination based on the very general circumstances in proposed section 4AA (other than the circumstance of registration in proposed sub-section (2)(g)) should be recognised as something different. Nor should the legal framework for registration of domestic or de facto relationships be diminished by that being, as it is in this Bill, nothing more

than one of nine circumstances to which the court may "attach such weight . . . as may seem appropriate to the court in the circumstances of the case".[2]

13. The 2005 amendments that extended the jurisdiction of the Family Court in bankruptcy matters in relation to married couples have caused serious concerns amongst insolvency lawyers and amongst creditors. Bankruptcy practitioners are, I understand, hoping that the new Inspector-General in Bankruptcy, to be appointed shortly, will intervene with the Government to review the 2005 amendments and their application. The extension of this highly problematic jurisdiction to people in de facto relationships – as defined in proposed section 4AA – raises serious concerns. The amendments are already problematic in relation to married couples. Their extension to people in de facto relationships involves much more than the extension of other more general Family Law Act provisions to such persons because of the effects on third parties in the bankruptcy system based on an after-the-event determination that a de facto relationship existed, perhaps years earlier – as distinct from marriage, which is a matter of public record from the very outset.

14. There are Constitutional issues in the Commonwealth legislating without first having section 51(xxxvii) referrals from all the States. Section 51(xxxvii) certainly envisages and provides for references by something less than all States, but requires, in that case, that "the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law". However, the subject matter of this Bill is not capable of being limited to particular referring and adopting States – or, if it is, the measures by way of

[2] Proposed section 4AA(4).

"geographical requirements" in proposed sections 90RG., 90SD, 90SK and 90UA will not effectively limit the law.

15. This Bill effects significant change from existing State laws in relation to what are, in those laws, generally called "domestic partnerships" – in relation to maintenance and property as well as in relation to bankruptcy and trustees and creditors in an insolvency. The Explanatory Memorandum does not indicate consideration, nor does it explain the basis for any policy decisions in relation to this.

16. The Bill appears to go beyond the scope of the referrals of power in the State Acts. Section 51(xxxvii) permits referrals in as wide terms as the referring States wish to make them. However, the Commonwealth is not invested with any more referred power than the State Acts give it.

17. Commonwealth legislation under the Commonwealth's enumerated powers has been upheld on the basis of some connection with the enumerated power – a "close connection", even a "sufficient connection" with the enumerated head of power. So also, in the case of a law said to be supported by a section 51(xxxvii) referral, as is this Bill, there must be a sufficient connection, so that it can be said, that the law is one with respect to the matter referred by the State or States.

18. Several provisions in the Bill appear to be outside the ambit of the terms of the State referrals, including, for example, sub-paragraphs (e), (f) and (g) of the definition of de facto financial causes in proposed section 4(1); and the provisions relating to financial agreements that may be made before a de facto relationship (proposed section 90UB) or during the de facto relationship

(proposed section 90UC) – not only in respect of matters "in the event of the breakdown of the relationship" but also with property and financial resources at the time of the agreement or "at a later time and during the relationship"; and they can involve not only the parties, but "one or more other people (see eg proposed section 90UC(1)); and there are provisions not within the limitation in the State referring Acts in relation to when a de facto relationship breaks down by reason of death (see eg proposed sections (90UK, 90 UM(8) and 4A(1A)).

19. There are also problems in relation to disjunction between State domestic relationships and Commonwealth de facto relationships as defined in this Bill. In the situation of a section 51(xxxvii) referral, the State retains concurrent power over the matter referred with the Commonwealth – subject to inconsistency between the Commonwealth law and any State law (such as where the Commonwealth law is found to cover the field, or where there is direct inconsistency between the Commonwealth law and the State law) – and the State unambiguously retains power – and State legislation continues to operate – in matters outside the referral.

Introduction

20. This Bill is the long awaited endeavour by the Commonwealth to legislate with respect to the financial aspects of "marriage like" relationships. It applies to both heterosexual and same sex unions which are generally referred to under present State legislation as "domestic relationships", but are referred to in the Commonwealth Bill as "de facto relationships"

21. The traditional source of power for the Commonwealth in family law matters is the marriage power [s .51(xxi)], the matrimonial causes power [s. 51 (xxii)] and the incidental power [s. 51 (xxxix)] in the Constitution. These powers do not extend to relationships not based on marriage and the Bill relies on the referral of power by the States e.g. *Skoflec and Baftirovski* 12 Fam LR 55.

22. To date, the referring States are Victoria, New South Wales, Queensland and Tasmania. Western Australia has made a limited referral in relation to superannuation matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships.[3] However, proposed section 90RA(3) explicitly provides that a State is not a "referring State" if its Parliament refers to the Commonwealth only a limited class of matters from those in the section 90RA(2)(a) definition of "referring State".

23. In his second reading speech, the Commonwealth Attorney noted that the Commonwealth will rely on its Constitutional power over the territories to apply the legislation to the ACT, the Northern Territory and Norfolk Island.

