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Discussion Paper

# 44

# Review of the Property (Relationships) Act 1984 (NSW)

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# Contents

# Terms of reference

In a letter to the Commission dated 6 September 1999, the Attorney General, the Hon J W Shaw QC MLC required the Commission to inquire into and report on the operation of the *Property (Relationships) Act 1984* (NSW), with particular regard to:

- the financial adjustment provisions of the Act and in particular:
  - (i) the effectiveness of section 20 in bringing about just and equitable adjustments of the parties' respective interests; and
  - (ii) whether the current legislation is able to take into account superannuation entitlements effectively;
- the process of decision-making or determination of rights;
- the Commission's Report Number 36, De Facto Relationships (1983);
- the 1999 amendments incorporating the *Property Relationships (Amendment) Act 1999* (NSW) and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and
- any related matter.

# Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams*
Professor Hilary Astor
Professor Michael Chesterman
Professor Reg Graycar (until April 2001)
The Hon Jeff Shaw QC
Ms Philippa Smith
The Hon Gordon Samuels AC CVO QC

(* denotes Commissioner-in-Charge)

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# Submissions

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There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or else arrange to make your submission in person.

**The closing date for submissions is 30 July 2002.**

### Use of submissions and confidentiality

If you would like your submission to be treated as confidential, please indicate this in your submission. Submissions made to the Commission may be used in two ways:

- Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to other persons or organisations. However, if you would like all or part of your submission to be treated as confidential, please indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1989* (NSW).

- In preparing further papers on this reference, the Commission will refer to submissions made in response to this Discussion Paper. However, requests for confidentiality will be respected by the Commission in relation to the publication of submissions.

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## GLOSSARY

**1999 amendments:** Property (Relationships) Legislation Amendment Act 1999 (NSW)

**ADR:** alternative dispute resolution

**AIFS:** Australian Institute of Family Studies

**ALRC:** Australian Law Reform Commission

**ASFA:** Association of Superannuation Funds of Australia

**Birth mother:** means a woman who conceives a child through artificial insemination, with the consent of her partner.

**Co-mother:** means a woman who consents to the artificial insemination of her female partner, with the intention of being a functional parent to the child.

**CRA:** Contracts Review Act 1980 (NSW)

**CSAA:** Child Support (Assessment) Act 1989 (Cth)

**DRA:** Domestic Relationships Act 1994 (ACT)

**Family Court:** Family Court of Australia

**Family Law Superannuation Act:** Family Law Legislation Amendment (Superannuation) Act 2001 (Cth)

**FLA:** Family Law Act 1975 (Cth)

**FMA:** Federal Magistrates Act 1999 (Cth)

**FMC:** Federal Magistrates Court

**FPA:** Family Provisions Act 1984 (NSW)

**Functional child:** means a child who has a relationship with an adult as if that adult were his or her parent, but who is not the biological, adoptive or presumptive child of that adult.

**Functional parent:** means a person who acts as a child's parent but is not his or her biological, adoptive or presumptive parent.

**HTA:** Human Tissue Act 1983 (NSW)

**LEADR:** Lawyers Engaged in Alternative Dispute Resolution

**Legal child:** means a biological, adoptive or presumptive child of an adult.

**Legal parent:** means a biological, adoptive or presumptive parent of a child.

**NSWLRC:** New South Wales Law Reform Commission

**PDR:** primary dispute resolution

**PRA:** Property Relationships (Act) 1984 (NSW)

**PRR:** Property Relationships Regulation 2000 (NSW)

**SIS Act:** Superannuation Industry (Supervision) Act 1993 (Cth)

**Social Issues Committee:** Legislative Council's Standing Committee on Social Issues

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**The PRA should contain an objects clause. The objects of the legislation should be:**

- **to recognise and respect the diversity of relationships covered under the Act;**
- **to recognise and respect people's right to order their own financial affairs subject to certain safeguards to ensure any agreement reached between them is voluntarily made and fair;**
- **to facilitate a just and equitable resolution of financial matters at the end of a domestic relationship; and**
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**a child for whose long-term welfare both parties** *exercise* **parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) without necessarily having a parenting order in their favour (emphasis added).**

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**or the agreement is void, voidable or unenforceable (including where one of the parties has made the agreement under fear of domestic violence);**

**or the agreement is void, voidable or unenforceable AND include a separate section outlining the principles that the court is to follow, one of which highlights that domestic violence can affect people when they enter financial agreements;**

**(b) the circumstances between the parties have so changed since the date of the agreement that it would lead to serious injustice if any or all of the provisions of the agreement were to be enforced;**

**(c) circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out;**

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**or**

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**Should there be a statutory right to compensation for domestic violence? The amount of compensation could be assessed under the usual heads of damages, such as pain and suffering, past and future earning capacity, medical expenses etc. The claim for compensation could be brought at the same time as a property adjustment claim and damages could be awarded in the form of property.**

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# 1. Introduction

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- Background to the review
- The need for this review
- The scope of the reference
- Commission’s progress to date
- Structure of this paper
- The purpose of the proposals

## TERMS OF REFERENCE

1.1 By letter dated 6 September 1999, the then Attorney General, the Hon Jeff Shaw QC MLC asked the Commission to inquire into and report on the operation of the *Property (Relationships) Act 1984* (NSW) with particular regard to:

- the financial adjustment provisions of the Act and in particular:
  - the effectiveness of section 20 in bringing about just and equitable adjustments of the parties' respective interests; and
  - whether the current legislation is able to take into account superannuation entitlements effectively;
- the process of decision-making or determination of rights;
- the Commission's Report No 36, De Facto Relationships (1983);
- the 1999 amendments incorporating the *Property (Relationships) Legislation Amendment Act 1999* and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and
- any related matter.

## BACKGROUND TO THE REVIEW

### NSWLRC Report 36

1.2 In 1983, the NSW Law Reform Commission delivered its report on *De Facto Relationships* (Report 36).[1] The terms of reference, which asked the Commission to "inquire into and review the law relating to family and domestic relationships" with particular reference to people living in de facto relationships and

1. NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) ("NSWLRC Report 36").

the rights and welfare of children living in such relationships, were very broad. Nonetheless, the Commission decided not to "attempt to cover the whole field of 'family and domestic' relationships", but limited its consideration to heterosexual de facto relationships. It gave a number of reasons for this decision. These included the fact that the law as it then stood distinguished between de facto and other forms of domestic relationships; hence it was "best practice" to examine the law of de facto relationships without concurrently considering "other domestic relationships". It was also argued that an inquiry into the broader issues implicit in the terms of reference would require extensive consultations and investigation which would delay the report:

> There may well be a case for change in other areas of law affecting domestic relationships, but we think the necessary investigations can and should be undertaken as a separate exercise.[2]

1.3 The Commission also noted:

> The distinction drawn by the law accepts that de facto relationships resemble marriage to a certain extent, although not in all respects. It is this partial resemblance which has prompted legislators and policy makers specifically to confer rights and impose obligations on de facto partners in certain situations. Other domestic relationships bear less resemblance to marriage.[3]

1.4 Two important consequences flowed from this decision. First, people living in same sex and other forms of interdependent relationships were not taken into account in constructing legal regulatory frameworks that emerged from Report 36. Secondly, marriage remained the implicit benchmark for at least some aspects of the reform exercise.

1.5 Despite the narrow focus of Report 36, it was seen by some as a radical step, and the inquiry generated considerable interest and controversy. At that time, while the law recognised heterosexual

2. NSWLRC Report 36 at para 1.4.
3. NSWLRC Report 36 at para 1.4.

de facto relationships, it did so in a piecemeal fashion, despite the fact that the number of heterosexual couples living together without marrying had increased significantly between 1971 and 1982.[4]

1.6 Given the number of ways in which State and Commonwealth law already took account of such relationships by 1983, the Commission noted that the crucial issue was not whether the law should recognise de facto relationships, but, rather, how much further the process of regulation should go.[5] The Commission took a purposive approach to reform: examining specific areas of the law to identify anomalies or injustices, and recommending changes to rectify these problem areas. Generally, Report 36 recommended that the law be amended to remedy any such anomalous inconsistencies between married people and heterosexual couples living together on a "bona fide domestic basis". Specifically, the Commission recommended that courts should be given power to adjust the property interests of de facto couples where it is just and equitable having regard to the contributions made by each of them. It also recommended that limited maintenance rights be made available to de facto couples.

## Developments since 1983

1.7 Report 36 resulted in the *De Facto Relationships Act 1984* (NSW). Less than twenty years later, the social context and legal framework in which the current inquiry is based are markedly different to that of the early 1980s. An important question for this inquiry is whether the law reflects that context. Courts and legislatures around the world have increasingly recognised and acknowledged the diversity of family forms and household arrangements in which people live. We examine some of these developments throughout this Discussion Paper.

4. NSWLRC Report 36 at para 3.8. Table 3.1 shows that the number of de facto couples, as a proportion of all married and de facto couples, increased from 0.6% in 1971 to 4.7% in 1982.
5. NSWLRC Report 36 at para 4.2.

1.8 In 1993, the Gay and Lesbian Rights Lobby produced a consultation document entitled *The Bride Wore Pink*.[6] It recommended that the law be amended to recognise same sex couples as "domestic" partners, and that people in certain other close personal relationships ought also to have their relationships recognised for certain legal purposes. In addition, the document recommended that the issue be referred for more detailed consideration to the NSW Law Reform Commission.

1.9 In the ensuing years, two pieces of legislation which reflected the recommendations in *The Bride Wore Pink*, were introduced into NSW Parliament. The first, the *Significant Persons Relationships Bill 1997* (NSW), was introduced by Ms Clover Moore MP in September 1997.[7] The second, the *De Facto Relationships Amendment Bill 1998* (NSW), was introduced by the Hon E Kirkby MLC in June 1998.[8] Neither of these Bills proceeded to Second Reading stage.

1.10 However, in October 1998, the Government referred the issues raised by the *De Facto Relationships Amendment Bill* to the Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee"). The Committee inquiry lapsed when Parliament was prorogued in the lead up to the March 1999 election. On its re-election, the Government reconstituted the Committee in May 1999, but not before it signalled its intention to introduce its own bill to amend the *De Facto Relationships Act 1984* "to honour a commitment by Labor to extend the rights and obligations of de facto relationships to other domestic relationships between adult persons".[9]

6. Gay and Lesbian Rights Lobby, *The Bride Wore Pink: Legal Recognition of Our Relationships* (1st ed, Sydney, 1993).
7. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 September 1997 at 584.
8. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 24 June 1998 at 6319.
9. Hon J Shaw QC MLC, "Carr Government introduces Property Relationships Bill" (Media Release, 11 May 1999).

## Property (Relationships) Legislation Amendment Act

1.11 The *Property (Relationships) Legislation Amendment Act 1999* (NSW)[10] ("the 1999 amendments") amended a number of NSW Acts to include same sex couples within the meaning of "de facto relationship".[11] It also created a new category of "close personal relationship" and amended a smaller number of other Acts to apply to those in such relationships. A new provision[12] defined a "child of the parties to a domestic relationship" to include "a child for whose long term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (NSW))". While the legislation implemented the Labor Government's election promise to remove discrimination between heterosexual and gay and lesbian relationships in part, some areas of the law remain unchanged. Also, while the *De Facto Relationships Act 1984* (NSW) was extended to apply to a broader range of relationships and renamed the *Property (Relationships) Act 1984* (NSW) ("the PRA"), the substantive content of the legislation, particularly as it relates to financial adjustment on relationship breakdown, remained largely unchanged.

1.12 Following the passage of the PRA, the Government referred to the Social Issues Committee the question of which other laws, not amended by the Act, should also be changed. The Government also referred to the NSW Law Reform Commission the vexed issue of the operation of section 20 of the PRA, which enables court-ordered financial adjustment, including superannuation, and alteration of property interests of partners in a de facto relationship. The Commission was asked to take account of the work of the Social Issues Committee in its review.

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10. For a detailed chronology of the process leading to the enactment of the 1999 amendments, and of its parliamentary progress, see J Millbank and K Sant, "A Bride in her Everyday Clothes: Same Sex Relationship Recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 193-205.
11. A "domestic relationship" is either a de facto relationship or a close personal relationship: s 5(1).
12. s 5(3).

### Social Issues Committee

1.13 Following a period of consultation, the Social Issues Committee reported in December 1999.[13] It raised several other issues which it recommended the Commission investigate as part of its review. These are:

- issues surrounding the introduction of a relationship recognition system;
- definitional issues raised by the 1999 amendments;
- jurisdictional issues in relation to the District Court;
- alternatives to litigation;
- the issue of the legal recognition of non-biological parents to ensure that children in non-traditional domestic relationships are not disadvantaged; and
- the adequacy of the maintenance provision in relation to children.

## THE NEED FOR THIS REVIEW

1.14 The Commission believes that a review of the PRA is long overdue. Despite the Act being amended and expanded in 1999, the broader issue of legal recognition of de facto and other close personal relationships outside of marriage has not been examined since Report 36 in 1983. At that time, the Commission acknowledged that issues arising in de facto relationships were similar to those that arose in marriage, and that the law treated de facto couples unfairly, particularly on the breakdown of relationships. However, the Commission regarded marriage as being on a higher plane than other relationships. Consequently, the provisions in the recommended new statutory scheme gave more limited rights to de facto couples than were available to married couples under the *Family Law Act 1975* (Cth) ("the FLA").

13. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform* (Report 20, Parliamentary Paper 127, 1999)

1.15 The Commission considers this view to be highly questionable today given the increasing numbers of people living together, the increasing social and legal acceptance of a wider range of family forms and the prohibition of discrimination on various grounds including sex, marital status and sexual orientation. Indeed, today recognition is given to many non-marriage like relationships.

## The changing social context

1.16 Much of the discourse and public policy about families in Australia has tended to focus on the nuclear family comprising parents who are married to each other raising their biological or adopted children. However, as it is becoming apparent that the nature of the family unit is a dynamic one, trends and attitudes have changed with time. For many, marriage is no longer seen as the yardstick for all close personal relationships. Marriage rates have gradually declined over time[14] and divorce is on the increase.[15] As a result, there is an increasing number of sole parent families.[16] Indeed, some empirical projections estimate that the "nuclear family could be extinct by the end of the century".[17]

14. It is now estimated that 28% of men and 23% of women will never marry in their lifetime: Australian Bureau of Statistics, *Marriages – Couples choose civil celebrants* (Cat No 3310.0, Media Release, 21 September 2000).
15. In 1999, figures indicated that 46% of marriages were likely to end in divorce: Australian Bureau of Statistics, *Main Features – Marriage and Divorces* (Cat No 3310.0, 1999).
16. As a percentage of all families with children under 15 years of age, 12.7% were sole parent families in 1990, whereas in 2000, they represented 18.2% of all families: Australian Bureau of Statistics, *Australian Social Trends 2001* (Cat No 4102.0) at 34.
17. "The Australian nuclear family could be extinct by the end of the century. True" *The Age* (7 August 2000). In a recent study, KPMG Consulting found that there were 7.1 million households in Australia at June 1998. All household types increased over the year to June 1998, with the exception of the traditional nuclear family, which contracted by 14,268 or 1.1% to 1.330 million. KPMG noted that, if this rate of decline were to continue, the nuclear family "would become extinct by 2092": KPMG Consulting, *Population*

While such estimates may not prove entirely accurate, they do indicate the rapid rate at which Australian families are changing.

1.17 Many more couples today choose to live together without marrying. Indeed, the number of couples describing themselves as de facto couples doubled between 1982 and 1999.[18] There has also been a rise in the number of people who live together in a de facto relationship prior to marriage.[19] For gay and lesbian couples, marriage is not an option. As for same sex de facto couples, their number is difficult to estimate for two main reasons. First, it is only in the last decade that empirical research has considered gay and lesbian people and their relationships as a separate category for analysis,[20] and secondly, the data collected concerning same sex couples and families may not yield accurate results.[21] It is fair to

*Growth Report 2000* (11th ed) «www.kpmg.com.au/index.htm». See also E Schmitt, "Nuclear Families Drop Below 25% of Households for First Time" *New York Times* (15 May 2001).

18. In 1982, 4.7% of all couples described themselves as de facto couples, whereas in 1999, it was estimated (based on marriage and population statistics) that 9.4% of all couples could be living in a de facto relationship: Australian Bureau of Statistics, *Main Features – Marriage and Divorces* (Cat No 3310.0, 1999).

19. In 1999, 69% of all registered marriages were preceded by the couple living together, as opposed to 23% in 1979: Australian Bureau of Statistics, *Main Features – Marriage and Divorces* (Cat No 3310.0, 1999).

20. J Millbank, "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" (1998) 12 *Australian Journal of Family Law* 99.

21. This is due largely to the fact that, in the 1996 census, there was no separate category for people to nominate themselves as gay or lesbian and also no separate category for same sex relationships. Same sex partners could nominate themselves as such by ticking "other" or by ticking the "de facto" box. If neither of these options was taken, people in a same sex relationship were identified by the Australian Bureau of Statistics as living without a partner: Australian Bureau of Statistics, *Census 1996 – Household Form* at Question 5. See also Australian Bureau of Statistics, *Census Dictionary* (Cat No 2901.0), which states that de facto marriage includes same sex relationships where nominated. The 2001 census repeated that format.

say that any inferences drawn from data, particularly census data, regarding the number of gay and lesbian relationships are likely to be an underestimate.

1.18 There has also been an increase in the number of relationships where one person acts as the carer providing domestic support or personal care for the other.[22] Between 1992 and 1999, the number of carers rose from 1.5 million[23] to 2.3 million.[24] In the light of the changing social and domestic relationships shown by these statistics, the Commission considers a review of the law purporting to recognise such relationships to be timely.

## Law needs updating

1.19 When the *De Facto Relationships Act* was introduced in 1984, it was a landmark piece of legislation. It was the first to give clear statutory rights to people living in de facto relationships to seek court orders for an adjustment of property interests when their relationships broke down. It was also the first legislation of its kind to allow, and indeed, encourage couples to make legally binding cohabitation agreements. The legislation essentially followed the recommendations made by the Commission in Report 36. As mentioned earlier, the Commission at that time concluded that de facto couples were also entitled to an accessible and fair statutory system to help resolve these issues when their relationships broke down. However, according to the Commission in 1983, de facto couples were not to be equated with married couples.

1.20 This policy was based on the view that a de facto relationship differed from marriage because marriage required a public commitment and that the law should reflect this difference.

22. See para 2.19 for a definition of "domestic relationship".
23. B Cass, "Australian Families: the Next Ten Years", paper presented at the *International Year of the Family Conference* (Adelaide, November 1994) at 11.
24. Australian Bureau of Statistics, *Disability Ageing and Carers: Summary of Findings* (Cat No 4430.0, 1998) at 10.

This was made abundantly clear in *Evans v Marmont* where one of the majority judges said:

> One thing is clear. It was not the intention of the NSW Parliament in 1984 to equate de facto relationships with marriage, or to make the same provisions with respect to de facto partners as the *Family Law Act*, at that time, made with respect to married people.
>
> There are some similarities between the provisions of the *Family Law Act* and those of the *De Facto Relationships Act*. There are also differences. Those differences are substantial, conspicuous, and deliberate.[25]

1.21 Consequently, the 1984 legislation introduced a regime that provided for the distribution of property and financial resources on the breakdown of a de facto relationship, but in a more limited fashion than the provisions under the FLA.[26]

1.22 This discrepancy in approach between marriage and de facto relationships persists today in the PRA. Newer models of property division in other Australian jurisdictions, on the other hand, have veered away from the NSW approach and moved towards a broader discretionary model, based on the FLA. The question for the Commission, almost 20 years after its first investigation into this area of law, is whether the changes in the social, legal and economic landscapes today require a further legal response in NSW.

