Changes to De Facto Relationship Law – A Move Towards Equal Treatment

By

Paul Boers

Craddock Murray Neumann Lawyers

Level 3, 131 York Street

SYDNEY NSW 2000

Phone: (02) 8268 4000

Fax: (02) 8268 4001

Index

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Changes to De Facto Relationship Law – A Move Towards Equal Treatment

Introduction

Under section 51 (xxi) of the Commonwealth Constitution, the Parliament of the Commonwealth has the power to make laws for peace order and good government with respect to marriage. As such, the States and Territories of Australia had the power to make laws dealing with relationships other than marriage relationships, including de facto relationships.

Each of the States and Territories enacted their own legislation to deal with the financial consequences arising out of the breakdown of de facto relationships. In New South Wales, the *Property (Relationships) Act 1984* dealt with a mechanism for determining financial settlement arising out of the breakdown of de facto relationships. Prior to the enactment of the *Property (Relationships) Act*, parties to de facto relationships had to rely upon the law of equity to seek a remedy for property division arising out of the breakdown of a de facto relationship.

In 1999, the *Property (Relationships) Act NSW* was amended to include same sex relationships within the definition of de facto relationships. In the absence of separating de facto couples reaching agreement about property division, any litigation under the *Property (Relationships) Act* was conducted in the State Civil Courts, usually either the District or Supreme Court, depending upon the quantum of the claim. Procedurally, this process was technical, labour intensive and expensive. For lawyers, it was difficult to predict a probable outcome, given inconsistency in judicial authority.

One of the other problems with proceedings arising out of the breakdown of de facto relationships concerns disputes involving both property and parenting issues. Whilst property issues were litigated in the States Civil Courts, the parenting issues were dealt with in the Commonwealth Courts, either the Family Court or Federal Magistrates Court. This duplication of Court processes made it especially expensive for separating de facto couples

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

who were unable to reach agreement, when the matter involved both property and children's issues.

The previous Commonwealth Government invited the various States and Territories to refer the power to deal with financial matters arising out of de facto relationships to the Commonwealth. New South Wales, Queensland, Victoria and Tasmania enacted legislation conferring power upon the Commonwealth. Western Australia, with its own Family Court, has dealt with all matters arising out of de facto relationships, both property and parenting, in the Family Court of Western Australia.

On 21 November 2008 the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* ("the Amending Act") received royal ascent. The matters dealt with in Schedule 3A, and Items 5 and 21 commenced on the day of royal ascent. The bulk of the provisions of the Amending Act, including those dealing with financial matters arising out of de facto relationships, commenced on 1 March 2009.

The provisions of the Amending Act do not apply to a de facto relationship that broke down prior to the commencement of the Act.[1] However, the provisions of the new section 86A of the *Family Law Act* sets out a procedure to "opt in" to the new regime with the consent of both parties. The section provides:

86A Opting into the new regime

Choosing the new regime

(1) The parties to a de facto relationship that broke down before commencement may choose for Parts VIIIAB and VIIIB, and subsection 114(2A), of the new Act to apply in relation to the de facto relationship.

When a choice can be made

(2) A choice under subitem (1) can be made if:

(a) the choice is unconditional; and

(b) subitems (3), (4) and (5) are satisfied for the choice.

A choice is irrevocable.

(3) This subitem is satisfied for the choice if no order (other than an interim order) under a preserved law of a State or Territory has been made by a court in relation to either of the following:

(a) how all or any of the:

(i) property; or

(ii) financial resources;

that either or both of the parties to the de facto relationship had or acquired during the de facto relationship is to be distributed;

(b) the maintenance of either of the parties to the de facto relationship.

(4) This subitem is satisfied for the choice if:

(a) the parties have not made a designated State/Territory

[1] Per section 86, the Amending Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

financial agreement in relation to their de facto relationship;

or

(b) if the parties have made such an agreement, that agreement has ceased to have effect without:
(i) any property being distributed; or
(ii) any maintenance being paid;
under the agreement.

(5) This subitem is satisfied for the choice if:
(a) the choice is in writing and signed by both of the parties to the de facto relationship; and
(b) each of the parties was provided, before the choice was signed by him or her, with:
(i) independent legal advice from a legal practitioner about the advantages and disadvantages, at the time that the advice was provided, to the party of making the choice; and
(ii) a signed statement by the legal practitioner stating that this advice was given to the party.