24. The Chief Judge of the Family Court of Western Australia says in his 23 July 2008 submission to this Committee that the *Family Court Act* 1977 (WA) "effectively replicates almost all of the property provisions of the *Family Law Act* 1975. Hence parties to de facto marriages [including same sex couples] have much the same rights and obligations as parties to marriages following the

[3] *Commonwealth Powers (De FactoRelationships) Act* 2006 (WA); see also submissions of the Attorney-General for Western Australia (3 July 2008) and the Chief Judge of the Family Court of Western Australia (23 July 2008).

breakdown of their relationships" except in relation to superannuation over which "the State Parliament lacks the necessary constitutional authority".

25. The submissions to this Committee of the Western Australian Family Court Chief Judge and of the Western Australian Attorney-General effectively both ask that the Commonwealth act on that State's referral of powers in relation to superannuation and de facto relationships and seem effectively to claim that, were the Commonwealth to do so, the combination of that with the Western Australian *Family Court Act* 1997 would result in effective uniformity with Commonwealth law in relation to de facto partners being brought into the Family Law and Family Court regime.

26. However, whatever may be said about Western Australia having, except in relation to superannuation, the same framework that this Bill would introduce in other States and in the Territories – the fact remains that South Australia has not made a referral and remains entirely outside the proposed framework; and Western Australia is also excluded from this Bill by proposed section 90RA(3).

27. In other words, the Bill cannot do what is claimed in the Second Reading speech, namely that:

> By providing a consistent and uniform approach for de facto relationships, this Bill will alleviate the administrative and financial burden currently faced by de facto couples as a result of multiple de facto regimes applying across the States and Territories.

Section 51(xxxvii) referrals of power to the Commonwealth

28. The Section 51(xxxvii) Constitutional provision on referrals specifically provides for the possibility that only some States may refer power in its proviso that:

> the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

29. The power of the Commonwealth to legislate in this situation is, however, constitutionally limited to legislation that will "extend only to States by whose Parliaments the matter is referred, or which will afterwards adopt the law".

30. The "geographical requirements" in proposed sections 90RG, 90SD, 90SK and 90UA are presumably intended to address this issue, but will not effectively do so.

31. The only nexus with a referring State in the "geographical requirement" in proposed sections 90SD(1)(b)(i) (maintenance) and 90SK(1)(b)(i) (property) is that "both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship . . . in one or more States or Territories that are participating jurisdictions[4] at the application time".

32. Because proposed section 90SB(a) fixes only a total of the periods of the de facto relationship being at least 2 years,[5] a total of as little as 8 months in a participating jurisdiction is all that is required. And that 8 months may be

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[4] "Participating jurisdiction" is defined in proposed section 90RA. In relation to States, it means no more than that the State has a current referral of power to the Commonwealth under section 51(xxxvii). The different term, "participating jurisdiction" seems to have no other purpose than to cover both the referring States and the Territories – "referral" not applying to the Territories, and they being brought in by the Commonwealth under its enumerated power over the Territories.

[5] "[T]hat the period, or the total of the periods, of the de facto relationship is at least 2 years".

pieced together from much shorter periods with no other connection on the part of either party with a referring State or participating jurisdiction.

33. Then, perhaps years later – after periods totalling 2 years of claimed de facto relationship, and with a further 2 years after the end of the claimed de facto relationship within which (without the need for leave) a party may make a claim,[6] a retrospective determination based on the general circumstances in proposed section 4AA can be made that a de facto relationship existed.

34. Even less nexus with a referring State of participating jurisdiction is required for a declaration under proposed section 90RD. Proposed section 90RG requires nothing more than that one person have been "ordinarily resident in a participating jurisdiction when the primary proceedings commenced".

35. Nor is that one person required to be the person in respect of whom the declaration is sought. That person may have no connection with any referring State or participating jurisdiction.

36. Proposed section 90RD(1)(b) provides simply for a declaration "that a de facto relationship [as defined and constituted by the Bill] existed, or never existed between" "the applicant and *another person*" (emphasis added).

37. The definition of "de facto relationship" in proposed section 4AA has no geographical requirement, element or limitation to participating jurisdictions or referring States; and it allows for multiple de facto relationships:

> 4AA(5) For the purposes of this Act:

[6] Proposed new sub-section 44(5).

> (a) . . . .
>
> (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

38. The Bill seems thus to provide for declarations and orders against people who may have little or no connection with any referring State or participating jurisdiction based on circumstances that may have little or no connection with any referring State or participating jurisdiction.

39. Venue in the Family Court of Australia and in the Federal Magistrates Court being a matter of convenience – *forum conveniens* – the claim could be heard and determined in a non-referring State (and non-participating jurisdiction), and affect people, property and creditors of the parties (because of the 2005 Insolvency and Bankruptcy amendments applying to de facto relationships) in a non-referring State (and non-participating jurisdiction).