1.23 Another important reason for reviewing the Act now is because of its extended coverage. One of the primary questions asked throughout this part of the discussion paper is whether the current provisions apply appropriately and adequately to those people in a diverse range of relationships which are now contemplated by the Act. The 1999 amendments to the PRA extended the coverage of the Act so that a wider range of people,

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25. *Evans v Marmont* (1997) 42 NSWLR 70 at 78 (Gleeson CJ and McLelland CJ in Eq).
26. See Chapters 4-9 of this Discussion Paper for an analysis of how the PRA differs from the FLA in the determination of property and financial matters.

including cohabiting same sex couples and people in close personal relationships, were covered within its scope. However, these amendments did not change the substantive provisions of the original Act in relation to the powers of the court to adjust parties' interests in property or to make orders for maintenance. Whether the claim is brought by a person in a de facto relationship or a person in a close personal relationship, exactly the same substantive provisions apply. Unfortunately, as one commentator has noted, this means that "any current difficulties of interpretation are likely to continue, but now be visited upon the wider class of potential claimants."[27] Nor did the 1999 amendments consider the effectiveness of the current provisions for making binding agreements, or the treatment of superannuation in property proceedings under the Act.

## THE SCOPE OF THE REFERENCE

1.24 A glance at the terms of reference indicates that the main focus of the Commission's inquiry is on property and financial issues. While the Commission gives due consideration to those issues, it is impossible to discuss and make proposals about property division and financial adjustments on the breakdown of relationships without examining the types of relationships which the law now regulates.

1.25 Examining the broader nature of relationships and the legal consequences that attach to them is necessary also because the terms of reference require the Commission to consider the effects of the 1999 amendments. As mentioned earlier, the 1999 amendments made consequential changes to some NSW laws as a result of the new definitions of de facto and close personal relationships, but left a number of other laws unchanged.

27. O Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation", paper prepared for NSW Law Reform Commission seminar (Sydney, 7 July 2000) «www.lawlink.nsw.gov.au/lrc.nsf/pages/seminar01.04» at para 1.2.

1.26 The terms of reference also require the Commission to have regard to the matters referred to the Social Issues Committee. The Committee specifically identified matters concerning interdependent personal relationships, extending beyond purely financial concerns, which warranted further investigation by the Commission. The clearest example of such matters is the Committee's recommendation that greater legal recognition is needed regarding the relationship between parents in de facto relationships and their non-biological children.

## COMMISSION'S PROGRESS TO DATE

### Preliminary Paper

1.27 The Commission released a short preliminary paper in February 2000, flagging the major issues that arose in the course of our research and seeking views on those issues and any others that had not been canvassed. Several submissions were received in response.

### Seminars

1.28 On July 7 2000, the Commission hosted a seminar which was opened by the former Attorney General, the Hon Jeff Shaw QC, on its review of the PRA. A distinguished panel of speakers, including the Honourable Madame Justice Claire L'Heureaux-Dubé, Dr Owen Jessep and Ms Hayley Katzen, delivered papers.[28]

1.29 The Commission also hosted a workshop in December 2000 at which Ms Paula Ettelbrick, Family Policy Director of the National Gay and Lesbian Taskforce (US) and a number of others involved in relationships law reform discussed approaches to relationship recognition.

28. The papers are available on the Commission's website at «www.lawlink.nsw.gov.au/lrc».

## STRUCTURE OF THIS PAPER

1.30 As noted above, while the main focus of the Commission's reference is on property and financial matters, broader considerations necessarily arise concerning relationships generally. In Chapter 2, the Commission looks broadly at the types of personal relationships in which people may be involved, and examines when, how and why the law attaches legal consequences to those relationships. Where children are involved, the interests and welfare of those children and the relationship they have with their parents is always an important factor to consider. While the law recognises the relationship between children and their biological or adopted parents in a marriage or de facto relationship, only limited recognition extends to non-biological children of parents in de facto relationships. Chapter 3 examines the legal recognition of non-biological parent/child relationships with a view to ensuring that children of parents in non-traditional (particularly same sex) relationships receive equal recognition and protection under the law.

1.31 Chapters 4 to 8 deal with financial and property issues under the PRA. Under the current law, couples in de facto or other close personal relationships may reach an enforceable agreement concerning the distribution of their assets on the breakdown of their relationship. In Chapter 4, the Commission examines the provisions dealing with such financial agreements to see whether an appropriate balance has been achieved between, on the one hand, enabling people to make their own legally binding agreements and, on the other, providing adequate safeguards to protect people from making, and being held to, unfair bargains.

1.32 Where a couple cannot reach an agreement, the court may make orders under section 20 of the PRA concerning the distribution of assets. In Chapters 5 and 6, the Commission looks at the operation of section 20 to see whether it is adequate to bring about just and equitable property division orders, especially in light of the broader range of relationships to which the PRA now applies, and discusses broader issues concerning property. Chapters 7 and 8 examine the powers of the court to make orders

concerning superannuation and maintenance for partners in a relationship, respectively.

1.33 The methods and appropriate forum for dispute resolution under the PRA are discussed in Chapter 9. The Commission identifies deficiencies in the current framework that impede the delivery of a fair, accessible, timely and affordable resolution of disputes, and canvasses options for reform.

## THE PURPOSE OF THE PROPOSALS

1.34 In this Discussion Paper, the Commission has formulated a number of proposals based on tentative views about aspects of the law that the Commission considers are in need of reform or clarification. The proposals do not, however, represent our final conclusions. They are intended to attract comment from interested groups and members of the public. The Commission welcomes submissions on the proposals and will be consulting with relevant interest groups and members of the public following the release of this Paper. All views and comments will be considered by the Commission before finalising recommendations for reform in the Report to be submitted to the Attorney General.

# 2. Relationships and legal consequences

- Introduction
- The Commission's approach
- Principles guiding the Commission
- Laws applying to relationships
- Policy objectives of relationships laws
- Relationships law in other jurisdictions
- Issues for discussion

## INTRODUCTION

2.1 As stated in Chapter 1, the major focus of this inquiry is on property and financial provisions in the *Property (Relationships) Act 1984* (NSW) ("the PRA") that apply on the breakdown of de facto and other close personal relationships.[1] However, it is impossible to make proposals for change without first examining the nature of the relationships which the law recognises. Currently, there are different laws and approaches that apply to marriage and de facto relationships, resulting in a variety of consequences. In this chapter, the Commission considers the rationale for and the validity of the different approaches, whether marriage is or ought to be the benchmark and whether the current approach is in keeping with the changing social context. The Commission also examines the way in which close personal relationships (other than marriage or de facto relationships) are regulated by the PRA.

2.2 In canvassing options for change, the Commission is guided by the need to recognise and respect the diversity of relationships and to facilitate a just and equitable resolution of financial matters after separation. The following three broad issues are raised for discussion:

- What policy approach should be adopted in attaching legal consequences to de facto relationships and other close personal relationships?
- Is the scope of coverage offered by the PRA adequate to ensure that those legal consequences are just and equitable?
- Is it necessary to make amendments to other legislation to ensure greater consistency in the way in which relationships defined under the PRA are recognised?

1. See para 2.19 for definitions.

## THE COMMISSION'S APPROACH

2.3 People form, or are born into, an indefinite number and variety of personal relationships throughout their lives. Given the complexity and diversity of personal relationships, there cannot be one law that deals comprehensively with all personal relationships: various laws regulate different aspects of different relationships in different ways. The focus of some laws is to recognise the financial dependence or interdependence between partners to a relationship, while other laws are more concerned with emotional connection. The most obvious examples are the laws that govern property and asset distribution on the breakdown of a marriage or similar relationship. Other examples extend far beyond the sphere commonly understood as "family law". Being in a personal relationship may attract certain legal consequences in areas such as pension or superannuation entitlements, victims' compensation, domestic violence, succession and guardianship laws, and the ability to make medical decisions on behalf of another. Those consequences may differ depending on whether the parties to the relationship are married or in a de facto relationship (referred to here as a partner relationship), and whether the parties are of the same or opposite sex. The consequences may differ again for people who are not in partner relationships, but are in other close personal relationships, such as siblings and parents and children.

### *Same issues, different legal recognition*

2.4 Historically, legal recognition of partner relationships focused on marriage. Recently, however, there has been a marked increase in the numbers of people forming partner relationships but, for various reasons, not marrying.[2] In some cases, the law recognises that de facto relationships raise similar issues to marriage, given that both types of relationships are based on financial and emotional interdependence, and has attached the same legal principles applicable to marriage to various aspects of de facto relationships. For example, laws relating to custody, residency and contact arrangements for children are the same regardless of whether the parents are married or in a de facto relationship.

2. See para 1.16-1.18 for statistics.

In other areas, however, the law draws a distinction between marriage and other partner relationships.

2.5 A key example of different laws applying to marriage and de facto relationships are the laws that regulate the distribution of property and financial resources on the breakdown of a relationship. The *Family Law Act 1975* (Cth) ("the FLA") applies one set of rules to marriage breakdown, while the PRA applies another set to heterosexual and same-sex de facto relationships. Throughout this paper, the Commission asks whether, in terms of property and asset distribution, the current PRA promotes a sufficiently just and equitable outcome, or whether other provisions, such as those in the FLA, may be more appropriate. In doing so, the Commission is not engaging in a discussion about whether de facto relationships per se are better or worse than, or should be equated with, marriage for all purposes. The crucial issue is whether, given the fact that the circumstances of the breakdown of a marriage are similar, and often identical, to those in de facto relationships, a similar set of laws should apply.

2.6 The most straightforward way to address this issue would be to amend the FLA and extend its jurisdiction, so that it applied to heterosexual and same-sex de facto relationships in the same way that it applies to married couples.[3] This course of action, however, would need to be discussed between the NSW and Commonwealth governments.[4] As the current inquiry concerns only the operation of the PRA, the Commission considers it beyond the scope of this review to recommend a referral of power to the Commonwealth to legislate on de facto relationships.

2.7 The redistribution of property and financial resources is only one aspect of the Commission's inquiry. The *Property (Relationships) Legislation Amendment Act 1999* (NSW) ("the 1999 amendments") which amended the PRA not only included same-sex de facto relationships within the scope of the Act's property and financial provisions, but also effected consequential amendments to

3. The FLA applies only to couples who are, or have been, married.
4. The laws relating to marriage are the responsibility of the Commonwealth legislature: see para 2.18.

approximately 20 other statutes that refer to people's partners.[5] For example, a reference in the *Family Provision Act 1982* (NSW) to "spouse" now includes heterosexual and same-sex de facto partner as defined in the PRA.

2.8 The 1999 amendments stopped short, however, of amending all NSW laws that refer to a "spouse" or "partner". In this chapter, the Commission follows a purposive approach by examining the situations where the term "partner" or "spouse" is relevant and asks the question: is there any practical justification for legally distinguishing between married and de facto partners in each particular instance, or should the PRA be extended to effect further consequential amendments to appropriate legislation?

2.9 While partner or de facto relationships are the ones most likely to give rise to legal consequences based on financial and emotional interdependence, they are not the only ones. The 1999 amendments to the PRA broadened the scope of the Act to include close personal relationships within the definition of "domestic relationship". The PRA defines a close personal relationship as one (not being a marriage or a de facto relationship) between two adults, whether or not related by family, who live together in circumstances where one or each of the parties provides the other with domestic support or personal care.[6] This definition would cover such situations as an adult child caring for an elderly parent in the family home, or two friends who live in the same home, with one providing care and support for the other.

2.10 Some close personal relationships have a different focus from de facto relationships, and the points at which such relationships intersect with the law, or attract legal consequences, are less clear and predictable than is the case with de facto relationships. For example, parent/child relationships are very different from de facto relationships, and other factors such as family provision and succession laws would affect the entitlement of one party to the property and assets of the other in the event of the latter's

5. See the *Property (Relationships) Legislation Amendment Act 1999* (NSW) Schedule 2 for a list of the statutes amended.
6. PRA s 5(1)(b). See also para 2.19.

death. Nevertheless, the provisions of the PRA in terms of property and asset division apply to close personal relationships in the same way as they do to de facto relationships.[7] Part of the Commission's role in this inquiry is to examine whether, given the differences between close personal relationships and de facto relationships, the same legal consequences should apply.

## PRINCIPLES GUIDING THE COMMISSION

2.11 From the approach outlined above, the Commission has devised the following principles which it considers should underpin not only the reforms proposed to the PRA in this Discussion Paper, but should guide reform of all laws governing aspects of relationships.

### *Recognising and respecting the diversity of relationships*

2.12 The PRA has gone some way to achieving this with the extension of its coverage to same-sex couples and close personal relationships. It does not, nor should it, contain any express or implied hierarchy of relationships. All types of relationships contemplated under the PRA should be equally respected and recognised and the provisions of the PRA should be capable of broad application across the diverse range of relationships now covered by the Act.

### *Allowing parties to order their own financial affairs*

2.13 The law should recognise and respect people's right to order their own financial affairs subject to certain safeguards to ensure any agreement reached between them is voluntarily made and fair. In order to enable, and encourage, partners to make their own financial agreements, those agreements should be binding on the courts, provided they comply with certain criteria. However, it is equally important that exceptions be available to guard against unfair bargains.

7. Note, however, that while the PRA applies equally to de facto and close personal relationships, different consequences may result depending on the circumstances. Note also that the majority of the consequential amendments made to other legislation by the 1999 amendments apply only to de facto relationships.

#### *Facilitating a just and equitable resolution of financial matters after separation*

2.14 If parties cannot agree how to re-arrange or adjust their financial affairs amicably in their circumstances, the law should provide a system to facilitate a just and equitable outcome between them.

#### *Providing a fair, timely and affordable process for resolving financial matters*

2.15 Following from the previous principle, the system established under the PRA for delivering an outcome in disputed matters should be fair, accessible, timely and affordable.

## An objects clause?

2.16 The Commission proposes that these four principles be included in the PRA as a clear expression of the objects of the legislation. Objects clauses in statutes are the modern day equivalent of a preamble and their use is becoming more prevalent.[8] They are a statement of what Parliament intended the purpose of the legislation to be and how the Act was intended to operate. They are an aid to statutory interpretation, albeit not a definitive one.[9] They may be used to resolve uncertainty or ambiguity but they do not, alone, represent the intention of a particular Act. Courts will still, in the first instance, look to the language of the specific section in question and to the whole Act to determine legislative intent.[10]

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8. For NSW examples, see *Freedom of Information Act 1989* (NSW) s 5; *Administrative Decisions Tribunal Act 1997* (NSW) s 3; *Water Management Act 2000* (NSW) s 3; and *Adoption Act 2000* (NSW) s 7.
9. *Re Credit Tribunal; Ex Parte General Motors Acceptance Corp, Australia* (1977) 14 ALR 257 at 260 (Barwick CJ) cited in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed, 2001, Butterworths, Australia) at 4.40.
10. See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed, 2001, Butterworths, Australia) at 4.40.

2.17 The new Part 19 of the Queensland *Property Law Act 1974*, which deals with the property rights of persons living in de facto relationships, contains an objects clause detailing seven major purposes.[11] Objects clauses have also been recommended by the Justice and Electorate Committee in relation to the reform of matrimonial property law in New Zealand.[12]

**ISSUE 1**

**The PRA should contain an objects clause. The objects of the legislation should be:**

- **to recognise and respect the diversity of relationships covered under the Act;**
- **to recognise and respect people's right to order their own financial affairs subject to certain safeguards to ensure any agreement reached between them is voluntarily made and fair;**
- **to facilitate a just and equitable resolution of financial matters at the end of a domestic relationship; and**
- **to provide a fair, timely and affordable process for resolving financial matters at the end of a domestic relationship.**

**Do you agree? Why or why not?**

11. See *Property Law Act 1974* (Qld) s 255.
12. New Zealand, Select Committee, *Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 as reported from the Justice and Electoral Committee* (2000). See also Pt 2 of the *Property (Relationships) Amendment Act 2001* (NZ), which sets out the principles and purposes guiding the legislation.

# LAWS APPLYING TO RELATIONSHIPS

## Marriage

2.18 Under the Commonwealth Constitution, Parliament has the power to make laws with respect to marriage, and with respect to divorce and related matters.[13] The Commonwealth *Marriage Act 1961* (Cth) regulates who may marry and the formalities that must attend valid marriages, while the FLA regulates marriage breakdown and divorce, and related matters such as the care of children after relationship breakdown and the adjustment of property interests. Part VII of the FLA also deals with disputes involving children where their parents were not married, following a reference of powers by NSW (and all of the states and territories apart from Western Australia) in 1988. However, aside from issues affecting those children, the FLA is otherwise limited in its operation to those couples who are or have been married.[14]

## De facto relationships

2.19 All other "family law" issues are matters within the jurisdiction of the State parliaments. As noted above, the 1999 amendments to the PRA effect a number of consequential changes to other NSW legislation.[15] The amending legislation made two particularly significant changes to NSW law. First, the definition of de facto spouse was changed to cover same-sex cohabiting couples (in addition to heterosexual couples) in the parts of the PRA that deal with adjusting property interests when a relationship breaks down as well as for a number of other purposes

13. s 51(xxi) marriage, and s 51(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
14. Marriage is taken to mean a union between a man and a woman, and so excludes same sex couples: see *Marriage Act 1961* (Cth) s 46(1), s 69(2), and FLA s 43(a).
15. See para 2.7.

in NSW law.[16] Secondly, the amendments introduced the concept of "domestic relationship" for the first time in NSW legislation. A "domestic relationship" is defined as:

> (a) a de facto relationship, or
>
> (b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.
>
> (2) For the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
>
> (a) for fee or reward, or
>
> (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).[17]

2.20 Consequently, people must live together to be considered to be in a "domestic relationship" under the PRA. There is, however, no need to "register" a relationship: the law applies to anyone who falls within the new definitions.[18]

## The legal meaning of "de facto relationship"

2.21 While the term "de facto relationship" is well established in a number of areas of Australian law (both federal[19] and state) and is a term with wide currency in Australia, it has no settled legal meaning.

16. Most notably those concerning inheritance, accident compensation, stamp duty and decision-making in illness and after death.
17. PRA s 5(1), s 5(2).
18. See para 2.62-2.76 for a discussion of registration and the cohabitation requirement.
19. The *Social Security Act 1991* (Cth) refers to a "marriage-like" relationship (s 4(2)) and the definition section includes a list of

2.22 It has been estimated that in NSW, over 120 different pieces of legislation refer to "spouse".[20] One need only look briefly at a few examples of laws, both federal and state, to see how complex and widespread is the legal regulation of family relationships. For example, the federal personal income tax system, while notionally based on the individual as the unit of taxation, has many aspects that are based on family relationships,[21] while the social security system is premised on ideas about who should support whom.[22] Our family relationships are also deeply implicated in our industrial or labour laws, for example, by regulating such issues as "parental" or "family leave" and providing who are "dependants" in the case of industrial injury or death.[23]

2.23 In NSW, there are a number of different statutory definitions of "de facto partner". Prior to the 1999 amendments to the PRA, "de facto partner" was defined in section 3 of that Act as:

> (a) in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him, and
>
> (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

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factors that a decision maker is required to consider in order to determine the nature of the relationship: see s 4(3)).