(6) For the purposes of Part VIIIAB of the new Act, a choice can be included in a Part VIIIAB financial agreement for which the parties are the spouse parties.

Setting aside a choice

(7) A court may make an order setting aside a choice if the court is satisfied that, having regard to the circumstances in which the choice was made, it would be unjust and inequitable if the court does not set the choice aside.

(8) A court setting aside a choice under subitem (7) may make such order or orders (including an order for the transfer of property) as it considers just and equitable to, so far as is practicable, return the rights of:
(a) the parties to the de facto relationship; and
(b) any other interested persons affected by the choice;
to their position immediately before the choice was made.

(9) Subsections 90UM(8) and (9) of the new Act apply in relation to setting aside a choice as if:
(a) a reference in those subsections to subsection 90UM(1) or (6) of the new Act were a reference to subitem (7) or (8); and

(b) the reference in those subsections to section 90UM of the new Act were a reference to this item.

It is not anticipated that there will be many cases where both parties will agree to opt into the new regime. It can be argued the new regime will be to the advantage of one party and the disadvantage of the other.

Most of the new provisions dealing with de facto relationships in the *Family Law Act* are contained in the new Part VIIIAB. However, many of the provisions relating to de facto relationships are scattered elsewhere in the *Family Law Act*. This paper will focus upon the major provisions.

De Facto Relationships

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

In order to invoke the jurisdiction of the *Family Law Act*, arising out of the breakdown of a de facto relationship, a *de facto financial cause* must exist, defined by a section 4(1) as follows:

> ***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)proceedings between:*
>
> *(i)a party to a de facto relationship; and*
>
> *(ii)the bankruptcy trustee of a bankrupt party to the de facto relationship;*
>
> *with respect to the maintenance of the first-mentioned party after the breakdown of the de facto relationship; or*
>
> *(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*
>
> *(d)proceedings between:*
>
> *(i)a party to a de facto relationship; and*
>
> *(ii)the bankruptcy trustee of a bankrupt party to the de facto relationship;*
>
> *with respect to the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property in relation to the bankrupt party; or*
>
> *(e)without limiting any of the preceding paragraphs, proceedings with respect to a Part VIIIAB financial agreement that are between any combination of:*
>
> *(i)the parties to that agreement; and*
>
> *(ii)the legal personal representatives 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; or*
>
> *(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.*

In order for a de facto financial cause to exist, the de facto relationship must be broken down. Subsection 4(1) defines *de facto property settlement or maintenance proceedings* as follows:

> **de facto property settlement or maintenance proceedings** means proceedings with respect to:
>
> (a) the distribution of the property of the parties to a de facto relationship or of either of them; or
>
> (b) the distribution of the vested bankruptcy property in relation to a bankrupt party to a de facto relationship; or
>
> (c) the maintenance of a party to a de facto relationship.

In addition, the definition of financial matters in subsection 4(1) now includes de facto relationships. Significantly, the new section 4AA has been inserted in the *Family Law Act* to provide a definition of *de facto relationship* as follows:

> Meaning of **de facto relationship**
>
> (1) A person is in a **de facto relationship** with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family (see subsection (6)); and
>
> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
>
> Paragraph (c) has effect subject to subsection (5).

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:
   (a) the duration of the relationship;
   (b) the nature and extent of their common residence;
   (c) whether a sexual relationship exists;
   (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
   (e) the ownership, use and acquisition of their property;
   (f) the degree of mutual commitment to a shared life;
   (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
   (h) the care and support of children;
   (i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(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.

(5) For the purposes of this Act:
   (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
   (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.

When 2 persons are related by family

(6) For the purposes of subsection (1), 2 persons are **related by family** if:
   (a) one is the child (including an adopted child) of the other; or
   (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
   (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

Subsection 4AA(2) sets out the various factors to be taken into account when determining whether a de facto relationship exists. Those factors largely reflect the definition of de facto relationship as set out in section 5 of the *Property (Relationships) Act NSW*. It should be noted that pursuant to subsection 4AA(3) it is not necessary that all of the factors listed therein exist in any particular case.