40. It is difficult to see how the Bill can be said to meet the Constitutional limitation that it "extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law".[7]

Key Passages in the Explanatory Memorandum Description of the Bill

41. The Explanatory Memorandum ("Explanatory Memorandum") states in the General Outline that:–

> "The primary objective of the Bill is to extend the financial settlement regime under the [*Family Law Act*] to parties to a de facto relationship. This is achieved by conferring jurisdiction on certain courts in 'de facto financial causes' involving parties to de facto relationships and providing a new Part

VIIIAB of the Act (and amendments to existing Parts VIIIAA and VIIIB) to allow the court to make orders in those proceedings covered by the definition of 'de facto financial cause'."

"The Bill provides that a person is in a de facto relationship with another person if they are not married or related to each other by family where, having regard to all the circumstances of the relationship, they have a relationship as a couple living together on a genuine domestic basis."

"Presently the financial arrangements between separated de facto couples are subject to State and Territory law, and these laws vary between jurisdictions. The Bill will offer de facto couples covered by the Bill a nationally consistent financial settlement regime . . . ."

"Also, the Bill will enable one court …. such as the Family Court of Australia or the Federal Magistrates Court to deal in the one proceeding with both financial and child related matters arising between separated de facto couples."

A nationally consistent financial settlement regime for de facto partners is not possible through this Bill

42. Because there has been no section 51(xxxvii) referral from South Australia and only a limited referral from Western Australia – and because the "geographical requirements" in proposed sections 90RG., 90SD, 90SK and 90UA do not effectively limit the law to referring States – a nationally consistent financial regime for de facto partners is not possible through this Bill.

The proposed section 4AA(2) circumstances prescribed as the basis for a determination that a de facto relationship exists or did exist

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[7] Constitution section 51(xxxvii).

43. Section 4AA(2) provides a list of 9 circumstances for a court to consider in determining whether a de facto relationship exists between two persons. The list is familiar to family law practitioners having originally derived from New South Wales case law, e.g. *Roy v Sturgeon* 1986 11 FamLR 271 at 274 which is now replicated in existing State laws, e.g. in Victoria s. 275(2) *Property Law Act* ("PLA").

44. The definition of a "de facto relationship" in s. 4AA encompasses both opposite sex and same sex de facto relationships.

45. Section 4AA(5)(b) makes it clear that a de facto relationship can exist even if one partner is legally married to someone else

The Bill departs from existing State and Territory laws

46. Essentially the Bill proceeds by applying the existing provisions of the *Family Law Act*, including those concerning property settlements, maintenance, financial agreements, bankruptcy and superannuation splitting to parties who are in a de facto relationship as defined in the Bill.

47. In doing so the Commonwealth Parliament has departed from the several existing State and Territory domestic relationship laws which, although not conforming with each other, have the common characteristic that they do <u>not</u> confer upon parties in a domestic relationship the same rights and obligations that Commonwealth laws of marriage and divorce confer upon parties to de jure marriages.

48. Conspicuously, some State jurisdictions base the right to an adjustment of property on proof of contribution alone, e.g. in Victoria (at present[8]) whereas others, e.g. the ACT and South Australia acknowledge in addition to the recognition of contribution such matters as the parties' respective means and needs, their other financial resources and their capacity for employment (referred to as s. 75(2) factors in the *Family Law Act*). Similarly, some States have a limited right of spousal maintenance, whereas others do not have a right of maintenance at all.

49. The different legal rights accorded to de facto partners under State legislation date back to the 1983 Report of New South Wales Law Reform Commission (Report 36) recommendations from which were implemented in the *De Facto Relationships* Act 1984 (NSW)). The NSW Act is the prototype for all of the State laws.

The Bill shifts the law from a recognition of the distinctive status of marriage to the application of the Family Law Act marriage-breakdown framework to de facto relationships as defined in the Bill without there being any discussion or explanation for such a significant policy shift in the Explanatory Memorandum.

50. In deference to the special status of marriage the differences under the State laws are "substantial, conspicuous and deliberate" [see *Powell v Supresencia* (30 FamLR 463 at paragraph 22)]. To move from that position involves a substantial policy shift.

[8] The Victorian *Relationships Act* 2008 will come into operation on 1 December 2008 and effect significant changes.

51. There is no discussion in the Explanatory Memorandum of the reasons for this shift. An obvious response is that it is easier for the one court system (the jurisdiction having been conferred by the Bill on the Family Court and Federal Magistrates' Courts) to administer legal regimes which do not differ depending on whether the relationship in question is a de jure marriage or a de facto relationship. If that is the dominant motivation for the Bill this may be a case of the "tail wagging the dog". The change of legislative policy entails some radical consequences. Some of these are set out below.

There is no discussion or explanation of the significantly wider basis for property orders

52. The power to order a property settlement in proposed s. 90SM incorporates proposed s. 90SF(3). This provision sets out a comprehensive set of some 20-plus considerations (s. 75(2) factors) which are not based on contribution, e.g. "means and needs" consideration and others as well e.g. the "need to protect a party who wishes to continue that party's role as a parent".