20. J Millbank, "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" (1998) 12 *Australian Journal of Family Law* 99 at 103.
21. See M Stewart, "Domesticating Tax Reform: The Family in Australian Tax and Transfer Law" (1999) 21 *Sydney Law Review* 453; P Apps, "Tax Reform, Ideology and Gender" (1999) 21 *Sydney Law Review* 437; C Young, "Taxing Times for Women: Feminism Confronts Tax Policy" (1999) 21 *Sydney Law Review* 487.
22. Cf B Cass, "Gender in Australia's Restructuring Labour Market and Welfare State" and L Bryson, "Two Welfare States: One for Women, One for Men" in A Edwards and S Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* (Allen and Unwin, Sydney, 1995).
23. See for example, T MacDermott, "Who's Rocking the Cradle?" (1996) 21 *Alternative Law Journal* 207.

2.24 Several other NSW Acts either copied or referred to the above definition,[24] while others referred to de facto spouse without defining the term.[25] Moreover, while many Acts referred to both spouses and de facto spouses, others referred only to spouses (meaning husbands and wives) but included in the definition section a provision to the effect that spouses should be taken always to include de facto spouses.[26] Other statutes used the term "spouse" with no definition.[27] Some statutes required that a couple live together for a certain number of years before being considered to be in a de facto relationship, while other Acts stipulated no time limit.[28]

2.25 Not surprisingly, this situation led to some confusion as to whether the term had the same, or a substantially similar, meaning across different areas of law. In one of the earliest cases under the *De Facto Relationships Act 1984* (NSW) (as it was before 1999), the NSW Supreme Court formulated a "check list" of factors to consider if a relationship was a de facto relationship for those purposes.[29] In common with many statutory checklists, no

24. See eg *Dentists Act 1989* (NSW) s 53(2), s 53(3); *Legal Profession Act 1987* (NSW) s 60(3)(b); *Retirement Villages Act 1989* (NSW) s 3; *Compensation to Relatives Act 1897* (NSW) s 7(4); *Motor Accidents Act 1988* (NSW) s 3; *Mental Heath Act 1990* (NSW) Sch 1; *Duties Act 1997* (NSW) s 67.
25. See *Police Service Act 1990* (NSW) s 216; *Liquor Act 1982* (NSW) s 4.
26. See eg *Coroners Act 1980* (NSW) s 4; *Guardianship Act 1987* (NSW) s 3; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4; *Industrial Relations Act 1996* (NSW) s 55(5).
27. *See eg Co-operatives Act 1992* (NSW); *Financial Institutions Commission Act 1992* (NSW).
28. See *De Facto Relationships Act 1984* (NSW) s 17 (that is, the PRA prior to 1999); *Wills Probate and Administration Act 1898* (NSW) s 61B(3A), s 61B(3B); *Adoption of Children Act 1965* (NSW) s 19(1A).
29. See *D v McA* (1986) 11 Fam LR 214 at 227 where the list of factors was set out as:
    1. The duration of the relationship;
    2. The nature and extent of the common residence;
    3. Whether or not a sexual relationship existed;

particular weight is accorded to any one factor and there is much variation in how these criteria have been applied.[30]

2.26 Since the 1999 amendments to the PRA, there are now at least six different statutory interpretations of the term "de facto relationship" in NSW. There are over 20 statutes in which a

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4. The degree of financial interdependence, and any arrangements for support between or by the parties;
5. The ownership use and acquisition of property;
6. The procreation of children;
7. The care and support of children;
8. The performance of household duties;
9. The degree of mutual commitment and mutual support;
10. Reputation and public aspects of the relationship.

This list has been largely reproduced as a section listing an open set of factors which may be considered by the court in determining whether there is a de facto relationship. The PRA s 4(2) now provides that: "In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case: (a) the duration of the relationship, (b) the nature and extent of common residence, (c) whether or not a sexual relationship exists, (d) the degree of financial dependence or interdependence, and any arrangements or financial support, between the parties, (e) the ownership, use and acquisition of property, (f) the degree of mutual commitment to a shared life, (g) the care and support of children, (h) the performance of household duties, (i) the reputation and public aspects of the relationship."

Section 4(3) clarifies that, "No finding in respect of any of the matters mentioned in subsection (2)(a)(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a 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."

30. A paradigm example is a list of factors to consider in determining a child's "best interests": see *Family Law Act 1975* (Cth) s 68F(1). See also the list of criteria now set out in the *Social Security Act 1991* (Cth) s 4(3) to guide a decision-maker in determining whether or not someone is living in a "marriage-like relationship".

specifically gendered definition is still used, 20 statutes where the 1999 (ungendered) definition is used, three more where same-sex partners are included but the language used is different from that in the PRA,[31] while several other statutes refer to but do not define "de facto relationship".[32] In addition, various federal laws that also apply to residents of NSW use a variety of other definitions for such purposes as social security, taxation, immigration, federal education allowances, family law and others. So while the term "de facto relationship" has become common parlance in Australia, its meaning is anything but common and depends almost entirely upon the statute applying.

## The distinction in treatment between marriage and de facto relationships

2.27 While both marriage and de facto relationships are similar in that they are both intimate personal relationships, there is a significant discrepancy in the legal approach between marriage and de facto relationships which results in different outcomes for people depending on which relationship they are in.

2.28 It is widely thought that there are only limited ways in which legal regulation affects families, and that this occurs only or mainly through laws such as the FLA and the PRA. However, as the following scenario illustrates, the law constructs, regulates, affirms or denies family relationships in a myriad of ways.

31. See *Criminal Procedure Act 1986* (NSW) s 23A and *Victims Compensation Act 1996* (NSW) s 9, both of which define a family victim as "the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least 2 years". The *Workplace Injury Management and Workers' Compensation Act 1998* (NSW) s 4 defines de facto relationship as "the relationship between two unrelated adult persons: (a) who have a mutual commitment to a shared life, and (b) whose relationship is genuine and continuing, and (c) who live together, and who are not married to one another".
32. See eg *Police Service Act 1990* (NSW) s 216.

Alex and Dale have been living together for six years. When they met, Alex had a child, Jaz, then aged 8. Alex and Jaz moved in with Dale who shared the care of Jaz with Alex. Dale owned the house they were living in and wanted to put it in Dale's and Alex's joint names. However, they found that this would cost a significant sum in stamp duty so decided against doing so until they were in a better financial position. Unfortunately, before they did so, Dale was involved in a serious, and ultimately fatal, car accident. While Dale was in a coma, a number of decisions needed to be made about medical treatment. Dale eventually died and there were then questions about organ donation and funeral arrangements. Dale had not made a will.

2.29 In the example above, what happens after Dale's death will depend on a number of factors, not least the sex of the people involved. If they were a heterosexual couple, they would not have had to pay stamp duty to transfer the property into joint names. If they were married, Alex would inherit under the law of intestacy (the law that determines what happens to a person's estate when he/she hasn't made a will).[33] If they were a heterosexual couple living together in a de facto relationship, and Dale did not have a "legal" spouse, then Alex would inherit as they had lived together for not less than two years prior to the death. However, if they were both women, or both men, then, until 1999, Alex would not have been able to inherit under intestacy and might have had to resort to complicated legal proceedings to establish a claim to any part of the value of the property. That situation was eased from September 1999 when amendments to the *Wills Probate and Administration Act* 1898 (NSW) extended the definition of de facto spouse to include couples in same sex cohabiting relationships. Now the sex of Alex and Dale will no longer determine their entitlement in this instance. Even so, there are still many laws in NSW that would draw that distinction.

### *Medical decision making*

2.30 Prior to Dale's death, a number of medical decisions had to be made. As Dale was unable to make those decisions, some other person had to do so. What would be Alex's status in relation to

33. *Wills, Probate and Administration Act 1898* (NSW) s 61B.

making decisions about Dale's treatment? This is a particular problem if there is a dispute between, say, Dale's parents or siblings on the one hand, and Alex on the other.[34]

#### *Decisions arising on death*

2.31 The same situation applies to funeral arrangements and important decisions such as organ donation. Is it for Alex to make those decisions, or members of Dale's biological family?

#### *What of Jaz?*

2.32 As Alex's child, there will be no issue about the future care of Jaz. However, there is also no possibility of Jaz inheriting any part of Dale's estate, in the absence of a valid will making provision for that, since Jaz was not a biological or adoptive child of Dale. But suppose it had been Alex who was killed, not Dale. Dale may be the only parent other than Alex that Jaz has known, but if there is a dispute between Dale and Alex's surviving biological family, there is no necessary assumption that Jaz will remain in the care of Dale. We look at issues involving children and, in particular, the relationship between children and non-biological co-parents, in Chapter 3.

## POLICY OBJECTIVES OF RELATIONSHIPS LAWS

2.33 As stated above, different legal approaches to particular aspects of various relationships can give rise to different consequences. This indicates that the policy behind various laws differs depending on the purpose of those laws. From the time that secular marriage first became widely available,[35] marriage has been presumed to attract certain legal consequences. One policy approach has been to extend that presumption to other relationships that are seen as analogous to marriage.

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34. See *Guardianship Act 1987* (NSW) s 36(1): Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given: (a) in the case of minor or major treatment by the person responsible for the patient, or (b) in any case by the Tribunal. See Section 33A for the definition of a responsible person.
35. *Lord Hardwicke's Act 1753* (UK); *Matrimonial Causes Act 1873* (NSW).

2.34 This currently occurs in some areas of the law. For example, the *Social Security Act 1991* (Cth) has for many years treated couples living in heterosexual relationships as if they were married for the purposes of assessing entitlement to certain payments: presumably on the assumption that their income and assets are pooled, and that the resources of one party are available for the support of the other.[36] The *Social Security Act 1991* (Cth) uses the expression "marriage-like relationship" to describe a de facto relationship. The Act sets out a list of statutory indicia to which a decision-maker must refer in order to decide whether someone is to be treated as living in a marriage-like relationship.[37]

2.35 In succession law, there is a rule that states "marriage revokes all former wills", that is, that any will made prior to a person's marriage ceases to have effect after they marry.[38] Conversely, entering into a de facto or close personal relationship does not automatically revoke a will. Apparently underpinning this rule is the presumption that, as well as being a legal contract, a marriage is a person's primary relationship, and that that relationship takes precedence over all others, unless there is clear evidence to the contrary (such as a will made after marriage that confirms a testamentary intention to benefit someone other than a spouse).

2.36 In evidence laws over the years, there have been various restrictions on the competence and the compellability of spouses concerning their ability to give evidence against the other.

2.37 The Law Commission of Canada noted that the historical basis for the non-compellability of spouses had all but disappeared. The current rationale appears to be the preservation of martial

36. See Chapter 8 for a discussion of the legal obligation on partners in a relationship to support one another.
37. *Social Security Act 1991* (Cth) s 4(3).
38. Except where a will was made "in contemplation of marriage": see *Wills Probate and Administration Act 1898* (NSW) s 15(3), s 15(4): R F Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (Butterworths, 1996) at 10.2.1-10.2.3.

harmony.[39] While noting that this is a valid objective, the Law Commission recommended that the rule on compellability should be extended to include other close personal relationships.[40]

2.38 In Australia, each State until recently had statutory provisions limiting the competence and compellability of spouses in relation to evidence against the other in criminal proceedings.[41] As part of its broad-ranging inquiry into evidence in 1984, the Australian Law Reform Commission recommended broadening the category of non-compellable witnesses to include parents, children and de facto spouses of the accused.[42] In a forceful dissent, Justice Michael Kirby (the then Chairperson of the ALRC) raised a number of policy concerns about that recommendation.[43] As many of the issues he raised go to the heart of the issues involved in this current reference, they are discussed in some detail here.

2.39 Justice Kirby's view was that the "right to object to giving evidence should be available to any person who is in an intimate personal relationship with the defendant, whether of blood or affection". He considered that the four categories chosen by the majority were "at once too narrow and insufficiently sensitive to the variety of human relationships which the wider statement of exemption is designed to accommodate". He noted that the categories proposed did not even provide protection for the "nuclear family" – for example, they did not include siblings. "Nor do they allow for the variety of personal relationships that sometimes

39. Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Report, December 2001) at 49.
40. Law Commission of Canada, Report at 51-55.
41. See *Evidence Act 1995* (NSW) s 18 and s 19 for the compellability of spouses in criminal cases only.
42. ALRC, *Evidence: Volume 1 Interim Report* (Report 26, 1984) at para 5.37. The majority view formed the basis for the *Evidence Act 1995* (NSW).
43. Justice Kirby's dissent is set out in ALRC, Report 26 at para 5.40-5.43.

constitute the 'family' of particular persons in Australian society today". He continued:

> Once the decision is further made to reflect the reality of personal relationships in Australian society today, to the extent of exempting (at least some) de facto spouses, it is clear that even a narrow definition of the orthodox nuclear family has been abandoned as the criterion for exemption.

2.40 Justice Kirby gave a number of reasons in support of his proposal to use the category "intimate personal relationship". These included the need to avoid discrimination, particularly against "traditional Aboriginal marriage relationships and homosexual relationships". Finally, he argued that so far as the practical operation of the provision was concerned, a *genus* was to be preferred to a category approach as the latter would invite disuniformity as categories were added or subtracted from the list. In Justice Kirby's view, the majority's categories were:

> illustrations rather than the description of a new principle. The result is arbitrary and discriminatory. The alternative formulation is simpler and provides for changing community attitudes to personal relationships.[44]

2.41 The Law Commission of Canada noted that the policy objectives of laws relating to relationships are usually not related to marriage per se unless they specifically address marriage and divorce. Rather, Parliament is "using marriage as a proxy for indicating the kinds of close personal relationships between adults to which it intends a particular policy to apply". The Law Commission noted further that the:

> generalised use of concepts like marriage and spouse as a proxy directly raises problems of congruence: in some cases, the concepts are too narrow; in some, they are too broad; and in some, they are both too narrow and too broad at the same time. Even when statutes are written so as to deal more generally with "conjugal" relationships – that is, when they are drafted to include both marriage and common law

44. ALRC, Report 26 at para 5.43.

> relationships – they can still fail to line up with what appears to be the underlying rationale for the policy or programme Parliament is pursuing.[45]

# RELATIONSHIPS LAW IN OTHER JURISDICTIONS

## Australia

2.42 There is legislation recognising heterosexual de facto relationships in all States and Territories of Australia.

2.43 The *De Facto Relationships Act 1999* (Qld) covers heterosexual and same-sex relationships, but only regarding property. The newly enacted *Family Court Amendment Act 2001* (WA) also applies to same sex and heterosexual de facto relationships, referring to them as "marriage-like" relationships.[46] There is recognition of same-sex and close personal relationships in the Australian Capital Territory and Victoria.[47] The *Domestic Relationships Act 1994* (ACT) opened the way for treating interdependent close personal relationships (at least for property purposes) as analogous to couple relationships.

## Internationally

2.44 Statutory schemes which recognise de facto relationships have also been enacted in other jurisdictions around the world including Canada, New Zealand, the USA, the Netherlands and other parts of Europe.

2.45 Recent amendments in New Zealand extend the provisions for property division under the *Matrimonial Property Act 1976* (NZ) to de facto couples, both heterosexual and same sex.

45. Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults* (Discussion Paper, May 2000) at 29.
46. s 205V.
47. *Domestic Relationships Act 1994* (ACT); *Statute Law Amendment (Relationships) Act 2001* (Vic).

The amending legislation[48] renames the Act the *Property (Relationships) Act 1976* (NZ), which will apply equally to marriages and de facto relationships of more than three years duration.[49] Under the new provisions, property will be divided equally and can only be shared unequally where it would be "repugnant to justice" otherwise.[50] The court also has a discretionary power to order one party to make payments to the other where there is a likely future economic disparity.[51]

2.46 Last year the Federal Government of Canada passed legislation to extend the definition of a common law partner to include same-sex couples. The new *Modernization of Benefits and Obligations Act SC 2000* c 12 (Can) was partly a response to the case of *M v H,*[52] which held that legislation which fails to recognise same-sex and heterosexual relationships equally is a violation of section 15 of the Canadian *Charter of Rights and Freedoms.*[53] The new legislation amends 68 existing statutes to include same-sex couples, thereby providing them with access to the same benefits and obligations that those statutes afford heterosexual common law partners. There has also been reform in Canada at a provincial level, with British Columbia,[54] Quebec[55] and Ontario[56] all having enacted legislation recognising same-sex relationships for certain provisions regarding property and/or maintenance.

48. *Matrimonial Amendment Bill 2000* (NZ) and *Supplementary Order 25.*
49. S O'Brien, *Dramatic Changes to Family Property Law*, «www.fmlaw.co.nz/family matrimonialpropertylaw.htm».
50. S O'Brien, *Dramatic Changes to Family Property Law*, «www.fmlaw.co.nz/family matrimonialpropertylaw.htm».
51. S O'Brien, *Dramatic Changes to Family Property Law*, «www.fmlaw.co.nz/family matrimonialpropertylaw.htm».
52. *M v H* [1999] 2 SCR 3 at para 73.
53. *Constitution Act 1982* (Can).
54. *Definition of Spouse Amendment Act 1999* SBC c 29 (BC).
55. *Act to amend various legislative provisions concerning de facto spouses 1999* RSQ c 14 (Quebec).
56. *Act to amend certain statutes because of the Supreme Court of Canada decision in M v H 1999* SO 1999 c 6 (Ontario).

2.47 In the USA, Vermont has enacted "civil union" legislation[57] covering same-sex relationships. The legislation states that:

> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.[58]

2.48 There are also individual municipalities throughout the USA with domestic partnership registries.[59] Being in a registered domestic partnership grants couples limited rights and obligations. For example, those who register in California receive some basic humanitarian rights, such as visitation rights during medical emergencies.[60] Also, more than 3,000 employers in the USA recognise domestic relationships and confer on them benefits similar to those provided to married spouses.[61]

2.49 The Netherlands is the first country to grant total equality of recognition to same-sex couples through recently enacted legislation that specifically allows same-sex marriage.[62] The Netherlands also has an alternative to marriage for

57. 15 VSA 23. This law came into effect on 1 July 2000. For more information, see American Association for Single People, *Domestic Partnership Information*, accessed via «www.singlepeople.org/dp-info.html».
58. 15 VSA 23 s 1204(a).
59. Thirty-five of them cover both same sex and heterosexual couples, while another five allow only same sex couples to register: see American Association for Single People, *Municipalities with Domestic Partnership Registries*, accessed via «www.singlepeople.org/dp-info.html».
60. American Association for Single People, *Domestic Partnership Information*, accessed via «www.singlepeople.org/dp-info.html» on 1 February 2001.
61. American Association for Single People, *Domestic Partnership Information*, accessed via «www.singlepeople.org/dp-info.html» on 1 February 2001.
62. *Wet openstelling huwelijik* (Staatsbald 2001, 9) or Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening of marriage for persons of the same sex, Staatsbald 2001, 9.

heterosexual and same sex-couples called Registered Partnerships.[63] Germany has also very recently enacted legislation[64] which will allow a limited form of same-sex marriage, where spouses can take each other's name, have next of kin rights in medical decisions and share household insurance.[65]

2.50 Denmark,[66] Norway[67] and Sweden,[68] and also Iceland[69] have Registered Partnership laws, although only for same-sex couples.[70] In Belgium[71] and France[72] there exist schemes similar to registered partnership into which cohabitees, including same sex and heterosexual couples, can voluntarily enter. The Belgian legislation covers non-marriage relationships, such as two siblings who live together, and recognises cohabitees in the area of debt, obliges couples to share the costs of cohabitation and also regulates the use and disposition of joint property during the relationship.[73] The Belgian scheme was modelled on the French one, although the latter excludes close relatives. The French scheme has

63. *Registered Partnership Act* (Staatsbald 1997, 324) or Act of July 1997 to amend Book 1 Civil Code and the Code of Civil Procedure in order to introduce provisions regarding registration of partnership, Staatsbald 1997, 324.
64. *Lebenspartngerschaftgesetz*, ("Lifepartnership Act") came into force 1 January 2001.
65. EGALE: Equality for Gays and Lesbians Everywhere, *Same Sex Marriage Around the Globe*, accessed via «www.marriageequality.com/global/international.htm» on 24 January 2001.
66. Act No 372 of 7 June 1989, in force 1 October 1989. This legislation also extends to Greenland.
67. Act No 40 of 30 April 1993, in force 1 August 1994.
68. Act of 23 June 1994, in force 1 January 1995.
69. Act of 12 June 1996, in force 27 June 1996.
70. For more detail, see C Forder, "Models of Domestic Partnership Laws: The Field of Choice", paper for *Feminism and Law Workshop Series* (Toronto, 27 October 1999) at 2.2.
71. *Statutory Cohabitation Act* (Belgium), passed on 29 October 1998, inserted into Book 3 of the Civil Code: See also C Forder, Models of Domestic Partnership Laws: The Field of Choice.
72. *Pacte Civil de Solidarite* in Book 1, pt XII of the French Civil Code.
73. C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.2.

consequences in the areas of debt, social security, leases, income tax, residency and also maintenance, where each party undertakes to provide mutual assistance during the relationship.[74] Also, property acquired together is regarded as jointly owned unless otherwise agreed in a written statement.[75]

2.51 The above registered partnership and similar schemes are all optional and voluntarily entered, but there is also legislation in Hungary, Sweden and Spain which recognises de facto heterosexual and same-sex relationships as a matter of presumption.