Pursuant to subsection 4AA(5) of the *Family Law Act*, the definition of de facto relationship captures opposite sex and same sex couples. Whereas the previous government's draft of the Amending Act only included a referral from the States and Territories with respect to opposite sex de facto relationships, the current Government in its promise to eliminate unequal treatment towards same sex couples within Commonwealth legislation has included same sex couples within the operation of the Amending Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Jurisdictional and Threshold Requirements

Apart from establishing the existence of a de facto relationship, other requirements set out in the new Part VIIIAB *Family Law Act* are:

1. At least one of the parties must be an Australian citizen, or a resident in Australia and present on the day proceedings are commenced;[2] or

2. The period, or total periods, of the de facto relationship is at least two (2) years;[3] or

   There is a child of the de facto relationship;[4] or

   The party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SN(4)(a), (b) or (c); and failure to make the order or declaration would result in serious injustice to the applicant;[5] or

   The relationship is or was registered under a prescribed law of a State or Territory;[6]

3. The parties must satisfy a geographical requirement where either or both of them are ordinarily resident in a participating jurisdiction;[7]and

   That either:

   3.1.1. Both parties to the de facto relationship are ordinarily resident during at least one third of the de facto relationship; or

   3.1.2. The applicant for the order made substantial contributions, in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

[2] Per Section 39A(2) of the Family Law Act.
[3] Per Section 90SB(a) of the Family Law Act.
[4] Per Section 90SB(b) of the Family Law Act.
[5] Per Section 90SB(c) of the Family Law Act.
[6] Per Section 90SB(d) of the Family Law Act.
[7] Per Section 90SD(1)(a) of the Family Law Act for maintenance applications, S.90SK(1)(a) for property applications.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

In one or more States or Territories that are participating jurisdictions at the application time[8]; or

4. Alternatively, the parties to the de facto relationship are ordinarily resident in a participating jurisdiction when the relationship broke down.[9]

The definition of *participating jurisdiction* includes the States or Territories that have referred the power to deal with financial matters arising out of the breakdown of de facto relationships to the Commonwealth, namely New South Wales, Queensland, Victoria and Tasmania.

A two (2) year limitation period from the date of separation exists within which to commence proceedings for financial settlement arising out of the breakdown of a de facto relationship.[10]Given the definition of *de facto financial cause* in subsection 4(1) of the *Family Law Act*, the de facto relationship must be broken down before the jurisdiction to bring an Application under Part VIIIAB can be invoked.

The Amending Act has essentially maintained the jurisdictional and threshold requirements previously contained in the *Property (Relationships) Act* before proceedings could be commenced for property settlement.

It is anticipated that one issue which will attract judicial determination is whether a de facto relationship actually existed. Lawyers will need to be careful to take instructions of all of the factors evidencing a de facto relationship as contained in the definition and section 4AA of the *Family Law Act*.

Previous Law – Financial Matters

Under the *Property (Relationships) Act* 1984 NSW, the following jurisdictional requirements existed before a claim could be brought:

[8] Per Section 90SD(1)(b) of the Family Law Act for maintenance applications, S.90SK(1)(b) for property applications.
[9] Per Section 90SD(1A) of the Family Law Act for maintenance applications, and S.90SK(1A) for property applications..
[10] Per the new subsection 44(5) of the Family Law Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

1. A de facto relationship had to exist.[11]

2. Either of the parties was resident in New South Wales on the day the application was made.[12]

3. Both parties were resident in New South Wales for a substantial period of the relationship, meaning at least a third of the duration of the relationship.[13]

4. The relationship was of not less than two (2) years duration, or there is a child of the parties to the relationship, or the applicant has made substantial contributions of a kind referred to in section 20(1)(a) or (b) or he/she has the care and control of a child with the respondent and that a failure to make the order will result in serious injustice to the applicant.[14]

In addition, there was a two (2) year limitation period from date of separation within which to bring any application for property adjustment under the *Property (Relationships) Act*.[15]

The methodology for determining entitlements to a property division involved:

1. Constructing the balance sheet – identify and valuing the assets, liabilities and financial resources of the parties;

2. Have regard to the financial and non-financial contributions, of a direct and indirect nature by or on behalf of the parties of the relationship to the acquisition, conservation or improvement of any of the properties of the parties or either of them or the financial resources of the parties or either of them, and of homemaker and parent contributions.[16]

3. After determining the contributions of the party make an order for property adjustment that is just and equitable as between the parties.