53. The adoption of the full range of means and needs considerations in the present *Family Law Act* to all de facto matters is a substantial change even in those jurisdictions, (e.g. in SA and the ACT) which already acknowledge some of those considerations. This will invite applications to the Court by a partner who may not have a strong case on contribution but who has substantial needs and ongoing support requirements.

54. The party in the stronger financial position will now be at risk when they enter into a de facto relationship in which the other party is in a poorer financial

position. Opportunistic claims will be made. One may expect an increase in cases where threshold issues such as the existence and/or duration of a de facto relationship will be a critical issue. Matters that enliven the jurisdiction will be keenly contested, e.g. the requirement of living together, the two year qualifying period and the requirement of the relevant geographical connection (proposed s. 90SD and proposed s. 90SK) with the referring States. The Bill may be indirectly destructive to the existence and/or the survival of stable marriage like relationships because people may plan their living arrangements to prevent it from applying to them.

New rights of spousal maintenance

55. The current State laws do not provide for general right to spousal maintenance between domestic partners. e.g. Section 26 *Property Relationships Act* 1984 (NSW) specifically denies a right of maintenance as between de facto partners. In some States there is a limited right of statutory "spousal" maintenance which can be described as "restorative" in its objective.

56. The current Section 27 of the NSW Act confers a limited right of maintenance on a party who has been rendered economically vulnerable by a de facto relationship. This is a right to short term spousal maintenance where the applicant's need for maintenance arises out of the care of a child under the age of 12 in the usual case (or the age 16 in the case of a handicapped child) or out of a loss of earning capacity which is due to the circumstances of the de facto relationship and where the applicant can establish that an order for maintenance

would increase their earning capacity by enabling them to undertake retraining [see s. 27(1)(a)(b)].

57. The ACT law is similar to the NSW law (ss 18 to 20 *Domestic Relationships Act* 1994 (ACT)).

58. The Northern Territory law provides for different time limits for the duration of a spousal maintenance order depending on whether the basis for the order is the age of a child or a personal needs basis in which case there is a 3 to 4 year time limit (*De Facto Relationships Act* 1991 (NT) ss. 26 to 32).

59. The Tasmanian law (*Relationships Act* 2003 Division 3) confers a broader right than the NSW Act, but requires that the partner's earning capacity has been adversely affected by the circumstances of the personal relationship or other reason arising from the circumstances of the personal relationship.

60. In South Australia, Queensland and Victoria there is currently no right of spousal maintenance. However, the Victorian *Relationships Act* 2008 which comes into operation on 1 December 2008 confers a right of spousal maintenance which is similar to that in the Tasmanian law in that it is potentially unlimited in duration. Section 51 of the Victorian 2008 Act requires that "the applicant is unable to support himself or herself adequately because: (a) the partner's earning capacity has been adversely affected by the circumstances of the domestic relationship; or (b) because of any other reason arising in whole or part from the circumstances of the domestic relationship."

61. The current State laws insofar as they make provision for spousal maintenance confer a restorative right of support. By contrast the Commonwealth Bill in s. 90SF creates a general right of spousal maintenance.

The present Family Law Act provision of what could be life-long maintenance on breakdown of marriage for life entered into voluntarily is very different from its provision in the Bill based on the construct of an after-the-event finding of a de facto relationship as defined in this Bill.

62. The Bill has the effect not only to remedy circumstances occasioned by the relationship itself. It creates a potential life-long financial obligation upon a de facto spouse to support the needy partner.

63. Certainly the death of either party to the order will cause a de facto maintenance order to cease. And the entry into a marriage by the supported party will cause the cessation of the obligation (s. 90SJ). But entry into a subsequent de facto relationship will not necessarily do so (s. 90SJ).

64. That this position exists under the present provisions of the *Family Law Act* where parties have voluntarily entered into a marriage is arguably very different to the case where parties have lived together for a time. Parties often choose not to marry because one or both of them may have wished to avoid the legal obligations of marriage. They may have already experienced a costly divorce and wish to preserve their assets and income for their children. They often live together in a relationship which in fact endures for two years or more but which one or both of them never intended to be a life long commitment.

The marriage relationship begins with marriage and ends with divorce; under this Bill, it may be long after the relationship has ended that a court is first asked

to consider and decide whether there has been a de facto relationship as defined in the Bill.

65. Proceedings under this Bill for property and maintenance may be initiated years after the relationship has ended.

66. Section 44(5) requires a party to obtain leave if an application is not made within two years after the end of the de facto relationship. Under proposed s. 44(6) leave may be granted after the end of that time if the court is satisfied that hardship would otherwise be caused to a party or a child (as very broadly defined in proposed s. 45A) or that an applicant for maintenance orders would not be able to support him or herself without an income tested pension, allowance or benefit.

67. Thus, not only is there a retrospective finding that there was a de facto relationship as defined in the Bill, but it could be years after the events on which the applicant relies as having constituted the de facto relationship that the other party has notice of the claim, and that the court is asked to consider and decide the matter.