2.52 In 1996, a provision in Hungary was amended to extend certain property rights of unmarried cohabitees to same-sex couples as well.[76] Upon breakdown of the relationship, property acquired during cohabitation is divided according to contributions made to its acquisition, including homemaker contributions.[77]

2.53 In Sweden, the *Cohabitees (Joint Home) Act*[78] which applies to couples living in a marriage-like relationship, is also applicable to same-sex couples due to provisions in the *Homosexual Cohabitees Act.*[79] The legislation provides for equal division of jointly acquired property upon breakdown of the relationship,[80] unless that would

74. C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.2.
75. EGALE: Equality for Gays and Lesbians Everywhere, *Same Sex Marriage Around the Globe*, accessed via «www.marriageequality.com/global/international.htm» on 24 January 2001.
76. Hungarian Civil Code, s 578/G(2): C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
77. Hungarian Civil Code, s 578/G(1): C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
78. 1987:232.
79. 1987:813 with amendments up to and including 1997:1133: C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
80. *Cohabitees (Joint Home) Act* s 5.

cause one party financial hardship.[81] The legislation does not however grant maintenance or inheritance rights.[82]

2.54 In Catalonia, a province in Spain, a scheme exists for cohabiting spouses which creates rights in the areas of debt and household costs, provides certain social benefits if one spouse is employed by the Catalan government and also regulates the use of the common home.[83] However, while the scheme will operate automatically for heterosexual couples if they have been together for two years or have a child, same-sex couples must register their relationships.[84]

## ISSUES FOR DISCUSSION

### Greater legal recognition of de facto relationships

2.55 As noted earlier, the 1999 amendments to the PRA amended some, but not all, NSW legislation that refers to "spouse" or "partner", to make it clear that the definition of those terms includes de facto partner as referred to in the PRA. The Gay and Lesbian Rights Lobby identified more than 50 NSW Acts that affected people in same-sex relationships and had proposed that these all be amended.[85] In December 1999, the Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee") recommended that the Government examine all NSW legislation "to determine whether amendments need to be made to ensure a consistent application of the new definition of de facto" in

81. *Cohabitees (Joint Home) Act* s 9.
82. C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
83. Act 10/1998, *Ley de Uniones Estables de Parejas* ("Stable Couples Act"): C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
84. Arts 21, 1.1 and 1.2 Act 10/1998: C Forder, Models of Domestic Partnership Laws: The Field of Choice at 2.1.1.
85. See Gay and Lesbian Rights Lobby, *The Bride Wore Pink: Legal Recognition of Our Relationships* (Sydney, 2nd ed, 1994).

the 1999 legislation and that employment-related laws and awards should be made consistent with the PRA.[86]

2.56 The Commission can see no policy reason why the definition of de facto partner or spouse should not be made consistent across all relevant legislation, but is interested in hearing views which support or disagree with this proposal.

**ISSUE 2**

**Should the definition of de facto partner in the PRA be applied consistently across all relevant legislation in NSW? Why or why not?**

## Should de facto and close personal relationships be regulated by the same provisions?

2.57 The *De Facto Relationships Act 1984* (NSW) was originally intended to provide a just and equitable means of dealing with the breakdown of intimate heterosexual relationships involving couples who were not married, and therefore could not avail themselves of the FLA. While the 1999 amendments extended the scope of the PRA beyond these relationships, the substantive provisions of the PRA remained largely the same. Consequently, it is arguable that the focus of the PRA, particularly regarding the property and asset provisions, is addressing the consequences of the breakdown of de facto relationships.

86. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform* (Report 20, Parliamentary Paper 127, 1999) ("Social Issues Committee Report") Recommendations 12 and 10, respectively, at 67. It was also proposed that the government "review and amend all legislation imposing responsibilities and obligations to require similar compliance by those in same sex relationships as those in opposite sex relationships" and that "adequate measures" be put in place "to protect the privacy of those making disclosures regarding their same sex relationship": see Recommendation 11 at 67.

2.58 The PRA includes people cohabiting in de facto and close personal relationships within the single category of "domestic" relationship. As such, for the purposes of property and asset division and maintenance, the same provisions of the PRA apply to both de facto and close personal relationships. This happens despite the fact that de facto relationships and close personal relationships can be vastly different in nature, and people may form such relationships for very different reasons.

2.59 One difficulty with applying the same provisions to both de facto and close personal relationships is that, sometimes, financial interdependence will be critical in a relationship, whereas at other times, it will be the emotional element that is critical. For example, in terms of medical decision-making, the emotional link is the significant aspect of the relationship. Conversely, with property division, financial interdependence is central. In general, the provisions of the PRA assume some degree of emotional and financial interdependence in a relationship. While this is usually the case in de facto relationships, it may not be so in other close personal relationships.

2.60 On the other hand, having a single, inclusive category of domestic relationship to which the provisions of the PRA apply is advantageous in that people in de facto and close personal relationships have access to equal protection under the PRA. The provisions of the PRA are broad and flexible enough to accommodate different types of relationships, and the legal consequences which attach may differ depending on the circumstances.

2.61 The Commission is interested to hear views on whether, given the differences between de facto and other close personal relationships, they should continue to be recognised and regulated by the same provisions in the PRA.

**ISSUE 3**

**Are the provisions in the PRA concerning de facto relationships appropriate for recognising and regulating close personal relationships? Why or why not?**

**If not, how should close personal relationships be recognised and regulated?**

## Cohabitation requirement

2.62 The PRA currently requires parties to a domestic relationship to be living together.[87] While cohabitation may be an accepted indication of whether a domestic relationship, particularly a de facto relationship, exists, many have argued that this requirement is too limiting.[88] The Gay and Lesbian Rights Lobby proposed that there should be a broader category of domestic relationship in the PRA that was not limited to cohabitants.[89] This was reflected in the two unsuccessful attempts prior to the PRA to broaden the *De Facto Relationships Act 1984* (NSW):

87. In his Second Reading Speech on the 1999 Amendment Bill, the then Attorney General, the Hon J W Shaw QC MLC, noted that the legislation did not include people who merely shared accommodation as a matter of convenience, such as flatmates: NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999, the Hon J W Shaw QC MLC, Attorney General, Second Reading Speech at 229.
88. See eg, Anti-Discrimination Board of NSW, *Submission* at 3-4.
89. See Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (Sydney, 2nd ed, 1994).

namely, the *De Facto Relationships Amendment Bill 1998*[90] and the *Significant Personal Relationships Bill 1997*.[91]

2.63 The PRA also currently specifies that only parties to a domestic relationship who have lived together for longer than two years may apply for an order for financial adjustment. This requirement is discussed in Chapter 6.

2.64 The major advantage of removing the cohabitation requirement is that the PRA would cover people who are genuinely in, or consider themselves to be in, domestic relationships based on mutual emotional and/or financial interdependency but, for a variety of reasons, do not live together. This would include de facto couples who live apart during the week, either through choice or work commitments, but spend their weekends together, and couples separated due to one partner being in prison or serving overseas in the armed forces. It would also cover, for example, siblings who own property together but live separately, and who may wish to seek relief under the PRA in the event of a dispute, and non-resident carer relationships.

2.65 More particularly, it has been argued that the cohabitation requirement does not cover many gay and lesbian relationships.[92] The Gay and Lesbian Rights Lobby pointed out that a significant number of gay and lesbian couples do not live together, yet they consider themselves to be in interdependent personal relationships.[93]

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90. For a discussion of the *De Facto Relationships Amendment Bill 1998* (NSW), and a list of the Acts that it would have amended, see J Millbank, "The De Facto Relationships Amendment Bill 1998 (NSW): The Rationale for Law Reform" (1999) 8 *Australasian Gay and Lesbian Law Journal* 1.
91. The ACT is the only Australian jurisdiction that provides a statutory framework for property alteration between non-cohabitants: see *Domestic Relationships Act 1994* (ACT).
92. See Anti-Discrimination Board of NSW, *Submission* at 3; Northern Rivers Community Legal Centre, *Submission* at 1.
93. Gay and Lesbian Rights Lobby, *Submision* at 2.

2.66 The Social Issues Committee noted that while the current definition of de facto relationship covered most relationships adequately, there were still some situations (such as those discussed above) that did not fall within the scope of the definition. As a solution, the Social Issues Committee recommended that the cohabitation requirement should remain for de facto relationships, but should be removed for close personal relationships. This would enable couples who meet the de facto criteria but for the cohabitation requirement to receive legal recognition as a close personal relationship.[94]

2.67 Removing the cohabitation requirement would make the ambit of the PRA extremely broad. This could have the significant disadvantage of making it difficult to determine when a close personal relationship exists. This could result in relationships where there is only a tenuous emotional or financial interdependency, which could cause injustice. In looking to make the PRA more flexible and inclusive, the focus of the legislation as a means of recognising close relationships, primarily for the purpose of effecting just and equitable financial adjustments when those relationships break down, needs to be kept in mind.

2.68 This difficulty could be partly addressed by the recommendation of the Social Issues Committee that the indicia in the PRA used to determine the existence of a de facto relationship be applied to close personal relationships. Those factors include: the duration of the relationship; the degree of financial dependence; the ownership, use or acquisition of property; and the degree of mutual commitment to a shared life.[95] In addition, the Social Issues Committee favours expanding these criteria to include the matters listed in the *De Facto Relationships Amendment Bill 1998* (NSW). These include matters such as the nature of living and financial arrangements, and social aspects of the relationship: whether the parties represent themselves to others as being in an interdependent relationship; whether they

94. Social Issues Committee Report at 50, 54-55.
95. See PRA s 4(2).

plan and undertake joint social activities; and the opinion of friends about the nature of the relationship.[96]

2.69 The problems associated with the PRA applying too broadly should the cohabitation requirement be removed could also be addressed by the introduction of a registration system, although this option has other difficulties associated with it. This is discussed below.

**ISSUE 4**

**Should the PRA be extended to cover people in domestic relationships who do not live together? Why or why not?**

**Should the cohabitation requirement apply to both de facto and close personal relationships, or to just one of those categories? Why or why not?**

## Registering relationships

### *Current presumptive approach*

2.70 The current approach in the PRA is presumptive, that is, those who meet the definition of domestic relationship fall automatically within the operation of the PRA without the need to register a relationship. As outlined above, this can be contrasted with some of the approaches in North America and Western Europe.

2.71 The main advantage of a presumptive approach is that it does not require any form of registration: people will not be required to take active steps to opt in. As a result, people do not need to be aware of the PRA to benefit from it, and will be covered by the provisions of the PRA if they do not make their own financial agreements. The presumptive approach also allows people to "opt out" of the operation of the PRA if they wish, by making private agreements.

96. See Social Issues Committee Report at 51-52.

2.72 The main difficulty with a presumptive approach is in relation to close personal relationships, where it may be difficult to identify the parties to a relationship. This would be a particular problem should the cohabitation requirement be removed. For example, a person in a domestic relationship as defined in the PRA is eligible to make a claim under the *Family Provision Act 1982* (NSW). Should the definition of domestic relationship be amended to remove the requirement that the parties live together, it may be difficult to establish whether people were in a close personal relationship sufficient for the purpose of making a family provision claim.[97] The situation would be clarified if such a relationship were formally registered in some way under the PRA.

#### *Benefits and drawbacks of registration*

2.73 Registration has the benefit of certainty. That certainty removes the need for legislative preconditions such as requiring cohabitation. The parties to a relationship can be readily identified, and have demonstrated that they know about, and agree to be bound by, the legislation and its provisions. It would give people who do not wish or are legally unable to marry, such as gay and lesbian couples,[98] the opportunity to have their relationship registered and formally recognised by the State. It also provides a system of recognition for people who do not wish to live together, but want to acknowledge their relationship of mutual support.

2.74 However, unlike other parts of the world, no Australian report or inquiry on the issue has supported registration as the sole method of relationship recognition. The Gay and Lesbian Rights Lobby have repeatedly expressed concern about registration, arguing that, while purporting to give legitimacy to relationships, it would in fact establish a hierarchy of legally

97. Although, the Commission notes in this regard that courts already make such assessments about the nature of relationships, based on individual facts and circumstances, for a variety of purposes.

98. Since marriage is an area of Commonwealth legislative responsibility, and this reference is confined to the PRA, the Commission refrains in this paper from discussing the option of homosexual marriage.

recognised relationships and be seen as a "second best" option.[99] The Social Issues Committee noted that registration would be unlikely to achieve more than the current presumptive regime under the PRA, and consequently recommended that such a system not be introduced.[100]

2.75 It has also been argued that few people would be likely to register relationships.[101] Heterosexual couples who choose not to marry would be unlikely to opt for another type of formal recognition, while same-sex couples may not want to register their relationships due to concerns about homophobia, or because of the issues noted above raised by the Gay and Lesbian Rights Lobby.

2.76 A further difficulty with adopting an opt-in approach is ensuring information remains updated. Otherwise, people may still be formally registered years after they separate and repartner. One way of addressing this problem is to require all registrations to be renewed regularly, for example every three years. Another issue is whether both parties should be required to end or update a registration, or whether this should be permitted unilaterally.

### *Option 1*

2.77 The first option is to retain the current presumptive approach in the PRA. The advantages and disadvantages of this approach are discussed at paragraphs 2.71-2.72.

### *Option 2*

2.78 The second option is to retain the presumptive approach in the PRA, but also introduce an optional registration system for those who choose to have their relationships recognised more formally. This option would have all of the advantages and disadvantages of registration set out at paragraph 2.73. It would have the additional advantage, however, of giving people the option to choose to register (which would clarify the status of their

99. Gay and Lesbian Rights Lobby, *Submission* at 3-4. See also, Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (Sydney, 2nd ed, 1994) at Ch 8.3.

100. See Social Issues Committee Report, Recommendation 5 at 27.

101. This view is backed up by evidence of low registration rates in jurisdictions that have such a system.

relationship as one falling within the scope of the PRA), yet would also provide protection for those who did not choose registration. The specific disadvantage with this approach is the undesirability of establishing a three-tier hierarchy of relationships: namely, marriage, registered domestic relationships, and presumptive domestic relationships.

### *Option 3*

2.79 A further option is to make registration the only option under the PRA. In this way, the PRA would operate similarly to the FLA, that is, the PRA would only apply to people who had formally registered their relationship. The major advantage is certainty concerning the scope of the legislation and the relationships it covers. However, as the Commission stated above,[102] there is a notable amount of opposition to registration as the sole means of relationship recognition under the PRA, suggesting that many people would have valid reasons for choosing not to register. Accordingly, the lack of a presumptive category would result in a significant number of relationships which are currently recognised under the PRA being excluded.

### *Option 4*

2.80 The final option put forward by the Commission is to have a presumptive approach with respect to certain relationships, while giving people the choice of deciding whether or not to register other types of relationships. For example, it could be presumed that people living in a de facto relationship were automatically covered by the PRA, since those relationships are easier to identify, while a registration approach could apply for people in other close personal relationships who may wish to have the provisions of the PRA apply to them. For de facto relationships, this option would entail all of the benefits and detriments of registration discussed earlier.[103] Difficulties would arise, however, for people who did not meet the criteria for de facto relationships, but fell into the close personal relationships category, and who did not wish, or did not know of the requirement, to register. This would exclude a number of relationships currently covered under the PRA.

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102. See para 2.74.
103. See para 2.73-2.76.

**ISSUE 5**

**Which of the Commission's options do you prefer? Why?**

**If a registration system is the preferred option, how should it work?**

# 3. Recognition of functional parent/child relationships

- Introduction
- Terminology
- Constitutional framework
- Types of functional parent/child relationships
- Existing recognition
- Existing options for additional recognition
- Areas of non-recognition
- Options for reform

## INTRODUCTION

3.1 While the focus of this reference is on relationships between adults, the legal treatment of parent/child relationships raises equally important issues. In some areas, the law recognises the relationship between adults and children who have a functional, rather than biological or adoptive, parental relationship. However, legal recognition of the functional parent/child relationship is inconsistent.[1]

Harry lives with his biological mother, Pippa, and her partner Mick. His biological father is Jai, but Jai and Pippa's relationship ended before Harry was born and Jai has no contact with Harry. Harry has always viewed Mick, whom he calls Dad, as his father and he is treated as a grandchild by Mick's parents, whom he calls Nanna and Grandad. But for many important legal purposes, such as determining who would receive a share of Mick's estate if he died without a will, the "father and son" relationship between Mick and Harry is invisible.

3.2 As the Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee") noted in its Inquiry into De Facto Relationships Legislation, limited recognition of the functional parent/child relationship has the potential to disadvantage the children of those in non-traditional relationships.[2] Accordingly, the Social Issues Committee recommended that:

> the issue of legal recognition of non-biological parents[3] to ensure children of those in non-traditional domestic relationships are not disadvantaged be fully examined, with a view to amending appropriate legislation if necessary.[4]

1. The terminology in this chapter is explained at para 3.6-3.9.
2. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform* (Report 20, Parliamentary Paper 127, 1999) ("Social Issues Committee Report") at 77, 82, 83.
3. The Social Issues Committee's use of the phrase "non-biological parent" equates to our use of "functional parent", which is defined at para 3.7-3.9.
4. Social Issues Committee Report at 82.

3.3 It further recommended that this issue be referred to the Commission for consideration in the course of this reference.[5] In accordance with the Social Issues Committee's recommendation, our consideration of legal recognition of functional parent/child relationships has been confined to those relationships that arise in the context of non-traditional relationships, such as de facto relationships. Particular attention has been given to functional parent/child relationships arising in the context of a same-sex de facto relationship because, as will be outlined in this chapter, this is an area of significant concern.

3.4 This chapter begins with an outline of the constitutional framework within which the legal recognition of functional parent/child relationships exists. It then describes a range of common scenarios where a functional parent/child relationship may arise. We discuss the ways that these relationships are or can be legally recognised at present before identifying a range of other legal areas that do not recognise such relationships. Finally, we consider ways in which the law might better address these functional relationships.