[11] As defined by Section 4 of the Property (Relationships) Act.
[12] Per Section 15(1)(a) of the Property (Relationships) Act.
[13] Per Section 15(1)(b) and (2) of the Property (Relationships) Act.
[14] Per Section 17 of the Property (Relationships) Act.
[15] Per Section 17 of the Property (Relationships) Act.
[16] Per Section 20 of the Property (Relationships) Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Whereas under the *Property (Relationships) Act* there is no general right to maintenance as between the parties to a relationship,[17] an order for maintenance could be sought under the *Property (Relationships) Act* in limited circumstances pursuant to section 27. Those limited circumstances include where the applicant is unable to support himself or herself adequately by reason of her having the care and control of the child of the relationship being under the age of 12 years, or being physically or mentally handicapped and under the age of 16 years. Alternatively, that the applicant is unable to support himself or herself adequately because of the applicant's earning capacity has been adversely affected by the circumstances of the relationship, and in the opinion of the Court the order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a course or program of training or education, and having regard to all the circumstances of the case it is reasonable to make the order.

Procedurally claims for property division under the Property *(Relationships) Act* were commenced by way of Statement of Claim in either the Local, District or Supreme Courts, depending upon the quantum of the claim. The drafting of the Statement of Claim necessitated pleading the particulars of the claim which compared to commencing proceedings in the Family Court was a far more time consuming, labour intensive and expensive process. The process of drafting a Statement of Claim, and a Defence and Cross-Claim often promoted dispute over matters which were not significant in view of the real issues in the matter.

New Provisions – Property Adjustments

The new Part VIIIAB of the *Family Law Act* deals with the majority of financial matters relating to de facto relationships. The new section 90RD of the *Family Law Act* enables a party to seek a declaration about the existence of a de facto relationship. It provides: -

90RD Declarations about existence of de facto relationships

(1) If:

(a) an application is made for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL; and

(b) a claim is made, in support of the application, that a de facto relationship existed between the applicant and another person;

*the court may, for the purposes of those proceedings (the **primary proceedings**), declare that a de facto relationship existed, or never existed, between those 2 persons.*

[17] Per Section 26 of the Property (Relationships) Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

(2) A declaration under subsection (1) of the existence of a de facto relationship may also declare any or all of the following:

(a) the period, or periods, of the de facto relationship for the purposes of paragraph 90SB(a);

(b) whether there is a child of the de facto relationship;

(c) whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

(d) when the de facto relationship ended;

(e) where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

*Note: For **child of a de facto relationship**, see section 90RB.*

When seeking orders for property division under the new Part VIIIAB of the *Family Law Act*, as a matter of grounding jurisdiction it is recommended that the orders sought in an Initiating Application in every de facto relationship case ought to include the section 90RD declaration about the existence of the de facto relationship. Upon being served a Response it will become apparent whether there will be any contested issue about the existence of a de facto relationship, and therefore any jurisdictional issue.

A comparison of the new provisions with respect to property division arising out of the breakdown of De-Facto Relationships, and marriage cases, is set out in the table below.

New De-Facto Relationship Provisions	**Equivalent Marriage Provisions**	**Commentary**
Section 90SE	Section 74	The new Section 90SE largely mirrors Section 74 with respect to the powers of the Court in spousal maintenance proceedings, arising out of the marriage.
Section 90SF	Section 72 & 75	The new Section 90SF sets out the matters to be taken into consideration in relation to a maintenance application. The new Section is largely an amalgamation of Section 72 & 75 of the *Family Law Act*. Specifically, Section 90SF(3) is similar to Section 75(2) of the Family Law Act.
Section 90SG	Section 77	The new Section 90SG is similarly worded to Section 77 of the *Family Law Act* dealing with urgent spousal maintenance cases.
Section 90SH	Section 77A	The new Section 90SH largely reflects Section 77A of