Possible transitional problem of acceleration of applications to avoid the Bill

68. The new Act will apply only to relationships which break down after its commencement (Cl. 86 of the Bill). Practitioners may expect an acceleration of applications by parties under the existing State laws to avoid being caught by the proposed Commonwealth legislation.

Far reaching impact on creditors of insolvent parties and bankrupt parties and far reaching effects on the operation of bankruptcy laws

69. The *Bankruptcy & Family Law Legislation Amendment Act* 2005 (Cth) ("the 2005 Act") relies on the marriage power, the matrimonial causes power and the bankruptcy and insolvency power (s. 51(xvii)) and the incidental power in the Constitution.

70. The 2005 Act enables the Family Court and the Federal Magistrates' Court when hearing property or spousal maintenance proceedings under the *Family Law* Act involving a party who is insolvent to award to the other spouse property that would otherwise be vested in a bankruptcy trustee or which is otherwise the subject of a personal insolvency agreement.

71. That property was previously dedicated to meeting the claims of creditors. The 2005 Act made drastic changes to concepts that were the very underpinnings of bankruptcy laws, e.g. to the fundamental notion of vesting of property upon bankruptcy in the Trustee in Bankruptcy in s. 58 of the *Bankruptcy Act* and to the concept of property that is divisible among creditors in s. 116(2) of the *Bankruptcy Act*. [See the discussion in *Witt v. Witt* 38 FamLR 431].

72. This Bill extends the operation of the 2005 Act to proceedings involving parties to de facto relationships as defined in the Bill. It greatly increases the population of prospective beneficiaries of the privileged position afforded to spouses by the 2005 Act.

73. Where an applicant for property settlement or maintenance asserts the existence of a de facto relationship in a dubious case, or asserts that such a relationship commenced or ended at a particular time, the other party to the relationship has an opposing interest so that there is an effective contradictor in the proceedings.

74. However, where both parties to the alleged de facto relationship have an interest in asserting and upholding the existence of the relationship and the only contradictor in the proceedings is the bankruptcy trustee who is not in a position to k now the facts, the trustee is at a manifest disadvantage and the opportunities for abuse of the legislation at the expense of taxpayers and creditors are substantial.

75. The privileges conferred on spouses by the 2005 Act created opportunities for collusive agreements and for "friendly" actions between spouses under s. 79 of the Family Law Act. That they were open to abuse by married parties utilising financial agreements to transfer assets from an insolvent spouse to the other spouse was known already (see *ASIC V Rich* 2003 FLC 93-171) and restraints were enacted on the use of such agreements (see s. 90K, s. 90U and s. 90DA).

76. However, prior to the present Bill, the 2005 Act applied only to parties who were or had been married. This created a natural barrier on the unrestrained use of collusive actions. The extension of the operation of the provisions of the 2005 Act to parties to de facto relationships raises the prospect of collusive transfers of assets between parties who are prepared to assert that they are or were in such a relationship and where there are no objective requirements such as a marriage certificate against which their relationship may be judged.

77. The regime implemented in the 2005 Act has been in effect for only a short time, relatively speaking, and we do not yet have a substantial body of reported decisions as to its effects.

78. However, one recent decision of the Family Court highlights the problems created for creditors by the 2005 Act – *Lemnos v Lemnos* (38 FamLR 594).

79. In *Lemnos* the husband had a debt to the ATO of more than $6 million. The net assets of the marriage were around $2 million. The husband had been made bankrupt and his bankruptcy trustee was a party in the proceedings.

80. Le Poer Trench J. made orders for the sale of the real estate which comprised the substantial matrimonial asset. Half of the proceeds were to be paid to the wife and all of the debt was be borne by the husband.

81. The learned trial judge asked "why should the wife ultimately prosper at the expense of the public purse?" The answer was that "the *Family Law Act* … provides for that to be the outcome". The learned judge stated, in paragraph 97 of the decision: "I have some concern with the outcome of this case insofar as the creditor principally to lose out … is the Australian Tax Office and therefore the taxpayers of this land".

82. Bankruptcy trustees have been another category of creditors who "lose out" where their costs have been substantial in comparison to the debt they are pursuing in the context of a small asset pool. See *Witt v. Witt* 38 FamLR 431.

83. The 2005 Act was enacted only after the difficulties associated with the protection of the property rights of spouses in the face of claims to payment by

arms-length creditors had been debated for years, and after decades of hesitation by the Parliament.

84. A new Inspector-General in Bankruptcy will, I understand, be appointed soon; and I understand from a professional colleague who practises in that area that Bankruptcy practitioners are hoping that the new Inspector-General will review the 2005 amendments and their application; and that the Parliament will then be persuaded to change them.

85. It is submitted that consideration should be given to deleting from the Bill the provisions extending the operation of the *Bankruptcy & Family Law Legislation Amendment Act* 2005 to insolvent and bankrupt parties to de facto relationships, at least for the moment.

86. The 2005 amendments and their operation in the situation where there is a marriage are problematic and may be subject to review. Their extension to the de facto relationships as defined in the Bill would be even more so – and such proposed extension raises issues that go beyond the extension of general Family Law Act provisions to those able to obtain a finding that they had a de facto relationship as defined by this bill.