3.5 As a preliminary matter, the Commission notes that the issues discussed in this chapter are unaffected by debate about the desirability of gay parenting and other such matters. The reality is that diverse family structures exist in NSW and the parental relationships in many children's lives diverge from the traditional nuclear family model.[6] As one commentator argues, by continuing to restrict the legal recognition of parent/child relationships, we "perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form".[7] In so doing, the current disadvantages faced by the children of those in non-traditional relationships are also perpetuated.

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5. Social Issues Committee Report at 82.
6. See para 1.16-1.18 for an outline of the social context of this review.
7. N Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families" (1990) 78 *Georgetown Law Journal* 459 at 469.

## TERMINOLOGY

3.6 The basic division with which this chapter is concerned is between cases where an adult has the legal status of being a child's parent and cases where an adult does not. The most common way in which an adult has legal parental status is by being the biological parent of a child. However, this status can also be acquired by adopting a child.[8] Legal parental status can also be presumed from circumstances.[9]

3.7 As people other than a biological parent can acquire legal parental status, we refer to people who possess such status as "legal parents". "Legal child" has the equivalent meaning. We refer to an adult who acts as a child's parent but is not a legal parent as a "functional parent". "Functional child" has the equivalent meaning.

3.8 The concept of a functional parent/child relationship covers a broad spectrum of relationships, which are outlined below. Our use of the terms "functional parent" and "functional child" encapsulates this range. Any differences in the nature of the functional parent/child relationship will, however, be relevant when considering in what circumstances it is appropriate to recognise the relationship.[10]

3.9 Later in this chapter, we discuss the legal status of a woman who consents to the artificial insemination of her female partner, with the intention of being a parent to the child. We refer to the woman who conceives the child as the "birth mother" and to her partner as the "co-mother".

8. *Adoption Act 2000* (NSW) s 95.
9. See, for example, *Status of Children Act 1996* (NSW) s 14 and *Family Law Act 1975* (Cth) s 69P-s 69U.
10. This point is discussed further at para 3.79-3.115.

***Legal parent*** means a biological, adoptive or presumptive parent of a child.

***Legal child*** means a biological, adoptive or presumptive child of an adult.

***Functional parent*** means a person who acts as a child's parent but is not his or her biological, adoptive or presumptive parent.

***Functional child*** means a child who has a relationship with an adult as if that adult were his or her parent, but who is not the biological, adoptive or presumptive child of that adult.

***Birth mother*** means a woman who conceives a child through artificial insemination, with the consent of her partner.

***Co-mother*** means a woman who consents to the artificial insemination of her female partner, with the intention of being a functional parent to the child.

## CONSTITUTIONAL FRAMEWORK

3.10 The *Commonwealth of Australia Constitution Act 1900* (Cth) divides legislative responsibility for children between the Commonwealth and the State Parliaments. Under the original Constitution, the Commonwealth's legislative power over family law was limited to making laws about marriage, divorce and its consequences. Specifically, section 51(xxi) provides the Commonwealth with power to legislate with respect to marriage, while section 51(xxii) refers to "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". Disputes about ex-nuptial children used to be State matters, dealt with by State courts.

3.11 However, from 1987, the State governments (other than Western Australia) referred their powers in respect of "maintenance, custody and guardianship of, and access to, all children and over the payment of expenses in relation to children"

to the Commonwealth.[11] As a result, issues to do with residence and contact (formerly guardianship, custody and access), child maintenance and support, now come within the jurisdiction of the Family Court of Australia, irrespective of the marital status of the child's parents. This includes ex-nuptial children, children from blended families, foster children, children from previous marriages and children born with the assistance of artificial conception procedures.

## TYPES OF FUNCTIONAL PARENT/CHILD RELATIONSHIPS

### Child with two legal parents plus a functional parent

3.12 Many children in NSW do not live with two legal parents.[12] A child may be living with only one legal parent because his or her parents are no longer in a relationship or one parent has died. Alternatively, although a child may have two legal parents, one of the parents may have had no involvement in the child's life other than the fact of biological parentage. Where a child is living with only one legal parent and that parent has a partner, the partner may develop a parental relationship with the child. In such a situation, the child will then have two legal parents and a functional parent.[13] The child may have a strong relationship with both the functional parent and the non-resident legal parent, in addition to the resident legal parent.

11. *Commonwealth Powers (Family Law-Children) Act 1986* (NSW).
12. For instance, 18.2% of all children under 15 were living in single parent families in 2000 and 20.9% of all families have only one parent: Australian Bureau of Statistics, *Australian Social Trends 2001* (Cat No 4102.0) at 34.
13. Of course, a child could have more than one functional parent. For example, a child may retain a relationship with a functional parent following the breakdown of a relationship between their legal parent and that functional parent and may subsequently come to view another partner of their parent as a functional parent.

Hanna and Andrew are the biological parents of Clara. When Clara is born, Hanna and Andrew are living in a de facto relationship but their relationship ends when Clara is 6 months old and Andrew moves out. About one year later, Hanna begins a relationship with Shane, who subsequently moves in with Hanna and Clara. Although Andrew still sees Clara regularly, Clara comes to view Shane also as her father. She calls Andrew "Dad" and Shane "Pop".

## Child with one legal parent plus a functional parent

3.13 A child may have one legal parent because he or she was conceived through artificial donor insemination and his or her biological mother was not in a heterosexual relationship at the time. As sperm donors are not the legal parent of any child conceived using their sperm, if a woman without a male partner conceives a child through artificial donor insemination,[14] that child will have one legal parent. An alternative way in which a child may have one legal parent is if he or she is adopted by a single person.

3.14 Where a child has one legal parent, he or she may acquire a functional parent if a parent/child relationship is formed with another adult, such as the legal parent's partner.

Mai, who is 38 years old, decides that she would like to have a child. As she is not in a relationship, she asks her friend, William, if he would be willing to help her conceive a child through artificial insemination. William is happy to help Mai and provides her with sperm donations. After a few attempts, Mai conceives and subsequently gives birth to Anna. At the time of her birth, Mai is Anna's only legal parent. When Anna is three years old, Mai and Anna move in with Mai's new partner, Charlotte. Charlotte soon becomes a second mother to Anna. One day Anna brings home a drawing of Mai and Charlotte from kindergarten – it is titled "My Two Mums".

14. A male partner of a woman who conceives a child through artificial insemination is legally presumed to be the father of the child: *Status of Children Act 1996* (NSW) s 14.

## Child conceived through artificially inseminated donor sperm, with consent of birth mother's female partner

3.15 A way in which a lesbian couple may have a child together is through the use of artificially inseminated donor sperm. Although both women have the intention to become parents of the child and may share in providing financial and emotional support for the child and undertaking child care responsibilities,[15] only the birth mother will have a legally recognised parental relationship with the child. In the eyes of the law, the co-mother has only a limited and piecemeal relationship with the child; for many legal purposes, she is a total stranger. Accordingly, the child will have one legal parent[16] and one functional parent.

Madeleine and Fiona have been in a relationship for 5 years and decide that they would like to have a child together. They choose to conceive a child through the use of artificially inseminated sperm. After much consideration, they decide that Fiona will be the birth mother. Madeleine carries out the insemination process and attends the pre-natal classes with Fiona, in preparation for assisting at the birth. When Colin is born, he is given both women's last names. Madeleine takes a month's leave from work to help care for their new baby.

3.16 We have confined the discussion of a functional parent/child relationship in the artificial insemination context to lesbian couples. This confinement is because the legal position outlined above stands in stark contrast with the situation when an opposite-sex couple have a child, using artificially inseminated sperm. Where a woman in a heterosexual relationship[17] becomes

15. P Ettelbrick, "Who is a Parent? The Need to Develop a Lesbian Conscious Family Law" (1993) 10 *New York Law School Journal of Human Rights* 513 at 517.
16. As discussed below, a sperm donor is not a legal parent.
17. Both marriage and de facto relationships qualify: *Status of Children Act 1996* (NSW) s 14(6).

pregnant as the result of an artificial insemination procedure,[18] her male partner is presumed to be the father of the child, provided he consented to the procedure.[19] It is irrelevant to this presumption that the male partner's sperm was not used in the procedure.[20]

## EXISTING RECOGNITION

3.17 Legal recognition of the functional parent/child relationship is piecemeal and therefore inconsistent. This section provides examples of where that relationship is currently recognised.[21]

### Property (Relationships) Act 1984 (NSW)[22]

3.18 A functional parent/child relationship, arising in the context of a domestic relationship,[23] may be recognised for the purposes of the *Property (Relationships) Act 1984* (NSW) ("the PRA"). The PRA defines "a child of the parties to a domestic relationship" as:

> (a) a child born as a result of sexual relations between the parties,

18. The terminology in the relevant legislation, the *Status of Children Act 1996* (NSW), is "fertilisation procedure", which would include other forms of assisted reproduction.
19. *Status of Children Act 1996* (NSW) s 14. Note that where the male donor is in a de facto relationship with a woman at the time of sperm donation and embryo creation, but that relationship has ended by the time the woman becomes pregnant, he is not deemed to be the legal parent of the resulting child: *Ganter v Whalland* (2001) 28 Fam LR 260 (Campbell J).
20. *Status of Children Act 1996* (NSW) s 14(1)(a).
21. This is not an exhaustive listing of areas of recognition.
22. A discussion of the impact of the PRA on functional children is found in J Millbank and K Sant, "A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW" (2000) 22 *Sydney Law Review* 181.
23. See PRA s 5(1) and para 2.19 for the definition of domestic relationship.

(b) a child adopted by both parties,

(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:

(i) of whom the man is the father, or

(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996* (NSW) to be the father, except where such a presumption is rebutted,

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).[24]

3.19 Section 5(3)(d) applies in cases where one or both of the parties is (or are) not the child's legal parent(s). "Parental responsibility" is defined in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) as having "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children".[25]

3.20 The precise circumstances in which a child in a functional parent/child relationship will be recognised as "a child of the parties to a domestic relationship" is unclear. The uncertainty lies in whether a functional parent can be said to have "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children" in the absence of a parenting order under the *Family Law Act 1975* (Cth) ("the FLA"),[26] conferring that responsibility.

3.21 We note that in the financial adjustment provisions of the PRA, a distinction is drawn between a situation where there is a child of the parties and a situation where the applicant has the care and control of a child of the respondent.[27] This distinction suggests that something more than acting as a parent is required to trigger section 5(3)(d). However, comments by the then Attorney

24. PRA s 5(3).
25. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.
26. These are discussed below at para 3.45-3.46.
27. PRA s 17.

General, the Hon J W Shaw, in his Second Reading Speech conversely suggest that the requirement in section 5(3)(d) is functional, rather than legal.[28]

3.22 In the final analysis, the scope of the definition is unclear. However, we consider that a parenting order should not be required for a functional parent/child relationship to give rise to there being "a child of the parties to a domestic relationship". Such a requirement would significantly limit the scope of the legislation and that of other statutes into which the section 5(3)(d) definition carries.[29]

**ISSUE 6**

**There should be legislative clarification that a parenting order is not required for a child to be a child of the parties to a domestic relationship, where one or both of the parents is a functional parent. This clarification should be achieved by amending section 5(3)(d) of the PRA to read as follows:**

**a child for whose long-term welfare both parties** *exercise* **parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) without necessarily having a parenting order in their favour (emphasis added).**

**Do you agree? Why or why not?**

28. "This extended definition will ensure that the welfare of children being cared for in the domestic relationships contemplated by the bill is considered if the domestic relationship breaks down": NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999, the Hon J W Shaw QC MLC, Attorney General, Second Reading Speech at 229.
29. See discussion below at para 3.27-3.38.

### *Relevance of existence of "a child of the parties to a domestic relationship"*

3.23 The two key areas where the presence of a child of the parties to a domestic relationship may have legal consequences are:

- proceedings for financial adjustment;[30] and
- maintenance orders.[31]

3.24 ***Proceedings for financial adjustment.*** A prerequisite for making a financial adjustment order is that the parties have lived together in a domestic relationship for not less than two years.[32] However, an exception applies if there is a child of the parties or the applicant has the care and control of a child of the respondent and failure to make the financial adjustment order would result in serious injustice to the applicant.[33]

3.25 In deciding whether or not to make an order adjusting the proprietary interests of the parties, a court is required to consider a range of contributions. Relevant contributions include those related to the welfare of a child of the parties or of a child accepted into the household of the parties.[34]

3.26 ***Maintenance.*** The PRA provides for only a very limited right to maintenance. One of the two bases on which a court may make an order for maintenance is that the applicant is unable to support himself or herself because he or she has the care and control of a child of the parties or a child of the respondent. However, the child must be under the age of 12 years or, if the child has a physical or mental disability, under the age of 16 years, at the time of the application.[35]

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30. PRA s 17, s 20.
31. PRA s 27, s 30, s 33.
32. PRA s 17(1).
33. PRA s 17(2). A further exception, unrelated to the existence of a child, is that the applicant has made substantial contributions, which would not otherwise be adequately compensated: PRA s 17(2)(b)(i).
34. PRA s 20(1)(b).
35. PRA s 27(1)(a). See also ch 8.

## Effect of the Property (Relationships) Legislation Amendment Act 1999 (NSW)

3.27 The *Property (Relationships) Legislation Amendment Act 1999* (NSW) ("the 1999 amendments") made consequential amendments to a number of other statutes. For example, the definition in the PRA of "a child of the parties to a domestic relationship" carries over into a limited number of other Acts.[36] The breadth of recognition conferred by these statutes is again affected by the uncertainty about whether a child will be recognised as a child of his or her functional parent(s), by virtue of coming within the definition of "a child of the parties to a domestic relationship", in the absence of a parenting order.

### *Family Provision Act 1982 (NSW)*

3.28 The *Family Provision Act 1982* (NSW) enables "eligible" persons to apply for a share or a greater share of the estate of a deceased person. Eligible persons may be entitled to provision from an estate if the share they received was inadequate for their proper maintenance, education and advancement in life.[37] One of the categories of eligible persons is a "child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the PRA a child of that relationship".[38]

### *Trustee Act 1925 (NSW)*

3.29 A child of the parties to a domestic relationship is included in the definition of "child" for the purposes of the protective trust provision of the *Trustee Act 1925* (NSW).[39] Accordingly, a functional parent/child relationship may be recognised in this context.

36. *Property (Relationships) Legislation Amendment Act 1999* (NSW) s 4 and Sch 2.
37. *Family Provision Act 1982* (NSW) s 9.
38. *Family Provision Act 1982* (NSW) s 6.
39. *Trustee Act 1925* (NSW) s 45.

## Compensation and damages

### *Workers' Compensation Act 1987 (NSW)*

3.30 The *Workers Compensation Act 1987* (NSW) regulates payment of compensation following the death or injury of a worker. Where a worker dies as a result of an injury sustained in the course of employment, compensation is payable by the employer to any dependent children of the worker.[40] "Child of the worker" is defined as "a child or stepchild of the worker and includes a person to whom the worker stood in the place of a parent".[41]

3.31 Where a worker is incapacitated from working as the result of an injury sustained in the course of employment, the compensation payable to the worker will take into account any dependent children of the worker.[42] In this context, the definition of child includes a person under the age of 16 years to whom the worker stands in the place of a parent and a student who is a person to whom the worker stands in the place of a parent.[43] A student is a person aged 16 years or above, but under 21 years of age, who is receiving full-time education.[44]

### *Workers Compensation (Dust Diseases) Act 1942 (NSW)*

3.32 The *Workers Compensation (Dust Diseases) Act 1942* (NSW) was established to provide compensation to those workers suffering death or disablement from dust diseases. Following the death of a worker from a dust disease, compensation is payable to certain people, including a dependent child of the worker.[45] For the purposes of the compensation provisions, a reference to a child of a worker includes a child to whom the worker stood in the place of a parent.[46]

40. *Workers Compensation Act 1987* (NSW) s 25.
41. *Workers Compensation Act 1987* (NSW) s 25(5).
42. *Workers Compensation Act 1987* (NSW) s 37.
43. *Workers Compensation Act 1987* (NSW) s 37(7).
44. *Workers Compensation Act 1987* (NSW) s 37(7).
45. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B).
46. *Workers Compensation (Dust Diseases) Act 1942* (NSW) s 8(2B)(e).

### *Compensation to Relatives Act 1897 (NSW)*

3.33 The *Compensation to Relatives Act 1897* (NSW) enables an action to be brought against any person causing death through neglect, despite the death of the person injured.[47] The action is to be brought for the benefit of specified relatives of the deceased, including his or her child.[48] The definition of child includes any person to whom another stands in loco parentis.[49]

### *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)*

3.34 The *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) provides that a person can recover damages for injuries arising from mental or nervous shock. Liability in respect of an injury includes liability for injury arising from mental or nervous shock sustained by a parent or spouse of a person who was killed or injured and by any other member of the family of the person who was killed or injured where he or she saw or heard the death or injury.[50] The definition of parent includes any person standing in loco parentis to another.[51] The definition of "member of the family" includes a child. "Child" includes any person to whom another stands in loco parentis.[52]

### *Sporting Injuries Insurance Act 1978 (NSW)*

3.35 The *Sporting Injuries Insurance Act 1978* (NSW) establishes a scheme for the payment of benefits to those who are injured or die while participating in sporting or recreational activities[53] and to their dependants. In the event of a participant's death, an application may be made by their legal representative for compensation payable to a dependent child.[54] The definition of

47. *Compensation to Relatives Act 1897* (NSW) s 3.
48. *Compensation to Relatives Act 1897* (NSW) s 4.
49. *Compensation to Relatives Act 1897* (NSW) s 7.
50. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4(1).
51. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4(5).
52. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4(5).
53. The scheme is limited to participation as a registered participant in an authorised activity: *Sporting Injuries Insurance Act 1978* (NSW) s 19(1), s 19(2).
54. *Sporting Injuries Insurance Act 1978* (NSW) s 19(2), s 26.

child includes a person to whom the deceased stood in loco parentis immediately before his or her death.[55]

## Miscellaneous

### *Bail Act 1978 (NSW)*

3.36 Under the *Bail Act 1978* (NSW), certain matters must be taken into consideration when determining whether or not to grant bail to an accused person.[56] One of these matters is the protection of the close relatives of any person against whom the alleged offence was committed.[57] Close relative is defined as:

> (a) a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister or half-brother of the person, or the other party to a domestic relationship to which the person is a party, or
>
> (b) if the person is a party to a domestic relationship, any person who is a relative, of the kind mentioned in paragraph (a), of either party to the relationship.[58]

3.37 Where the victim of an offence was a party to a domestic relationship, his or her de facto or domestic partner's legal child is a close relative for the purposes of the *Bail Act 1978* (NSW). For example, if a lesbian couple have a child together and the co-mother is the victim of an offence, the child will be classified as a close relative. However, if it is the child who is the victim of an offence, the co-mother would not be classified as a close relative.

55. *Sporting Injuries Insurance Act 1978* (NSW) s 26(1)(b).
56. *Bail Act 1978* (NSW) s 32.
57. *Bail Act 1978* (NSW) s 32(1)(b)(ii). The protection of close relatives may also be relevant to the imposition of bail conditions: *Bail Act 1978* (NSW) s 37.
58. *Bail Act 1978* (NSW) s 4(1).