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		the *Family Law Act* setting out the requirements where the Court proposes making an Order for lump sum maintenance either in one amount or by instalments or by the transfer or settlement of property.
Section 90SI	Section 83	Applications to vary maintenance Orders in de-facto relationship cases can be made pursuant to the new Section 90SI of the *Family Law Act*, which largely reflects Section 83 dealing with the modification of spousal maintenance Orders in marriage cases.
Section 90SJ	Section 82	The new Section 90SJ deals with when maintenance Orders cease. Its provisions largely reflect the provisions of Section 82 of the *Family Law Act* dealing with cessation of spousal maintenance Orders in marriage cases.
Section 90SL	Section 78	Whilst Section 78 of the *Family Law Act* deals with declarations of property interests (rarely sought these days), the equivalent provision with respect to de-facto relationships is replicated in the new Section 90SL of the *Family Law Act*.
Section 90SM	Section 79	The power to make Orders altering the property interests of parties to a de-facto relationship is contained in the new Section 90SM(1) of the *Family Law Act*. The balance of Section 90SM is largely a reflection of Section 79 of the Family Law Act. In particular, Section 90SM(4) largely replicates Section 79(4) of the *Family Law Act*, and the just and equitable requirement with respect to making Orders for property adjustment in de-facto relationship cases is contained in Section 90SM(3).

The significant difference with the new Section 90SM(4) of the *Family Law Act* to Section 20 of the *Property (Relationships) Act* is that parties to a de-facto relationship now have their entitlements to a property adjustment dealt with equivalent to marriage relationships. That is,

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

the four step methodology now applies to de-facto relationships with the inclusion of a third step, being the adjustment for section 90SF(3) and other factors.

The elevation of the treatment of de facto relationship property adjustments to that of marriage cases, with the inclusion of the third step for the adjustment for other factors, will be a determining factor in whether consent is given to opt into the new scheme in cases where the parties separated prior to 1 March 2009. Naturally, those parties who had the primary care of children or who are financially or economically disadvantaged will do doubt seek to opt into the new regime. Whereas the financially advantaged parties are unlikely to consent to opting into the new scheme.

Grounds for setting aside orders for property adjustment in de facto cases is dealt with under the new section 90SN. Again, this is largely a replication of section 79A dealing with the setting aside of orders altering property interests in marriage cases.

New Provisions – Financial Agreements

The new Division 4 of Part VIIIAB of the *Family Law Act* makes provision for Financial Agreements.

The new section 90UA sets out a requirement for at least one of the parties to be ordinarily resident in a participating jurisdiction at the time they make the agreement.

A comparison of the new provisions with respect to Financial Agreements in de facto relationships with Binding Financial Agreements in marriage cases is set out in the table below.

New De Facto Relationship Provisions	**Equivalent Marriage Provisions**	**Commentary**
Section 90UB	Section 90B	Although not in the exact same terms as one another, the new section 90UB Agreements can be entered into prior to the parties entering into a de facto

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		relationship, and are analogous with pre-marriage Financial Agreements. Although the wording of the new section 90UB is different to section 90B, both types of Financial Agreement achieve the same thing.
Section 90UC	Section 90C	The wording of the two sections, although not the same, achieve the same thing. Section 90UC Agreements can be entered into during the course of a de facto relationship. They differ from section 90C agreements in that the latter can be made during the course of a marriage, but before divorce, including after separation. Section 90UC agreements cannot be entered into after the break down of a de facto relationship.
Section 90UD	Section 90D	The wording of the two sections although not the same, achieve the same outcome. Section 90UD agreements can be entered into after the break down of a de facto relationship. Section 90D agreements can be entered into after divorce.

Section 90UE deals with Financial Agreements entered into under laws of non-referring States. Where the parties to a de facto relationship in a non-referring State enter into a Financial Agreement under de facto relationship legislation in that State, then the new section 90UE provides that the Financial Agreement will be deemed a Financial Agreement for the purposes of Part VIIIAB of the *Family Law Act* upon the non-referring State becoming a referring State.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

There are other similarities between Financial Agreements under Part VIIIAB, relating to de facto relationships, and under Part VIIIA relating to marriage cases. The table below sets out the relevant sections and what they deal with.