87. Informed creditors are now requiring guarantees from married spouses. It will be very much more difficult to cover their situation in relation to those who may be able to claim they were in a de facto relationship.

88. Not uncommonly, the creditor to lose out will be the Australian Taxation Office – effectively, as Justice Le Poer Trench observed in *Lemnos v Lemnos* (see paragraph 86 above), the Australian taxpayer.

Does the Bill go beyond the scope of the referred powers?

89. Insofar as it is not supported by the marriage power (s. 51(xxi)), the matrimonial causes power (s. 51(xxii)), the bankruptcy and insolvency power (s. 51(xviii), and the incidental power (s. 51(xxxix) in the Constitution, the present Bill relies on the powers referred by the States under section 51(xxxvii).

90. The State legislation [see *Commonwealth Powers* (*De facto Relationships) Act* 2004 (Vic)] (and the other Acts which are in similar terms) in section 4(1) provides that:

> The following matters, to the extent to which they are not otherwise included in the legislative powers of the Parliament of Commonwealth, are referred to the Parliament of the Commonwealth . . . :
>
> (a) financial matters relating to de facto partners arising out of the breakdown (other that by reason of death) of de facto relationships between persons of different sexes;
>
> (b) financial matters relating to de facto partners arising out of the breakdown (other that by reason of death) of de facto relationships between persons of the same sex.

"Financial matters" is defined in section 3(1) as:

> "financial matters", in relation to de facto partners, means any or all of the following matters –
> (a) the maintenance of de facto partners;
> (b) the distribution of the property of de facto partners;

(c) the distribution of any other financial resources of de facto partners, including prospective superannuation entitlements, or other valuable benefits of or relating to de facto partners.

91. The Commonwealth Bill emulates the *Family Law Act* method of conferring jurisdiction in matrimonial causes by enacting a new Division 2 headed "Jurisdiction in De Facto Financial Causes" which sets out in proposed s. 39A to s. 39G "equivalent proposed provisions to s. 39 and 40 (FLA) that confer jurisdiction in certain causes". (Explanatory memorandum paragraph 63).

92. Proposed section 39A(5) provides that "a de facto financial cause that is able to be instituted under this Act must not after the commencement of this section be instituted otherwise than under this Act" thereby replicating the current exclusive jurisdiction under the Act in matrimonial causes.

93. The definition in the Bill of "de facto financial cause" proposed to be inserted into s.4(1) of the Family Law Act is that "a de facto financial cause means:

(a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship; or

[(b) & (d) include proceedings between a party to a de facto relationship and a bankruptcy trustee of a bankrupt party to a de facto relationship];

(c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them; or

(e) without limiting any of the preceding paragraphs, proceedings with respect to a Part VIIIAB financial agreement that are between <u>any combination</u> of:

(i) the parties to that agreement; and

(ii) the legal personal representative of any of those parties who have died (including a combination consisting solely of parties or consisting solely of representatives}; or

(f) third party proceedings (as defined in section 4B) to set aside a Part VIIIAB financial agreement; and

(g) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of the preceding paragraphs.

94. Sub-paragraphs (e), (f) and (g) of the definition of a de facto financial cause extend beyond the parties to the relationship to various third parties. Sub-paragraphs (e) and (f) plainly operate after the death of a party. They do not obviously sit within the scope of the referring Acts.

95. Indeed, despite the extension of parts of the Family Law Act (as presently drafted) to third parties, important questions remain as to the validity of aspects of the Family Law Act even in its present form. In particular, the status of Part VIIIAA – insofar as it allows Orders to be directed to various third parties including creditors and trustees – is presently before the High Court pursuant to a grant of special leave in *Spry v. Kennon* & Ors [2008] HCA Trans. 130 (7 March 2008).

96. Sub-paragraph (g) of the definition of "de facto financial cause" reflects the present s. 4(1)(f) of the *Family Law Act*. Section 4(1)(f) allows proceedings to be brought under the FLA which involve other parties and entail other matters providing they are proceedings "in relation to" another matrimonial cause.

97. The other matrimonial causes in s. 4(1) rely on the marriage power, the matrimonial causes power and the incidental power in the Constitution – see *Lansell v. Lansell* (1964) 110 CLR 353 and *Perlman v Perlman* (1984) 155 CLR 474. Legislation under those heads of power will be valid if it satisfies the tests of a "close connection" with their subject matter or at least a "sufficient

connection". They may also be supported by the penumbra to those powers and by the incidental power. (see *Gazzo v Comptroller* 1981 149 CLR 227).

98. The question of a "close" or "sufficient" connection with the Commonwealth head of power is the same in case of a section 51(xxxvii) referral. As Justice Windeyer said in *Airlines of New South Wales Pty Ltd v New South Wales(Airlines case (No1)* (1964) 113 CLR 1 at 53, "If a matter be referred by a State Parliament, that matter becomes . . . one with respect to which the Commonwealth Parliament may under the Constitution make laws. If the Commonwealth Parliament then avails itself of the power, it does so by virtue of the Constitution, not by delegation from, or on behalf of the State Parliament. It is not exercising a legislative power of the State conferred by a State Parliament and revocable by that Parliament. It is exercising the legislative power of the Commonwealth Parliament conferred by s. 51 of the Constitution."