### *Coroners Act 1980 (NSW)*[59]

3.38 Under the *Coroners Act 1980* (NSW), a relative of a person who has or is suspected to have died is defined as the person's spouse, parent, guardian or child or a person who stands in loco parentis to that person.[60] Accordingly, a functional parent will be recognised as a relative of his or her child, but a child will not be recognised as a relative of the functional parent. Falling outside the definition is significant, as the Act acknowledges the likelihood of a close relationship between a relative and a deceased person. For example, only a relative is able to request that an inquest be held before a coroner with a jury,[61] is automatically entitled to be represented at an inquest[62] and can be protected from being identified where he or she is the relative of a person whose death may have been self-inflicted.[63]

## EXISTING OPTIONS FOR ADDITIONAL RECOGNITION

3.39 Although the law only recognises the functional parent/child relationship in a limited range of circumstances, there are certain ways in which that recognition can be supplemented.[64] However, it is important to note that access to additional recognition differs depending upon whether the functional parent is in an opposite-sex or same-sex relationship with the legal parent.

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59. Although there is some recognition of a functional parent/child relationship in the *Coroners Act 1980* (NSW), there is a lack of recognition in the post mortem provisions and this is discussed in the context of areas of non-recognition, at para 3.74-3.75.
60. *Coroners Act 1980* (NSW) s 4(1).
61. *Coroners Act 1980* (NSW) s 18; unless requested an inquest is held without a jury: s 18(1).
62. Unless there are exceptional circumstances: *Coroners Act 1980* (NSW) s 32.
63. *Coroners Act 1980* (NSW) s 44.
64. We note that additional recognition is conferred following the marriage of a functional parent and legal parent, pursuant to which the functional parent becomes a step-parent. However, we have not considered this matter as it is not within the context of non-traditional relationships.

## Adoption

3.40 The step-parent adoption provisions of the *Adoption Act 2000* (NSW)[65] enable a functional parent to adopt the legal child of his or her partner.[66] However, these step-parent adoption provisions are only available to functional parents in opposite-sex relationships.[67] "Step-parent" is defined as a person who:

> (a) is not a birth parent or adoptive parent of the particular person, and
>
> (b) is married to the particular person's birth parent or adoptive parent or has had a de facto relationship of 3 or more years duration with the birth parent or adoptive parent.[68]

3.41 "De facto relationship" is defined as a "relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another".[69] Accordingly, where a child's functional and legal parent are in a same-sex relationship, the functional parent is precluded from being a step-parent for the purposes of the *Adoption Act 2000* (NSW).

3.42 An adoption order can be made in favour of a step-parent of a child if:

> (a) the child is at least 5 years old, and
>
> (b) the step parent has lived with the child and the child's birth or adoptive parent for a continuous period of not

65. This Act was assented to on 9 November 2000, but had not commenced at the date of publication of this paper. The legislation currently in force is the *Adoption of Children Act 1965* (NSW).
66. It should be noted that step-parent adoptions are not a common occurrence: in 1999-2000, there were only 114 adoptions by step-parents in Australia: Australian Institute of Health and Welfare, *Adoptions Australia 1999-00* (AIHW Cat No CWS 12, Canberra, Child Welfare Series No 26).
67. A similar restriction exists under the *Adoption of Children Act 1965* (NSW).
68. *Adoption Act 2000* (NSW) Dictionary.
69. *Adoption Act 2000* (NSW) Dictionary. We note that this definition is inconsistent with that contained in the PRA.

> less than 3 years immediately before the application for the adoption order, and
>
> (c) consent has been given by each of the child's parents and any guardian, and
>
> (d) the court is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child.[70]

3.43 Where an adoption order is made in favour of a step-parent, the pre-existing parent/child relationship between the resident legal parent and the child is unaffected.[71] Accordingly, both parents are able to have an enduring parental relationship with the child. This contrasts with the general effect of an adoption order, which terminates the parental rights and status of the birth parents and transfers them to the adoptive parent(s).[72]

3.44 As same-sex couples are excluded from the ambit of the step-parent adoption provisions, if a functional parent wanted to adopt a child, that would entail severing the relationship between the legal parent and the child. This is clearly not an attractive option. As people in same-sex relationships are not eligible to adopt a child as a couple, there is not the secondary option of the legal parent applying to adopt the child in a joint application with the functional parent.[73]

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70. *Adoption Act 2000* (NSW) s 30. The requirement that the court be satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other legal action means that the court will have to be satisfied that some form of parenting order would not be more appropriate.
71. *Adoption Act 2000* (NSW) s 95(3).
72. *Adoption Act 2000* (NSW) s 95(2).
73. In its review of the *Adoption of Children Act*, the Commission recommended that same-sex couples be eligible to adopt a child as a couple and be included within the ambit of the step-parent provisions: NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at Recommendation 58 and para 6.119.

## Parenting orders under the FLA

3.45 The core principle regarding the care and control of a child is that each of the child's parents[74] has legal responsibility for the child.[75] This legal responsibility is termed "parental responsibility".[76] However, a child, his or her parent or grandparent or any other person concerned with the child's care, welfare or development[77] can apply to the Family Court to have this altered by way of a parenting order. Parenting orders deal with aspects of parental responsibility, such as who a child can live with,[78] who can or cannot have contact with a child,[79] who has maintenance obligations[80] and who is responsible for the day-to-day care of the child.[81] They confer parental responsibility, or aspects of it, on a person who would not otherwise have any legal connection with a child[82] and, accordingly, provide a way in which a functional parent can establish a legal relationship with a child. For example, a birth mother and co-mother could apply for a joint parenting order and thereby acquire legal recognition of a parental relationship between the co-mother and child.[83]

74. Being biological, adoptive or presumptive parents.
75. FLA s 61C(1).
76. FLA s 61B defines the term "parental responsibility".
77. FLA s 65C.
78. FLA s 64B(2)(a). Such an order is a "residence order": FLA s 64B(3).
79. FLA s 64B(2)(b). Such an order is a "contact order": FLA s 64B(4).
80. FLA s 64B(2)(c). Such an order is a "child maintenance order": FLA s 64B(5).
81. FLA s 64B(2)(d). Such an order is a "specific issues order": FLA s 64B(6). Specific issues orders can cover any aspect of parental responsibility.
82. It is clear from FLA s 64C that a parenting order may be made in favour of a person who is not a legal parent of a child. It should be noted that the granting of a parenting order does not necessarily affect the parental responsibility of another person, such as a biological parent, for the child: FLA s 61D(2).
83. Joint parenting orders have been granted to lesbian couples: J Millbank, "Same Sex Couples and Family Law", paper presented at the *Third National Conference of the Family Court* (October 1998) «www.familycourt.gov.au/papers/html/millbank.html».

3.46 While parenting orders provide a potential means of creating a legal parental relationship between a functional parent and a child, there are some limitations on their efficacy for this purpose. First, a court will not necessarily grant a desired parenting order. In deciding whether to make a parenting order, a court must regard the best interests of the child as the paramount consideration[84] and could potentially conclude that making an order was not in the child's best interest. Secondly, a parenting order ceases to have effect once the child reaches 18 years of age, marries or enters into a de facto relationship.[85] Accordingly, these orders do not create an enduring legal parent-child relationship. Thirdly, parenting orders do not affect significant areas of the law, such as intestacy, and therefore do not equate to legal parental status, even while the order is in force.

## AREAS OF NON-RECOGNITION

3.47 As noted above, the functional parent/child relationship is recognised in only a very limited range of circumstances. Set out below is a discussion of some of the areas where the functional parent/child relationship is not recognised.[86] Rather than compiling an exhaustive list of incidents of non-recognition, we have selected some examples that illustrate the wide-reaching consequences of non-recognition. Indeed, non-recognition potentially affects the lives of functional parents and children from birth until death.[87]

84. FLA s 65E.
85. FLA s 65H(2).
86. A discussion of the areas of non-recognition as at 1998 can be found in J Millbank, "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" (1998) 12(2) *Australian Journal of Family Law* 99. See also J Millbank and K Sant, "A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW" (2000) 22 *Sydney Law Review* 181.
87. For an overview of the research on gay and lesbian families and the impact of the current laws, see J Millbank, *Meet the Parents* (Gay and Lesbian Rights Lobby (NSW), January 2002).

## Parental leave

3.48 The *Industrial Relations Act 1996* (NSW) provides that certain employees may be entitled to parental leave in connection with the birth of a child.[88] Maternity leave may be available to a female employee who is pregnant,[89] while paternity leave may be taken by a male employee in connection with the birth of his child.[90] A male employee may also take paternity leave in connection with his partner's pregnancy, even if he is not the biological father.[91] There is no equivalent scope for a female employee to take maternity leave in connection with her partner's pregnancy.

## Day-to-day life

3.49 As discussed above,[92] the basic position is that the legal parents of a child have parental responsibility for that child. Accordingly, unless the law intervenes, legal parents have responsibility for making decisions about a child's daily life. However, a functional parent may acquire legal responsibility for a child's day-to-day care, welfare and development by virtue of a "specific issues" parenting order.[93] Unless or until a functional parent obtains a parenting order, he or she will have no legal status to make decisions about a child's day-to-day life; for example, he or she could not provide consent for a school trip or consent to a doctor providing medical treatment.

## Victims compensation

3.50 One of the objects of the *Victims Support and Rehabilitation Act 1996* (NSW) is to provide support and rehabilitation for victims

88. *Industrial Relations Act 1996* (NSW) s 53-s 72.
89. *Industrial Relations Act 1996* (NSW) s 55(2).
90. *Industrial Relations Act 1996* (NSW) s 55(3).
91. *Industrial Relations Act 1996* (NSW) s 55(3).
92. At para 3.45.
93. FLA s 64B(6).

of crimes of violence by giving effect to a statutory compensation scheme.[94] The people eligible to receive statutory compensation are a primary or direct victim,[95] a secondary victim[96] and a family victim[97] of an act of violence.[98]

### *Secondary victim*

3.51 A secondary victim is a person who receives a compensable injury[99] as a direct result of witnessing an act of violence[100] towards the primary victim. A secondary victim need not have any prior relationship with the primary victim.

3.52 When a legal parent or guardian becomes aware that his or her child has received a compensable injury or died, the parent or guardian is taken to have witnessed the act of violence. A functional parent, however, is eligible for compensation as a secondary victim only if he or she actually witnessed the event.[101]

3.53 "Parent" is not defined, however the Act does differentiate between "parent" and "step-parent" in a subsequent provision, so it is unlikely that "parent" would extend to a functional parent. "Guardian" is not defined, but a person who had a parenting order conferring responsibility for the long-term welfare of the child would probably be classed as a guardian.

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94. *Victims Support and Rehabilitation Act 1996* (NSW) s 3(a).
95. Defined in *Victims Support and Rehabilitation Act 1996* (NSW) s 7.
96. Defined in *Victims Support and Rehabilitation Act 1996* (NSW) s 8.
97. Defined in *Victims Support and Rehabilitation Act 1996* (NSW) s 9.
98. Defined in *Victims Support and Rehabilitation Act 1996* (NSW) s 6.
99. A compensable injury is an injury specified in Schedule 1 to the *Victims Support and Rehabilitation Act 1996* (NSW); *Victims Support and Rehabilitation Act 1996* (NSW) s 10.
100. The act of violence must be one which results in a compensable injury to, or death of, the primary victim; *Victims Support and Rehabilitation Act 1996* (NSW) s 8(1).
101. Prior to the *Family Law Reform Act 1995* (Cth), which removed the concept of guardianship, s 63E of the FLA defined a guardian as a person who had responsibility for a child's long-term welfare.

Jonathan learns that Jill, the young daughter of his partner Sara has been fatally shot during an armed robbery. As a direct result, Jonathan suffers a chronic psychological disorder. Because he did not actually witness the event he is not a secondary victim for the purpose of compensation.

### *Family victim*

3.54 Family victim is defined as a person who is, at the time the act of violence is committed, a member of the immediate family of a primary victim who has died as a direct result of an act of violence.[102] Unlike secondary victims, a person need not suffer a compensable injury to be classified as a family victim.[103] A member of the immediate family of a primary victim is defined as:

(a) the victim's spouse, or

(b) the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least 2 years, or

(c) a parent, guardian or step-parent of the victim, or

(d) a child or step-child of the victim or some other child of whom the victim is the guardian, or

(e) a brother, sister, step-brother or step-sister of the victim.[104]

3.55 In the absence of a parenting order conferring guardianship status, a functional parent or child would not come within the definition of family victim.

Dimitri is Tony's functional father. Tony hears that Dimitri has been fatally stabbed. If Dimitri is married to Tony's mother or has a parenting order conferring parental responsibility, Tony is eligible to receive compensation as a family victim. However, if Dimitri is not married to Tony's mother and does not have the requisite parenting order, Tony is not eligible to receive any compensation.

102. *Victims Support and Rehabilitation Act 1996* (NSW) s 9(1).
103. *Victims Support and Rehabilitation Act 1996* (NSW) s 9(2).
104. *Victims Support and Rehabilitation Act 1996* (NSW) s 9(3).

## Child support[105]

### *Commonwealth child support legislation*

3.56 The assessment of child support is primarily governed by the *Child Support (Assessment) Act 1989* (Cth) ("the CSAA") and the FLA.[106] The FLA applies where the parents separated or the child was born prior to 1 October 1989. If the separation or childbirth occurred after 1 October 1989, the CSAA is the relevant legislation.[107]

3.57 Under both the FLA and the CSAA, parents have the primary duty to maintain their child or children.[108] In practical terms, a parent be ordered to provide financial support for a child. Indeed, under the CSAA, payment of child support can only be sought from a parent. While the FLA does not specify the people from whom child support can be sought,[109] the imposition of the primary child maintenance duty on parents indicates that a parent will be the most likely respondent in an application for child support.

3.58 Despite the emphasis on parental duty in the Commonwealth child support legislation, neither the FLA nor the CSAA comprehensively defines who is a parent. Under the FLA "parent" is only defined in relation to a child who has been adopted; in those circumstances, parent means the adoptive parent. The CSAA takes a similar approach and only defines "parent" in relation to a child who has been adopted or who was artificially conceived.[110] In these circumstances, "parent" means an adoptive parent or a person who is legally presumed to be a parent.[111] Given the absence of any

105. An overview of child support in the context of functional parent/child relationship can be found in J Millbank and K Sant, "A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 209-210.
106. The PRA also touches on child maintenance; this is discussed below at para 3.61-3.63.
107. Unless support is being sought from a step-parent, in which case the FLA is the relevant statute.
108. FLA s 66C(1); CSAA s 3.
109. The term "respondent" is used in the legislation.
110. CSAA s 5.
111. FLA s 60H.

further, general provision defining "parent" as meaning a biological parent, it seemed arguable that a functional parent could be classified as a "parent" under the Commonwealth child support legislation. However, the Full Court of the Family Court in *Tobin v Tobin* rejected this argument.[112] The court held that the class of people who are parents for the purposes of the child support legislation is restricted to legal (that is, biological, adoptive or presumptive) parents.[113]

3.59 Under the FLA, step-parents may also have a duty to maintain a child.[114] A step-parent is a person who:

(a) is not a parent of the child;

(b) is or has been married to a parent of the child; and

(c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.[115]

3.60 The coverage of the Commonwealth child support legislation leaves a significant gap in the areas of functional parents who are in a relationship with a child's legal parent and, more acutely, co-mothers. As Fogarty J observed in relation to the application of the Commonwealth legislation in a lesbian co-parenting context:

> It is a reality of life that children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of these situations.[116]

112. *Tobin v Tobin* (1999) 150 FLR 185.
113. This supports the finding of the Family Court in the earlier decision: *Re B and J* (1996) 135 FLR 472.
114. A step-parent will only have a duty to maintain a child if a court determines it is proper they have such a duty: FLA s 66D. The matters that must be taken into account by a court are listed in FLA s 66M.
115. FLA s 60D.
116. *Re B and J* (1996) 135 FLR 472 at 483.

***PRA***

3.61 The maintenance provisions of the PRA provide a limited way in which the law addresses the provision of child support by a functional parent in the context of a domestic relationship. As outlined above,[117] a court may make an order for partner maintenance on the basis that the applicant is unable to support himself or herself because he or she has the care and control of a child of the parties or a child of the respondent. However, the child must be under the age of 12 years or, if the child has a physical or mental disability, under the age of 16 years, at the time of the application.[118]

3.62 The age limits under the PRA are significantly lower that those found in the Commonwealth legislation, where an application for maintenance can be made in relation to a child until he or she turns 18, or marries or enters into a de facto relationship.[119] An exception to the Commonwealth age limit may exist if maintenance is necessary to enable a child to complete his or her education[120] or because of a disability of the child.[121]

3.63 A further point of contrast between the PRA and the Commonwealth legislation is that under the PRA, any entitlement to financial assistance depends upon the applicant being unable to support himself or herself. There is no scope to find that a non-resident functional parent has an obligation to assist with the financial burden of raising a child, independently of the resident parent's financial circumstances. Such a discretionary obligation is found in the step-parent provisions of the FLA. The absence of any automatic or discretionary obligation to provide maintenance for a child is particularly striking in the case of lesbian couples who conceive a child through artificial insemination. There is absolutely no legal obligation on the co-mother to maintain her child, unless the resident mother cannot support herself because she is caring

117. At para 3.26.
118. PRA s 27(1)(a).
119. FLA s 66L(1), s 66V. CSAA s 24.
120. FLA s 66L(1)(a), s 66L(2)(a). CSAA s 151B.
121. FLA s 66L(1)(a), s 66L(2)(b).

for their child.[122] Finally, as the PRA maintenance regime is essentially about partner maintenance, it lacks the child-centred focus of the Commonwealth child support regime and places children in non-traditional families completely outside that regime.

### *Equitable estoppel*

3.64 The final way in which a functional parent can be required to provide child support is through the equitable doctrine of promissory estoppel. The potential operation of this doctrine in this context is illustrated by the case of *W v G*.[123]

3.65 In *W v G*, two women had lived together for eight years. During the course of their relationship, they had two children together, conceived by way of artificial insemination. W was the biological mother of their children and following the breakdown of the relationship, the children remained in her care. The case involved an application by W seeking, amongst other matters, a lump sum payment by way of equitable compensation towards the cost of maintaining the two children. As G was not recognised as a parent under the Commonwealth child support legislation and the case predated the 1999 amendments to the PRA, W had to find an alternative legal way to claim child support.

3.66 The key elements in a claim of promissory estoppel are that the plaintiff has acted in reliance on a promise made by the defendant, that the defendant knew or intended the plaintiff would so act and that this has caused the plaintiff detriment. W argued that by making positive comments about having children together and by participating in the insemination process, G caused or encouraged her to believe that G would fulfil her promise to act as a parent to the children and to assist and contribute to their

122. This situation has been addressed using the doctrine of equitable estoppel; see below.

123. *W v G* (1996) 20 Fam LR 49. For a detailed discussion of this decision, see J Millbank, "An Implied Promise to Parent: Lesbian Families, Litigation and W v G (1996) 20 Fam LR 49" (1996) 10 *Australian Journal of Family Law* 112 and J Millbank, "Parental responsibility of co-mothers" (1996) 21 *Alternative Law Journal* 243.

upbringing. She further argued that, relying on that promise, W had the two children and was now placed in the detrimental position of having the cost and responsibility of raising the children without G's assistance. The court found that W was entitled to relief on the basis of equitable estoppel and ordered that G provide a lump sum of $151,125 towards the cost of raising the children.