Part VIIIAB Agreements	**Part VIIIA Agreements**	**Commentary**
Section 90UF	Section 90BA	Although both sections are not exactly the same, the requirements of each with respect to a separation declaration is the same. In order for either type of agreement to take effect, at least one of the parties will need to sign a separation declaration. The declaration must state that the parties lived in a de facto relationship or marriage, as the case may be, they had separated and are living separately and apart at the time of the declaration, and in the opinion of the party making the declaration there is no reasonable likelihood of cohabitation being resumed.
Section 90UH	Section 90E	Both sections make provision for maintenance of a party to the agreement or a child being void, unless provision specifies: a). The party, or the child or children, for whose maintenance provision is made; and b). The amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child, or each child as the case may be.
Section 90UI	Section 90F	Both provisions are in similar terms. In effect they provide that a Financial

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		Agreement seeking to exclude the power of a Court to make orders with respect to maintenance of a party to the agreement will not have effect if a Court is satisfied that, when the agreement came into effect, the circumstances of the party was such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension allowance or benefit.
Section 90UJ	Section 90G	Both sections contain the same requirements. They include: a). The agreement is to be signed by all parties; b). The agreement contains, in relation to each party to the Agreement, a statement to the effect that the party to whom the statement relates has been provided, before the Agreement was signed by him or her, as certified in an annexure to the Agreement, with independent legal advice as to the following matters: (i) The effect of the agreement on the rights of the party; (ii) The advantages and disadvantages, at the time the advice was provided, to the party making the agreement. c). The agreement contains a certificate annexed to it confirming that the advice referred to in the previous subparagraph was provided.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		d). The agreement has not been terminated or set aside by a Court; and e). After the agreement is signed, the original is given to one of the parties, and a copy is given to each of the other parties.
Section 90UK	Section 90H	Both sections provide that the Financial Agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal person or representative of that deceased party.
Section 90UL	Section 90J	Both sections provide that a Financial Agreement may be terminated only by: a). Including provision to that effect in another Financial Agreement entered into between the parties; or b). Entering into a Termination Agreement. The Termination Agreement must be signed by all parties to the Financial Agreement. It must contain, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided with, before the Termination Agreement was signed, as certified in an annexure to the Termination Agreement, with independent legal advice as to the following notice: a). The effect of the Termination Agreement on the rights of that party; b). The advantages and disadvantages, at the time the advice was provided, to the

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		party making the Termination Agreement; c). The annexure to the Termination Agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; d). The Termination Agreement has not been set aside by the Court; e). After the Termination Agreement is signed, the original Termination Agreement is given to one of the parties and a copy is given to each of the other parties.
Section 90UM	Section 90K	Both sections deal with the grounds for having a Financial Agreement set aside by a Court. The grounds are essentially the same, with the addition of section 90UM1(c) and (d) set out hereunder:- *(1) A court may make an order setting aside, for the purposes of this Act, a Part VIIIAB financial agreement or a Part VIIIAB termination agreement if, and only if, the court is satisfied that*: *(c)a party (the **agreement party**) to the agreement entered into the agreement:* *(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the **other de facto relationship**) with a spouse party; or* *(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship; or* *(iii) with reckless disregard of those interests of that other person; or*

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

		*(d) a party (the **agreement party**) to the agreement entered into the agreement:* *(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or* *(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or* *(iii) with reckless disregard of those interests of that other person;*
Section 90UN	Section 90KA	Both sections deal with the validity, enforceability and effect of Financial Agreements and Termination Agreements. The provisions are largely the same.

The new section 87 makes provision for the recognition of Domestic Relationship Agreements entered into between parties prior to the commencement of the Amending Act. Those agreements made in contemplation of a de facto relationship will now be deemed Financial Agreements under Part VIIIAB of the *Family Law Act*. Similarly, pursuant to section 88 of the *Family Law Act*, Cohabitation Agreements made during the course of a de facto relationship and prior to the commencement of the Amending Act will be deemed Financial Agreements pursuant to Part VIIIAB.

A Financial Agreement under State legislation signed by one party prior to 1 March 2009, but not by the other party, will need to be redrafted and entered into under Part VIIIAB *Family Law Act*. Where a party enters into a Financial Agreement pursuant to S.90UB in contemplation of entering into a de facto relationship, and the relationship subsequently develops to contemplating marriage, it is submitted the parties will then need to enter into a separate S.90B Financial Agreement and cannot rely on the S.90UB Agreement if a marriage relationship later breaks down.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Superannuation

Previously the superannuation splitting provisions contained in Part VIIIB of the *Family Law Act* were only available in marriage cases. There were no equivalent provisions contained in the *Property (Relationships) Act*.