99. The difference in exercising power under a section 51(xxxvii) referral is that the addition of "a further subject of concurrent Commonwealth legislative power to the existing list in s. 51" is in terms of the referral – and, in this case, the referrals are in specific terms and the "close" or "sufficient" connection must be with those specific terms – as compared, say, to the generality of "trade and commerce with other countries, and among the States" (s. 51(i), "marriage" (s. 51(xxi) and "divorce and matrimonial causes" (s. 51(xxii).

100. Certainly the States can choose to express a referral in the broadest and most general terms, but where the State referral is closely defined – even to the point

of including the exact terms of the statute the Commonwealth is authorised to enact – the Commonwealth is limited to what the State(s) choose to refer to it.

101. That is, the Commonwealth's power is one to make laws with respect to the matter as defined in the referral – in this case, limited to: "any or all of the following matters", namely "the maintenance of de facto partners"[9], "the distribution of the property of de facto partners"[10] and "The distribution of any other financial resources of de facto partners, including prospective superannuation entitlements or other valuable benefits of or relating to de facto partners"[11] "relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes"[12] and "between persons of the same sex"[13].

102. In other words, the reference relates to maintenance, the distribution of property and the distribution of other financial resources "arising out of the breakdown (other than by reason of death) of de facto relationships".

103. The Bill is within the section 51(xxxvii) States' reference in its provisions that relate to "proceedings . . . with respect to maintenance . . . after the breakdown of their de facto relationship"[14] and "proceedings . . . with respect to the

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[9] *Commonwealth Pwers (De Facto Relationships) Act* 2004 (Vic) section 3(1) definition of "financial matters", sub-paragraph (a).
[10] *Id* sub-paragraph (b).
[11] *Id* sub-paragraph (c).
[12] *Id* section 4(1)(a).
[13] *Id* section 4(1)(b).
[14] See eg the clause 3 proposed amendment to subsection 4(1) Family Law Act insertion of a definition of "de facto financial cause", paragraph (a).

distribution, after the breakdown of the relationship, of the property of the parties or either of them"[15].

104. However, both in the definition of "de facto financial cause" (discussed in paragraphs 91-94 (above) in this submission), and in a number of significant substantive provisions, the Bill appears to stray beyond what might be considered to be "financial matters relating to de facto partners arising out of the breakdown of the relationship" (emphasis added) as required by the State referring Acts.

105. The Bill extends to matters which are not limited to maintenance or the distribution of property or other financial resources arising out of the breakdown of a de facto relationship.

106. For example the Bill provides for financial agreements which can be made before a de facto relationship (proposed section 90UB); and which can be made during the relationship (propsed section 90UC).

107. Certainly, in both cases the agreements are referred to as being in respect of matters "in the event of the breakdown of the relationship". However, the proposed sections provide that such agreements can deal with property, and financial resources "at the time when the agreement is made, or at a later time and during the relationship".[16]

108. Also such financial agreements can involve not only the parties to the de facto relationship, but also "one or more other people" (see Section 90UC(1) by way

[15] *Id* sub-paragraph (c).

of example). This raises the question of the basis for the power to legislate with respect to third parties when the power which has been referred by the States makes no reference to third parties.

109. Section 90UE contemplates that agreements entered into in non-referring States can at a subsequent time "morph" into Part VIIIAB Financial Agreements. The referral of power in respect of "financial matters" in the States referring legislation may extend beyond "proceedings" see *Re: Wakim* (1999) 198 CLR 511. The jurisprudence on associated and accrued jurisdiction and the jurisprudence on cross-vesting will accordingly be relevant when the validity of some of these provisions is considered.

110. Third parties can freely take part in property proceedings see proposed s. 90SM(16). They can be the subject of injunctions in extended circumstances see proposed s. 90TA. One can expect that the challenges to the validity of injunctions directed to third parties when those injunctions relied on the powers directly in the Constitution [see Re Ross Jones J. ex parte Green (1984) 156 CLR 185 and *Ascot Investments v Harper* (1981) 148 CLR 337] will re-emerge in the context of the scope of the Commonwealth power to enact these provisions which rely on powers referred from the States.

111. Some provisions appear to contravene the specific limitation in the State referral legislation when the de facto relationship breaks down by reason of death (the limitation is explicit: "(other than by reason of death").

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[16] Proposed sections 90UB(2)(a) and 90UC(2)(a).

112. Proposed sections 90UK and 90UM(8) provide for the effect of the death of a party to a financial agreement. Section 90SM(8) allows continuation of property proceedings on the death of a party.