3.67 While the doctrine of equitable estoppel may have resolved the dispute in *W v G*, its application is a highly unsatisfactory way of addressing questions of child support. As one commentator has noted, addressing the dispute in terms of an "unconscionable dishonoured deal", which could equally have involved property instead of children, is an inappropriate way to approach child support matters.[124] The proper focus of a child maintenance application should be the needs of the child.[125] Furthermore, had the dispute been resolved under the FLA, the parties would have had the opportunity to use the Family Court's dispute resolution services such as conciliation and mediation, which could have reduced hostility between the parties and may have avoided litigation altogether.[126]

## Intestacy and family provision

3.68 In the event that a person dies without leaving a valid will, the *Wills, Probate and Administration Act 1898* (NSW) establishes a hierarchy of people who will inherit his or her estate. Legal children are placed near the top of that hierarchy, second only to a spouse.[127] Functional children are completely omitted from the list. The effect of this omission is that members of the statutory hierarchy, such as an aunt or uncle to whom the deceased person may not have had a close relationship may automatically inherit the estate, while a functional child who lived

124. D Sandor, "Paying for the Promise of Co-Parenting – A Case of Child Maintenance in Disguise? (1996) 43 *Family Matters* 24 at 26.
125. Sandor at 26.
126. Sandor at 26.
127. *Wills, Probate and Administration Act 1898* (NSW) s 61B.

with the deceased for a number of years and was, in fact, dependent upon the deceased, has no automatic entitlement.[128]

3.69 Where a functional parent dies intestate, the only option for their child to receive any of the estate is to make a claim under the *Family Provision Act 1982* (NSW). There are two ways in which a functional child can be eligible to do this. The first is if the parent was a party to a domestic relationship at the time of his or her death and the child is a child of that relationship.[129] But if the relationship between the child's legal and functional parent ended before the death of the functional parent, the child would not be eligible under this head. The second is if the child was or had been dependent on the parent and was or had been a member of his or her household.[130] In order to show dependence, a child would have to show the existence of something more than an emotional relationship;[131] there must be whole or partial dependence for financial or material needs.[132] Even where a functional child is eligible to bring a claim, there is, of course, no guarantee that the claim will be successful.

## Care of child when a legal parent dies

3.70 The care of a child following the death of one or more of his or her legal parents is addressed by both State and Commonwealth law. In NSW, a legal parent can nominate a person, either in his or her will or in a separate deed, to become the guardian of the child upon his or her death.[133] Such an appointed guardian is commonly

128. Ensuring that there is a current will is an obvious means of avoiding the deleterious effect of the lack of recognition of functional children in the intestacy context. However, this does not address the concern that the functional child is disadvantaged because of the non-recognition of the functional parent/child relationship.
129. *Family Provision Act 1982* (NSW) s 6(1).
130. *Family Provision Act 1982* (NSW) s 6(1).
131. *Benney v Jones* (1991) 23 NSWLR 559 at 560, 565-566.
132. *Re Fulop* (1987) 8 NSWLR 679 at 682.
133. *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 14.

referred to as a testamentary guardian. If the deceased names a surviving legal parent and another person as a testamentary guardian, the surviving parent and testamentary guardian become joint guardians.[134] The effect of becoming a guardian is that a person has the full range of parental responsibilities in respect of a child.[135]

Priya is the biological mother of Jake. Sarah is Jake's functional mother. As Priya conceived Jake through donor insemination, Jake does not have a legal father. In her will, Priya named Sarah as Jake's testamentary guardian. Following Priya's death, Sarah acquires all the responsibilities of a legal parent in respect of Jake.

3.71 Although a parent can specify a testamentary guardian, there is no guarantee that that person will in fact become a child's guardian. Under the NSW legislation, the court[136] has the ability to alter guardianship appointments as it thinks fit[137] and a surviving parent can oppose the appointment of a testamentary guardian.[138] An appointment of a testamentary guardian may also be defeated by an application for a parenting order under the FLA. For example, a child's grandparent could oppose the appointment

134. *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 13. However, the parent has the right to object to the appointment of a guardian: s 14(3).
135. As "guardian" is not defined in the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), it follows that the common law meaning of the term was intended to apply: see R Atherton, "Testamentary Guardianship and the Reference of Powers over Children: A problem in search of a solution, or who gets to look after the kids?" (1989) 3 *Australian Journal of Family Law* 236 at 240.
136. Being either the Supreme Court or the District Court: *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 2.
137. *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 14(3), s 14(4), s 18.
138. *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 14(3).

of a testamentary guardian by applying for a parenting order, which confers full parental responsibility.[139]

Joan and Janine had a daughter, Kristen, whom Joan conceived through artificial insemination. At the time Kristen was born, Joan and Janine had been living together for 8 years. When Kristen was 5 years old, Joan died after a long illness. Janine commenced proceedings to obtain parental responsibility for Kristen. However, Joan's parents began identical proceedings. Years of uncertainty for Kristen and court battles followed before Janine was finally granted parental responsibility.

3.72 Where a legal parent dies without appointing a testamentary guardian, a surviving parent will continue to have the parental responsibility that is conferred upon parents by section 61C of the FLA. If a functional parent wishes to obtain parental responsibility, he or she has to apply to the Family Court for a parenting order. Even where there is no surviving legal parent, the law gives no automatic recognition to the functional parent/child relationship.[140]

## Human Tissue Act 1983 (NSW)

3.73 The *Human Tissue Act 1983* (NSW) ("the HTA") governs tissue removal, blood donation and post-mortem examinations. Tissue can only be removed from a child for the purpose of transplantation to the body of the child's parent or sibling and with

139. The FLA provides that anyone who is concerned with the care, welfare or development of a child can apply for a parenting order: s 65C.

140. We note that there is some uncertainty as to whether the FLA provisions supersede the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), with the effect being that unless a person is a child's legal parent, they require a parenting order to be a guardian/have parental responsibility, irrespective of appointment as a testamentary guardian.

the written consent of the child's parent.[141] "Parent" is defined as including a step-parent or adoptive parent of the child.[142] It is implicit that a functional parent would not be defined as a parent for the purposes of the HTA. Parental consent is also required for the removal of blood from a child for the purpose of donation. However, a guardian may also provide the necessary consent.[143] While "guardian" is not defined, a functional parent who had a parenting order conferring responsibility for a child's long-term welfare may be considered to be a child's guardian.

3.74 Where a child has died, the HTA provides that his or her "senior next of kin" can consent to the removal of tissue from his or her body[144] and to the undertaking of a post-mortem examination.[145] "Senior next of kin" is defined, in relation to a child, as:

> (a) a parent of the child,
>
> (b) where a parent of the child is not available, a brother or sister of the child, being a brother or sister who has attained the age of 18 years, or
>
> (c) where no person referred to in subparagraph (a) or (b) is available, a person who was a guardian of the child immediately before the death of the child.[146]

3.75 A functional parent is given no role in deciding what procedures may and may not be carried out on the body of the deceased child.[147]

141. *Human Tissue Act 1983* (NSW) s 10.
142. *Human Tissue Act 1983* (NSW) s 4.
143. *Human Tissue Act 1983* (NSW) s 20.
144. *Human Tissue Act 1983* (NSW) s 23.
145. *Human Tissue Act 1983* (NSW) s 28.
146. *Human Tissue Act 1983* (NSW) s 4.
147. Unless that parent is also a guardian.

## Coroners Act 1980 (NSW)

3.76 The *Coroners Act 1980* (NSW) also excludes functional parents from decision-making with respect to a post-mortem examination of the deceased child. Again, senior next of kin have the right to object to a post-mortem examination being carried out on the deceased, whether the deceased was an adult or child.[148] "Senior next of kin" is defined as:

> (a) the deceased person's spouse, or
>
> (b) if the deceased person did not have a spouse or a spouse is not available, any of the deceased person's sons or daughters who are of or above the age of 18 years, or
>
> (c) if the deceased person did not have a spouse, son or daughter or a spouse, son or daughter is not available, either of the deceased person's parents, or
>
> (d) if the deceased person did not have a spouse, son, daughter or living parent or a spouse, son, daughter or parent is not available, any of the deceased person's brothers or sisters who are of or above the age of 18 years, or
>
> (e) if the deceased person did not have a spouse, son, daughter, living parent, brother or sister or a spouse, son, daughter, parent, brother or sister is not available:
>
> (i) any person who is named as an executor in the deceased person's will, or
>
> (ii) any person who was the deceased person's personal representative immediately before the deceased person's death.[149]

3.77 Again, a functional parent does not have the right to object to a post mortem being carried out on his or her child. Similarly, a child would not have the right to object where his or her functional parent had died. The potential trauma of this exclusion may be compounded by the fact that if the deceased person does not have a spouse, child, living parent or sibling, or such people are not

148. *Coroners Act 1980* (NSW) s 48A.
149. *Coroners Act 1980* (NSW) s 4(1).

available, any person who is named as an executor in the deceased person's will, or any person who was the deceased person's personal representative immediately before his or her death, acquires senior next of kin status.

## Distribution of superannuation funds following death

3.78 The primary statute regulating superannuation funds is the *Superannuation Industry (Supervision) Act 1993* (Cth). Under this Act, a regulated superannuation fund must be maintained solely for certain specified purposes.[150] One of the specified purposes is the provision of death benefits to a contributing member's legal representative and/or dependant(s), following the death of the member.[151] "Dependant" is defined as including a person's spouse and child, who are in turn defined as including an opposite-sex de facto partner and adopted child, step-child or ex-nuptial child.[152] As the definition of "dependant" is inclusive, rather than exclusive, a person who was financially dependent on the member will also be treated as a dependant for the purposes of death benefits.[153] A significant effect of receiving death benefits as a dependant is that a tax concession is received, which provides a financial benefit. In order for a functional child to be able to receive death benefits with a tax concession, he or she must have been financially dependent on the deceased member. This contrasts with the automatic classification of biological, adopted or step-children as dependants.

150. *Superannuation Industry (Supervision) Act 1993* (Cth) s 62.
151. *Superannuation Industry (Supervision) Act 1993* (Cth) s 62(1).
152. *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.
153. Many Trust Deeds expand on the s 10 definition of "dependant" by including any person who was "wholly or partially financially dependent" on the member; see, for example, *Faull v Superannuation Complaints Tribunal* [1999] NSWSC 1137; *Phillips v Newcastle Permanent Custodians Pty Ltd* (NSW, Supreme Court, No 2943/98, Hodgson CJ, 9 July 1998, unreported).

## OPTIONS FOR REFORM

3.79 The above discussion clearly shows a widespread lack of recognition of the functional parent/child relationship. In the context of same-sex relationships, this lack of recognition is compounded by the inability to create a legal parent/child relationship through adoption. It also precludes the application of a parentage presumption.[154] Accordingly, consideration should be given to whether the laws relating to adoption by same-sex parents and the legal parentage of children conceived through donor insemination should be reformed.

3.80 Of course, parents and children who develop a functional relationship in the context of a heterosexual adult relationship may also be unable to legalise their relationship if a second legal parent objects to a step-parent adoption or certain adoptive criteria cannot be met. Alternatively, they may not wish to enter into the adoptive process, just as their counterparts in same-sex couples may choose not to do so. Whether there are current areas of non-recognition that should be reformed warrants consideration. For example, we need to consider whether it is appropriate that a child is omitted from the list of persons eligible to inherit if his or her functional parent dies intestate.

### Step-parent adoption by a lesbian or gay functional parent

3.81 As noted above,[155] a lesbian or gay functional parent is unable to adopt his or her partner's legal child under the current and pending step-parent adoption provisions. In its 1997 *Review of the Adoption of Children Act 1965* (NSW),[156] the Commission recommended that the step-parent adoption provisions be amended to include a step-parent in a same-sex de facto relationship.[157] Although many of the recommendations from that review were

154. For example, see *Status of Children Act 1996* (NSW) s 14.
155. At para 3.40.
156. NSWLRC Report 81.
157. NSWLRC Report 81 at recommendation 58 and para 6.119.

accepted by the Government, the recommendation regarding same-sex couples was not implemented.[158]

3.82 The Commission is of the view that this issue should be revisited, not in the general context of adoption law, but in the specific context of disadvantages faced by children living in non-traditional relationships. As noted in the Social Issues Committee Report, the exclusion of lesbians and gay men from the adoption provisions remains a point of concern when considering children who are living in non-traditional families.[159]

### *Jurisdictions where lesbian or gay step-parent adoption is permitted*

3.83 Same-sex couples have been able to adopt children in the Canadian province of British Columbia since 1996.[160] Other Canadian provinces have extended step-parent adoption to same-sex couples through case law rather than legislative amendment. In Alberta, the term "step-parent" is not defined for the purposes of the step-parent adoption provisions of the *Child Welfare Act 1984*. However, the Court of Queen's Bench has held that "step-parent" includes a partner in a same-sex relationship who seeks to adopt a child of his or her partner.[161] The Ontario Court of Justice has also held that same-sex couples have the right to apply for joint adoption.[162]

158. We note that the Commission's recommendation was not considered by the government as the then Community Services Minister stated that he had made a personal decision not to consider the recommendation and did not take the proposal to Cabinet: Social Issues Committee Report at 80.
159. Social Issues Committee Report at 79-81.
160. The provision is gender neutral, stating that an adult may apply to become a parent of a child jointly with a birth parent of the child: *Adoption Act 1996* (RSBC) s 29(2).
161. *Re A* (1999) Alta DJ 692. See also C Barillas, "Alberta Issues Precedent-Setting Adoption Ruling" (29 November 1999) «www.datalounge.com/datalounge/news/record.html?record=4893».
162. *Re K* (1995) 15 RFL (4th) 129. For a detailed discussion of this decision, see D Sandor, "Same-Sex Couples Can Adopt in Ontario:

3.84 In several countries, the legal recognition of same-sex relationships acknowledges that adults in same-sex relationships have families. Since 1 July 1999, a person in a registered partnership in Denmark may apply for step-parent adoption of the other partner's child.[163] Similarly, since 8 May 2000, any person in a registered relationship in Iceland can adopt the child of his or her partner, provided the child's other parent does not have custody claims.[164] An equivalent law came into force on 23 June 2000 in the Spanish autonomous region of Navarra where all registered couples, including same-sex couples, can adopt children.[165] Legislation has been introduced into the Swedish Parliament which would enable registered same-sex couples to adopt children.[166] In January 2001, legislation was introduced in Norway that would permit a registered partner to adopt her or his partner's legal child.[167]

3.85 In the Netherlands, step-parent adoption provisions have applied to same-sex couples since April 2001, irrespective of whether they have registered their relationship or married.[168]

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The Canadian Case of Re K and its Significance to Australian Family Law" (1997) 11 *Australian Journal of Family Law* 23.

163. *Danish Registered Partnership Act 1989* s 4. During the portion of 1999 that such adoptions were permitted, there were 61 such adoptions: N Polikoff, "Recognizing Partners but not Parents: Gay and Lesbian Family Law in Europe and the United States" (2000) 17 *New York Law School Journal of Human Rights* 711 at fn 32.
164. This was an amendment to the 1996 registered partnerships legislation: «www.lbl.dk/artikler/artikler/euroletterartikler/e180_2».
165. International Gay and Lesbian Human Rights Commission, "All Registered Couples Can Adopt Children" «www.iglhrc.org/world/w_eur/Spain2000Jun». There does not appear to be a separate step-parent adoption provision.
166. See C J Williams, "Sweden Seeks to Bolster Gay Couples' Right to Adopt" *Los Angeles Times* (24 February 2002). This follows from a January 2001 recommendation by the Swedish Parliament's Committee on Homosexuality and Children: Polikoff (2000) at 722.
167. Polikoff (2000) at 721.
168. On 21 December 2000, legislation was passed, amending Book 1 of the Civil Code. The Act entered into force on 1 April 2001. Staatsblad van het Koninkrijk der Nederlanden 2001 nr 10.

To be eligible to adopt his or her partner's child, a functional parent must have been living with the child's legal parent for at least three years and must have cared for the child for at least one year. Where a child is conceived in the context of a lesbian relationship, the non-biological mother can apply to adopt the child immediately after the birth.[169]

3.86 Adoption laws vary widely from state to state in the USA. However, certain states allow same-sex couples to adopt children in a step-parent adoption context. The first step-parent adoption was granted to a lesbian couple in 1985, by a trial judge in Alaska.[170] Since then, many courts have granted similar adoptions.[171] In Vermont, same-sex couple adoption is permitted by statute.[172]

***What are the advantages or disadvantages of step-parent adoption?***

3.87 As the child is already in the permanent care of his or her legal parent and step-parent, the crucial question is whether there are any circumstances in which an adoption order in favour of a step-parent will serve the child's interests better than any alternative order, such as a parenting order, or maintaining the status quo. The reasons in favour of step-parent adoption include:

- to give the child automatic inheritance rights from the step-parent and to address other similar areas of non-recognition;
- to give the parenting relationship permanency;
- to confer full parental rights and obligations on the step-parent, which is of particular relevance if the legal parent with whom the child resides should die;
- to strengthen relationships within the new family;

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An unofficial English translation of the Act is available at «www.ruljis.leidenuniv.nl/user/cwaalddij/www/NHR/transl-adop». An explanation of the effect of the legislation is available at «www.minjust.nl:8080/a_beleid/fact/adoptsam».

169. The requirement of at least three years co-habitation still applies.
170. Polikoff (2000) at 731.
171. Polikoff (2000) at 731-734.
172. Vermont Stat Ann Tit 15A 1-102 (b) (Supp 2000).

- to express the step-parent's commitment to the child.

3.88 Disadvantages of step-parent adoption include:[173]

- a child may feel rejected by the legal parent who is relinquishing parental rights;
- a child may fear losing the relinquishing parent;
- a child would lose the right to inherit automatically from the relinquishing parent and that parent's extended family.

3.89 Most of the disadvantages are only relevant when the child has a second legal parent. Many, if not all, of the problematic aspects of step-parent adoption would not apply where a child had a birth mother and a co-mother or where a child's legal mother had conceived him or her through artificial insemination, without a consenting male partner.

3.90 In the final analysis, the Commission considered that an order for adoption in favour of a step-parent is often an inappropriate way to promote a child's best interests and generally should not be encouraged. However, it acknowledged that there could be circumstances in which a step-parent adoption is in a child's best interest. Currently, children who have a lesbian or gay step-parent are denied the opportunity to be adopted, when adoption by the step-parent may be in the child's best interests.

**ISSUE 7**

**The current and pending step-parent adoption provisions should be amended to include lesbian and gay step-parents.**

173. Most of these disadvantages are only relevant where there is a second legal parent and where a second legal parent is alive.

## Status of consenting female partner of woman who conceives a child through artificial insemination

3.91 We consider that the status of a lesbian co-mother should be examined separately from the issue of step-parent adoption. The central reason for this view is the inconsistent application of the parentage presumption to children conceived through artificial insemination. Children conceived in the context of a heterosexual relationship receive the advantage of two legal parents while children conceived in the context of a lesbian relationship face the disadvantage of having one legally invisible parent.[174] We note that the disadvantages flowing from non-recognition are particularly harsh for children who only have one legal parent, which will inevitably be the case where a child has a birth mother and a co-mother.

### *Presumption of parentage*[175]

3.92 Where a woman with a male partner conceives through artificial insemination, her partner is presumed under the *Status of Children Act 1996* (NSW) to be the child's father.[176] This presumption is intended to remove any liabilities and rights from the sperm donor and to transfer all legal rights and responsibilities to the woman who has undergone the procedure and her consenting male partner.[177] Essentially, the presumption was adopted to define the rights of people using fertility treatments and the children who are born as the result of such treatments.

174. Or, as the law currently stands, one parent whose visibility is inconsistent.
175. We note that it is outside the Terms of Reference to consider the basic operation of the presumption. Accordingly, we have not addressed issues such as the right of a child to know their genetic origins, etc.
176. Unless he can prove that he did not consent to the procedure: s 14(1)(a).
177. D Kovacs, "The AID Child and the Alternative Family: Who pays? (or Mater semper certa est – That's easy for you to say!)" (1997) 11 *Australian Journal of Family Law* 141 at 142.