Unlike the enactment of the new Part VIIIAB, dealing with financial matters arising out of the breakdown of de facto relationships, Part VIIIAB has not been replicated to deal with superannuation interests in de facto relationships. Instead amendments have been made to various sections of Part VIIIB to include superannuation interests arising out of de facto relationships. For instance, section 90MC, dealing with the meaning of matrimonial cause, now contains a new subsection 2 as follows:

> *(2) A superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of **de facto financial cause** in section 4.*

Significantly section 90MD has been repealed and a new definition of spouse has been substituted as follows:

> **spouse** means:
> (a) a party to a marriage; or
> (b) a party to a de facto relationship.

The new section 90MHA makes provision for superannuation agreements to be included in a Part VIIIAB Financial Agreement if about a de facto relationship.

Accordingly, superannuation splitting, superannuation flagging, and superannuation agreements will be available in de facto relationship cases.

Procedural Matters

De facto relationship financial settlements litigated under the *Property (Relationships) Act* followed a different pathway to matters litigated under the *Family Law Act*. There were no pre-action procedures required to be followed, claims were commenced in the State Civil Courts by way of a Statement of Claim containing pleadings and case management of the matters was somewhat different to that of the Family Court.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

For de facto relationships which break down after 1 March 2009, the parties will be subject to pre-action procedures. This includes the requirement to make a full and frank disclosure of financial circumstances, the exchange discoverable documents, and making a genuine attempt to settle the matter, prior to commencing Court proceedings.

Assuming the parties abide by pre-action procedures, but do not resolve financial issues, the proceedings can then be commenced in either the Family Court or the Federal Magistrates Court for Orders as to property settlement. Both Courts have amended their Initiating Applications to include de facto relationships. Given that there are various jurisdictional requirements with respect to de facto relationship cases in order to invoke the jurisdiction of the Court, including the existence of a de facto relationship and separation, the new forms deal with these jurisdictional issues. As a matter of practice in all de facto financial cases, it is recommended that a declaration be sought pursuant to section 90RD of the *Family Law Act* about the existence of a de facto relationship.

As with any matter commenced in the Federal Magistrates Court, the Initiating Application will be given a return date in a duty list where the issues in dispute will be ventilated, and directions made by the Court to prepare the matter for a Conciliation Conference.

In the Family Court, the matter will be allocated a Case Assessment Conference where the issues are ventilated, and directions made to prepare the case for a Conciliation Conference.

Post Conciliation Conference, de facto relationship financial cases will be managed in either Court the same as any financial matter arising out of a marriage.

Parentage Issues in Same Sex De Facto Cases

On 21 November 2008, new provisions came into effect concerning Part VII of the *Family Law Act*, specifically in relation to children of a de facto relationship.

Section 60EA provides for a definition of de facto partner as follows:-

> ***60EA Definition of de facto partner***
>
> *For the purposes of this Subdivision, a person is the **de facto partner** of another person if:*

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or

(b) the person is in a de facto relationship with the other person.

The definition of de facto partner previously only applied to opposite sex couples, but now applies to same sex couples. This is of significance to the new section 60H(1) which now reads as follows:-

(1) If:

*(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the **other intended parent**); and*

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

Section 60H deals with presumptions of parentage arising out of conception by way of an artificial conception procedure. It essentially provides that where a woman has a child as a result of an artificial conception procedure, she is a parent of the child regardless of whether the child has her DNA. Her de facto partner will also be presumed a parent if the procedure was done by consent of both parties. The extension of the definition of de facto relationship to same sex couples is dealt with in S.60EA as follows: -

*For the purposes of this Subdivision, a person is the **de facto partner** of another person if:*

(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or

(b) the person is in a de facto relationship with the other person.

Turning to the definition of de facto relationship in S.4AA of the Family Law Act, subsection (5)(a) provides same sex couples are included in the definition

Therefore this presumption of parentage now extends to the non-biological mother of a lesbian couple. Previously, the non-biological mother was left in a legal vacuum without any

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

presumption of parentage applying to her, the result of which was that she had no parental responsibility under the *Family Law Act*, even though she functioned as a parent of the child. The solution to this problem was obtaining parenting orders by consent under the *Family Law Act* allocating parental responsibility to the non-biological mother. This did not give her the status of "parent", rather it was the next best thing.