113. Third party proceedings can be taken to set aside a financial agreement, including proceedings between any combination of the parties to the agreement and the legal personal representative of the party who has died and in addition a creditor or a government body acting in the interests of a creditor or the legal personal representative of the creditor (see proposed s. 4A(1A)) and indeed proceedings involving numerous categories of third parties and representatives of deceased parties must be taken exclusively under the Act as a de facto financial cause.

Disjunction between State Domestic Relationships and Federal De facto Relationships

114. In recent years, some States have sought to ameliorate the hardships faced by parties who are required to prove they are in a domestic relationship in order to access various statutory benefits (e.g. workers' compensation, superannuation) by legislation which provides for voluntary registration of a domestic relationship. The movement for recognition of civil unions has resulted in increased awareness of registration as a form of recognition of relationships.

115. The Tasmanian *Relationships' Act* 2003 allows parties to register a relationship where the parties are "in a significant or caring relationship" (see Section 11 sub-section 1). This only requires two adult persons "each of whom provides the other with domestic support and personal care" (see s. 5(1)).

116. In Victoria the *Relationships' Act* 2008 (effective in December 2008) provides for a relationships register to be kept by the Registrar of Births Deaths and Marriages. This has been described as "not a form of gay marriage", but a means by which unmarried heterosexual and same sex couples can access entitlements by the production of one certificate. The Victorian Act defines a registrable relationship as including one where a party "provides personal or financial commitment and support of a domestic nature to the material benefit of the other … whether or not [in contrast to the Commonwealth Bill] they are living under the same roof" (see Section 5 *Relationships' Act* 2008).

117. Both States enable parties to a registered relationship to seek orders for an adjustment of interest in property and orders for maintenance. Domestic partners who are in registered relationships have entitlements which are in some respects different to those of partners who are not in a registered relationship.

118. Other States do not have registration provisions but allow the State Courts to make declarations as to the existence of a domestic relationship and in some cases to revoke or annul the declaration in the light of subsequent disclosures (see *De Facto Relationships Act* 1991 (NT) ss. 10 and 11 and PLA 1974 (Qld) ss. 320-328,

119. The State registration legislation has different and broader definitions of a registrable relationship than the proposed de facto relationship contemplated in the Commonwealth Bill.

120. The Bill does not contain registration provisions but parties can obtain a declaration about the existence of a de facto relationship including that it "never

existed" under proposed s. 90RD. The Commonwealth declaration may presumably be made in circumstances where a State Court has already made a declaration or where a relationship has been registered under State law. The Bill does not respond comprehensively to relationships registered under State laws although it gives some sporadic recognition to them, e.g. in s. 90SB.

121. Accordingly, in referring States one can look forward to the concurrent operation of the federal Bill in respect of some relationships; to the State law insofar as the federal legislation does not cover the field; and within the operation of the State law to yet again different regimes, depending on whether there has been a State declaration and whether the relationship has been registered or not.

122. State law may also be effective where parties have a connection with a referring State but there is also a connection of the relationship or of the proceeding with a non-referring State. Other opportunities to argue that State law applies will arise depending on whether date of separation post-dates the operation of the Bill.

123. It would appear therefore that the notion that new federal legislation is about to simplify and to standardise the law on de facto relationships has not yet been achieved.

A statement on referrals by less than all States by the next Chief Justice of the High Court of Australia

124. Justice Robert French, shortly to become Chief Justice of the High Court of Australia spoke on The Referral of State Powers in an address to the Australian Association of Constitutional Law in Brisbane on 28 August 2002. His Honour's paper has since been published: 31 WALR 19 (February 2003).

125. Justice French cautioned strongly against the Commonwealth acting on anything less than a referral by all States:

> The language of the referral power leaves open the possibility that a Commonwealth law made under it may have application to one or more, but not necessarily all, States of Australia. This possibility does not seem to have been prominent in the consideration of the power during the Convention debates. The spectacle of a kind of Swiss cheese Commonwealth law is not particularly edifying . . . . It is difficult enough in a federation to have to deal with State laws which change from one border to the next. The Balkanisation of Commonwealth laws should not lightly be accepted. There is a strong argument against the exercise of the power in relation to anything less than a universal referral.[17]

Conclusion

126. Australia has waited for more than 10 years since the Standing Committee of Attorneys-General at its meeting in April 1998 considered the issue of the inconsistency and inequities resulting from different de facto regimes in the various States and Territories – and very nearly 5 years since the first section 51(xxxvii) referral of power to the Commonwealth by New South Wales in October 2003. The cause has wide support. However, the Bill the Commonwealth has finally produced in my opinion appears to be significantly flawed. There are questions as to whether some provisions are within the power

[17] Robert S French *The Referral of State Powers* 31 WALR 19 at 34(February 2003).

of Commonwealth under the section 51(xxxvii) referrals it does have. There are questions as to whether the "geographical requirement" provisions effectively limit the Bill to referral States. There are questions in relation to some aspects of the substance of the Bill. None of these matters should be left to be tested in court by the private litigants who would be the parties to applications based on the proposed provisions. The issues identified above are weighty and should be addressed before the Bill is allowed to proceed.