The presumption of parentage applying to the non-biological mother under the new section 60H(1) leads to other issues such as evidencing it. In late 2008 the NSW Parliament amended section 14 of the *Status of Children Act* to give to the non-biological mother of a lesbian couple the presumption of parentage, similar to that contained in section 60H(1) of the *Family Law Act*. Simultaneously the *Births, Deaths & Marriages Registration Act* was amended, and birth certificates in NSW altered, so that the non-biological mother of a lesbian couple could be named on a birth certificate as a parent of the child conceived by way of an artificial conception procedure.

The Registry of Births, Deaths & Marriages now has an application form and procedure to amend birth certificates to retrospectively record a non-biological mother of a lesbian couple as a parent on a birth certificate. Being named on a birth certificate as a parent of a child gives rise to a presumption of parentage under section 69R of the *Family Law Act*.

In those cases involving lesbian couples where the non-biological mother has not been named on the birth certificate, and the relationship breaks down, whether the presumption of parentage under section 60H(1) applies may be an issue. See the case of *Keaton and Aldridge 2009 FMCAfam 92* as an example. This case involved a lesbian couple whereby the Respondent had a child by way of an IVF procedure. The Respondent was in a lesbian relationship with the Applicant at the time of conception. However, at the hearing of this matter before the Chief Federal Magistrate it was argued on the part of the Respondent birth mother that the Applicant is not a parent pursuant to the presumption in section 60H(1) because they were not in a de facto relationship at the time of conception. The Judgment includes a detailed examination of the nature of the relationship, having regard to the definition of de facto relationship contained in section 4AA of the *Family Law Act*. The decision provides an example of the close scrutiny the Court will give to the facts that concern the nature of the relationship, when a party asserts that a de facto relationship existed, whilst the other asserts it did not.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Child Support in same sex de facto cases

A person entitled to bring an Application for Child Support is a parent or carer of the child[18]. The person liable to pay child support is a parent of the child[19]. Section 5 of the *Child Support (Assessment) Act* defines parent as follows:

> "**parent**" means:
>
> (a) when used in relation to a child who has been adopted--an adoptive parent of the child; and
>
> (b) when used in relation to a child born because of the carrying out of an artificial conception procedure--a person who is a parent of the child under section 60H of the Family Law Act 1975 .

Therefore, where a child is conceived by way of an artificial conception procedure, a person deemed by section 60H(1) of the *Family Law Act* to be a parent will be deemed a parent for the purposes of the *Child Support (Assessment) Act*, and therefore can be liable to a Child Support Assessment. Accordingly, the non-biological mother of a lesbian couple who has a child by way of an artificial conception procedure can be liable to pay child support.

The difficulty for the Child Support Agency will be obtaining evidence of the non-biological mother's parentage under section 60H(1) in order to invoke an administrative assessment. The obvious evidence of parentage would be the issue of a birth certificate naming the biological mother and the non-biological mother both as parents. But what of a case where the non-biological mother is not named on the birth certificate? Feasibly, the biological mother could bring an Application before a Court seeking a declaration that the non-biological mother is liable for a Child Support Assessment.[20] In the course of such proceedings, the Court would then presumably need to take evidence of the nature of the relationship addressing the factors with respect to the definition of de facto relationship contained in section 4AA of the *Family Law Act*. If the Court is satisfied that a de facto relationship exists, then a Child Support declaration may be made. To date, no such Application has been brought before the Court.

[18] Per sections 25 and 25A of the Child Support (Assessment) Act.
[19] Per Section 25 of the Child Support (Assessment) Act.
[20] Pursuant to section 106A Child Support (Assessment) Act.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

Conclusion

It is expected that judicial authority will emerge from the Commonwealth Courts as to the issue of whether a de facto relationship existed in particular cases. It is expected that there will be arguments concerning jurisdiction to bring claims for financial settlement arising out of de facto relationships on the basis of the existence of a de facto relationship or other factors. Nevertheless, bringing financial matters arising out of the breakdown of de facto relationships into line with marriage cases is viewed as sensible. Parties to either type of relationship make the same types of contributions, whether financial or non-financial, and they have the same needs. There is no sensible rationale to treating parties to a marriage relationship and a de facto relationship differently.

N:\CRAD-MUR\WEBSITE\JVL_090.DOC

N:\CRAD-MUR\WEBSITE\JVL_090.DOC