3.93 Prior to the enactment of the *Artificial Conception Act 1984* (NSW), a child who was conceived through artificial insemination would have been the legal child of the sperm donor. Accordingly, the child could assert legal rights, such as a right to maintenance or testamentary rights, against the donor.[178] This was clearly an undesirable position. In addition, the child would have faced the same barriers of non-recognition as those children with functional parents face today. There was the further issue of the child being ex nuptial.[179] This led not only to social stigma but also to the position that if the child's parents separated, any disputes over custody and maintenance would have to be held in the State courts, because the Family Court did not have jurisdiction to deal with ex-nuptial children.[180]

3.94 These problems were avoided by the parentage presumption, so that the child conceived through fertilisation procedures suffered no legal disadvantage or social stigma. During the Second Reading Speech of the *Artificial Conception Bill* and *Children (Equality of Status) Amendment Bill*, the then Minister for Youth and Community Services stated:

> As legislators we have a responsibility to reform those parts of the law that fail to adapt to the changing circumstances of modern society. Quite clearly, the legal position of children conceived by AID is an area requiring legislative attention, and I am sure that even those who have personal objections to the use of this form of treatment would not wish to leave these children in the legal limbo in which they are now placed.[181]

178. Kovacs at 142.
179. W R Atkin and C A Bridge, "Establishing Legal Relationships: Parents and Children in England and New Zealand" (1996) 17 *New Zealand Universities Law Review* 12 at 18.
180. The definition of child of a marriage originally excluded ex-nuptial children; the FLA was subsequently amended to incorporate ex-nuptial children within the definition of child of a marriage.
181. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 21 November 1983, the Hon F Walker at 3451-3452.

3.95 Dr Andrew Refshauge similarly noted that:

> The principle bill seeks to make the normal natural patterns of bonding legally acceptable. I do not think the significant element in child rearing and in having children is the act that creates the children. For many people that act is the major part of their life, but there is a great deal more to children than child rearing and being a parent as a result of one act.[182]

3.96 In addition to addressing potential legal difficulties, the presumption operates to give effect to the consenting male partner's intention to be a parent of the child.[183] A Committee in the United Kingdom, carrying out a review of the laws in this area,[184] noted that although the presumption creates a legal fiction, it was consistent with the husband's assumption of all parental rights and duties with regard to the child.[185]

### *Applying the parentage presumption to co-mothers*

3.97 The question must be asked whether it is appropriate to apply the presumption in the context of lesbian relationships, with the effect that the consenting female partner of a woman who conceives a child through artificial insemination is presumed to be the legal parent of the child.

3.98 As the reasons underlying the application of the presumption in a heterosexual context, namely avoidance of legal disadvantage and giving effect to an intention to be a parent of the child, are equally applicable in a lesbian context, it is difficult to identify any reason why the presumption should not be extended.[186] A similar proposal was made in Sweden by the Commission on the Situation

182. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 21 February 1984, the Hon Dr A Refshauge at 4437.
183. Kovacs at 142.
184. UK, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilization and Embryology* (1984) Chairperson Dame Mary Warnock.
185. Australia, Family Law Council, *Creating Children: A uniform approach to the law and practice of reproductive technology in Australia* (AGPS, Canberra, 1985) at 49.
186. We note that even if the legislation were amended, it would still operate only for children born after the amending legislation.

of Children in Homosexual Families and that this proposal has been supported by the Minister of Justice.[187]

### *Adoption*

3.99 Enabling a co-mother to adopt her child, while retaining the legal relationship between the child and his or her birth mother, would address the disadvantages currently faced by children of lesbian couples. This could be achieved by extending the step-parent adoption provisions discussed above at para 3.81-3.89. However, it would be appropriate to remove the requirements that the child is older than 5 years old and has lived with the prospective adoptive parent for at least three years. This model would be similar to that enacted in the Netherlands in April 2001.[188] Adoption would then be available immediately as a means of creating a legal parent/child relationship.

3.100 While a modified step-parent adoption provision would potentially address the disadvantage flowing from non-recognition, it requires action on the part of the child's mothers for that to occur. Where a child's mothers did not apply for adoption, the child would still face the current disadvantages.

Madeleine and Fiona have been in a relationship for 5 years and decide that they would like to have a child together. They choose to conceive a child through the use of artificially inseminated donor sperm. After much consideration, they decide that Fiona will be the birth mother. Madeleine intends to adopt their son, Colin, as soon as she is able to do so following his birth. However, the first few months after Colin is born are a busy and exhausting period for Fiona and Madeleine and they delay applying for an adoption order. Before Madeleine follows up her intention to adopt Colin, Fiona dies in a car accident. Colin is left with no legal parent.

187. Polikoff (2000) at 723.
188. See para 3.85.

**ISSUE 8**

**Should a lesbian co-mother be presumed to be the legal parent of her child? Why or why not?**

**Should a lesbian co-mother be able to adopt her child under modified step-parent adoption provisions? Why or why not?**

**Is there any other way of recognising the relationship between a co-mother and her child?**

## Recognition for specific purposes

3.101 Where a functional parent is not able to, chooses not to or simply does not create a legal parental relationship with his or her child, the disadvantages flowing from non-recognition of the relationship will persist. In this section, we give consideration to whether it may be appropriate to recognise a functional parent/child relationship in legal areas where it is currently invisible. The approach that we propose is to examine the purpose of the law in question and to assess whether recognition of a functional parent or child would be consistent with that purpose.[189]

3.102 The concept of a functional parent/child relationship will encompass a broad spectrum of relationships. For example, an adult may act as a parent towards his or her partner's legal child, sharing in the day-to-day care of the child, but may not consider having any long-term responsibility for the child. This type of functional parent/child relationship may arise where there is a second legal parent who shares long-term responsibility with the resident legal parent. In such a situation it may be appropriate to recognise the functional parent/child relationship only in a limited

189. We note that if a full statute audit was to be done for adult personal relationships, it would be appropriate for a similar audit to be done for parent/child relationships: eg when should legal parental status be necessary, when will legal parental responsibility be enough, when will functional parental status have consequences.

range of fields. Alternatively, an adult may view a child as if the child was his or her legal child. In such a situation, the adult may intend to have a role in both the child's day-to-day care and long-term welfare. It will be necessary to accommodate qualitative differences in the functional parent/child relationship when considering whether to extend recognition in particular legal areas.

3.103 Rather than examine every area of non-recognition identified above, we have selected the laws of child support and intestacy as examples of how this exercise could be conducted. The Social Issues Committee identified child support as an area in need of prompt attention.[190]

### *Child support*

3.104 The principal object of the child support provisions in both the FLA and the *Child Support (Assessment) Act 1989* (Cth) is to ensure that children receive a proper level of financial support from their parents.[191] This object is reflected in the imposition on parents of the primary duty to maintain a child.[192] The clear policy basis of these child support laws is that the legal parents of a child should bear the primary financial responsibility of supporting that child, either because of their biological parentage[193] or their acceptance of that responsibility through adoption. The view that there is a parental obligation to support children has existed for many years. Blackstone's Commentaries stated that:

> The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation … laid on them not only by nature itself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their

190. The Social Issues Committee recommended that "the NSW Minister for Community Services approach her Federal counterpart to request that the child support legislation be amended so that it applies to same-sex co-parents in the same way as it currently applies to opposite sex parents and step-parents": Social Issues Committee Report at 83.
191. FLA s 66B(1); *Child Support (Assessment) Act 1989* (Cth) s 4.
192. FLA s 66C; *Child Support (Assessment) Act 1989* (Cth) s 3(1).
193. Actual or presumed.

> children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved.[194]

3.105 An additional policy concern of child support obligations is that parents, and not the state, should provide financial support for children. As Fogarty J noted in *B v J*, the "financial support of children is a matter of great public interest" and "the community as a whole would be adversely affected if a person were permitted to waive a 'right' to seek support from a child's parent".[195]

3.106 In the Commission's view, consideration should be given to whether it would be consistent with the purpose of child support laws to impose an obligation on co-mothers to provide financial support for their children. Where a woman has consented to her female partner conceiving a child through artificial insemination, with the intent of being a parent to the child, it is arguable that she should attract an automatic obligation to support the child. Certainly, in terms of public policy, it seems appropriate that a co-mother bears the financial cost of caring for a child, rather than that cost falling on the state. Accordingly, our provisional view is that there should be an obligation imposed upon co-mothers to provide financial support for their children.

3.107 As noted above, step-parents may have a duty to maintain a child under the FLA. This duty is secondary to that of a legal parent and is also dependent on a court determining that it is appropriate to impose the duty in the particular circumstances. The factors that a court must consider when determining whether to impose a maintenance obligation are:

> (a) the objects of the child maintenance provisions and the primary duty of a child's legal parents to maintain the child;

194. W Blackstone, *Commentaries on the Laws of England* (Vol 1, Kerr ed, Oxford 1862) at 466.
195. *Re B and J* (1996) 135 FLR 472 at 480.

(b) the length and circumstances of the marriage to the relevant parent of the child;

(c) the relationship that has existed between the step-parent and the child;

(d) the arrangements that have existed for the maintenance of the child; and

(e) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.[196]

3.108 This provision was introduced primarily to promote and protect the interests of step-children. It is clearly beneficial to a step-child that he or she receives the sorts of benefits accruing to natural or legally adopted children upon separation or divorce of their parents.[197] The provision attempts to balance the rights of the child with the competing rights of the natural parents and step-parent. It recognises that biological ties are not necessary to create a functional child-parent relationship. More important is the nature of the relationship with the child.

3.109 A step-parent, having formed a relationship with the natural parent, becomes part of a new family and in doing so he or she generally takes on all the rights and responsibilities (social, emotional or financial) of a natural parent. Once a step-parent has assumed a parental role, he or she should not simply be permitted to waive all responsibilities if the relationship breaks down. This is especially so if the relationship is a lengthy one.

3.110 Perhaps an argument could be made that the step-parent should be estopped from denying his or her responsibilities. However, it should be noted that the step-parent situation may be different to that of a co-mother situation[198] especially if the two women agree to have the children after their relationship has commenced. In contrast, a step-parent has no role in the decision to have the

196. FLA s 66M.

197. A H Young, "This Child Does Have 2 (Or More) Fathers: Step-Parents and Support Obligations" (2000) 45 *McGill Law Journal* 107 at 119.

198. See discussion on *W v G* at para 3.64-3.67.

child in a step-family, this decision having been made by the natural parents. Further, it may be unfair or inappropriate to cut all ties between the child and the other non-resident natural parent.

3.111 The act of forming a de facto family, like the act of procreation, may reasonably give rise to economic responsibility for the children.[199] There is concern that the State will be left to support the children of broken relationships. It is thought to be more economical and just that a person who has previously borne responsibility for the child, continue to do so. In the United States, for example, legislation in several states imposes liability on step-parents "only for children who are, or are likely to become, recipients of public assistance."[200]

3.112 It is necessary to consider whether a functional parent who is in a de facto relationship with a child's legal parent should have a similar discretionary, secondary obligation to maintain the child. Our provisional view is that the policy underlying the step-parent maintenance obligation is equally applicable in the context of unmarried step-parents. The discretionary nature of the obligation would accommodate the potential qualitative differences in functional parent/child relationships.

**ISSUE 9**

**Should an automatic duty to maintain a child be imposed upon co-mothers? Why or why not?**

**Should there be a statutory provision, equivalent to the step-parent provisions of the FLA, imposing a discretionary child support duty on a functional parent who has been in a domestic relationship with a child's legal parent?**

199. M Mahoney, "Support and Custody Aspects of the Step-parent – Child Relationship" 70 *Cornell Law Review* 38 at 48.
200. M Mahoney, "Support and Custody Aspects of the Step-parent – Child Relationship" 70 *Cornell Law Review* 38 at 43.

### *Intestacy laws*

3.113 Intestacy laws address what happens to the property of a person who dies without a valid will. In many jurisdictions, including NSW, the statutory order of beneficiaries adopts the traditional hierarchy of family members.[201] For example, a surviving partner is placed at the top of the list, followed by legal children and people related through biology or adoption. This approach reflects the provisions that most people make in their wills.[202] In this way intestacy laws guess what people would want to happen to their property after they die.[203] However, an additional policy concern may also be to ensure that those people who are most likely to need the property or who have contributed to the acquisition of the property, namely a surviving partner and any children, are prioritised as beneficiaries.[204]

3.114 The existing intestacy provisions reflect a traditional view of family. As has been discussed, many different family structures now exist in NSW, including those where a functional parent/child relationship exists. It is necessary to consider whether the intestacy provisions should reflect the current diversity of family structures, and therefore include functional children in the statutory list of beneficiaries. The central question is whether omitting functional children from the list of beneficiaries is consistent with the goals of the intestacy provisions. This question could be rephrased in the following terms:

(1) In the event that he or she died intestate, is it likely that a functional parent would want his or her child to receive a share of the property?

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201. For a discussion of this in the American context, see S Gary, "Adapting Intestacy Laws to Changing Families" (2000) 18 *Law and Inequality* 1 at 1.
202. Law Commission of Great Britain, *Distribution on Intestacy* (Working Paper 108, 1988) at 31-32; Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 1.
203. Law Commission of Great Britain at 32.
204. Law Commission of Great Britain at 33-35.

(2) Is a child likely to need a share of his or her functional parent's estate in the event of the parent's death?

3.115 It is arguable that omitting functional children from the list of beneficiaries is inconsistent with the goals of the intestacy provisions. However, as discussed above, a functional parent/child relationship can exist in a diverse range of circumstances. For example, the relationship between an adult who has been in a de facto relationship with a child's legal parent for two years and who has, over that time, come to act as a parent to the child may be quite qualitatively different to the functional parent/child relationship that exists between a co-mother and her 15 year old daughter. It may be appropriate to add to the list of beneficiaries extant functional parent/child relationships of a specified minimum duration.[205]

**ISSUE 10**

**Should there be an examination of all the areas of non-recognition of the functional parent/child relationship with the goal of assessing whether the lack of recognition is consistent or inconsistent with the purpose of the law in question?**

**If a comprehensive statute audit is not undertaken, are there any particular areas, such as intestacy, that should be examined?**

205. An exception to a time limit may be appropriate in the case of co-mothers. We note that an alternative threshold requirement could be dependency, but further note that issues of dependency may sit more appropriately in the area of family provision.

# 4. Financial agreements

- Overview
- Financial agreements
- Making agreements under the PRA
- What conditions need to be met in order to make a binding agreement?
- Effect of a binding agreement
- Current powers to vary or set aside agreements
- Should there be other grounds for varying or setting aside a financial agreement?
- Other issues

4.1 Following the Commission's recommendations in Report 36[1], people living in de facto relationships have been permitted to make enforceable agreements with respect to their financial affairs. If these agreements comply with the requirements set out in the *Property Relationships (Act) 1984* (NSW) ("the PRA"), they effectively oust the jurisdiction of the court to alter property interests between the parties or to award maintenance. In Report 36, the Commission considered it appropriate that, subject to limitations, couples could make their own arrangements to divide property when their relationship ended. The Commission continues to hold this view.

4.2 One of the objects of the PRA, as stated in Chapter 2, should be to recognise and respect people's right to order their own financial affairs without court intervention. However, this freedom to contract out of the provisions of the PRA must be balanced against another major object of the legislation, namely to facilitate a just and equitable (re)distribution of property when a relationship ends. In this Chapter, the Commission examines the provisions dealing with financial agreements to see whether a correct balance has been achieved between, on the one hand, enabling people to make their own legally binding agreements and, on the other, providing adequate safeguards to protect people from making, and being held to, unfair bargains.

## OVERVIEW

### Private ordering

4.3 People who live together in a domestic relationship may wish to enter into an agreement dealing with their financial affairs, either before they begin living together or while they are living together. These agreements are commonly referred to as "cohabitation agreements" though they have been renamed "domestic relationship agreements" in the PRA.[2] People may also want to negotiate a financial agreement if they are thinking of

1. NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983).
2. For married couples, or couples intending to marry, the equivalent financial agreement is generally referred to as a pre-nuptial or pre-marital agreement.

separating, or after they separate. These were once referred to as "separation agreements" under the Act but have also been renamed and are now called "termination agreements". For the purposes of this discussion paper, the Commission adopts the umbrella term "financial agreements" to indicate all such agreements, whether or not they also deal with non-financial matters except of course, where the law distinguishes between the two.

4.4 The process by which people in domestic relationships enter into agreements in an attempt to order their own affairs, rather than seek a court-imposed solution, is also commonly referred to as "private ordering".

## LRC Report 36

4.5 Until the 1970s, agreements between persons that involved cohabitation outside marriage were considered contrary to public policy, as they were seen as promoting "immorality", and were therefore unenforceable.[3] By the early 1970s, judges were beginning to note that the incidence and community acceptance of people living together outside marriage had changed[4] and in 1982, the NSW Court of Appeal suggested that the public policy principle no longer applied.[5] Indeed, as more and more property disputes between de facto partners came before the courts (prior to the enactment of the *De Facto Relationships Act 1984* (NSW)), it was increasingly felt that the court and the parties themselves would benefit if the parties were encouraged to regulate their own financial affairs by agreement.[6]

3. *Fender v St John Mildmay* [1938] AC 1 at 42.
4. See *Andrews v Parker* (1973) QR 93 (Stable J) cited in NSWLRC Report 36 at para 11.5.
5. *Seidler v Schallhofer* [1982] 2 NSWLR 80 (Hutley J). See also *Hagenfelds v Saffron* (NSW, Supreme Court, No 1914/85, McLelland J, 12 August 1986, unreported) where it was held that it was "not abundantly clear that, even in 1961, a contractual consideration of the kind in question would invalidate an otherwise enforceable contract" at 4.
6. *Jardany v Brown* (NSW, Supreme Court, Powell J, 1 July 1981, unreported) cited in NSWLRC Report 36 at para 11.7.

4.6 In recognition of this growing community and judicial support for private ordering, the Commission in its 1983 review recommended that the new de facto relationship legislation make express provision for legally binding cohabitation and separation agreements.[7] The Commission was of the view that people should be free to regulate their own financial affairs if they wished to do so and thus opt out of the adjustive jurisdiction of the court. However, the Commission said that it should not be an unqualified right. It had to be balanced against a competing policy to ensure that agreements are fair; that the parties are fully informed and agree freely with the terms of the agreement. Consequently, the Commission recommended that financial agreements between de facto partners should be enforceable subject to the satisfaction of a number of criteria designed to ensure fairness. Even when all those criteria are satisfied, the Commission recommended that the court should have an overriding power to set aside or vary an agreement in cases where circumstances have so changed since the agreement was made that to enforce it would lead to serious injustice. These recommendations were implemented in the *De Facto Relationships Act 1984* (NSW).

4.7 There are similar provisions for binding financial agreements in other Australian jurisdictions.[8]

7. NSWLRC Report 36 at para 11.26-11.29.
8. In South Australia, the Northern Territory and the Australian Capital Territory, there are provisions for the making of binding agreements in similar terms to those in the NSW Act. In contrast, Part IX of the *Property Law Act 1958* (Vic) has no provisions for making cohabitation agreements. However, the court is able to have regard to any agreement which may exist between the couple when determining what property order, if any, to make (see for example, *Lesiak v Foggenberger* (1995) DFC 95-167 (Hedigan J)). Under the *Family Law Amendment Act 2001* (WA), parties to a de facto relationship may make binding financial agreements under provisions that mirror those recently inserted in the *Family Law Act 1975* (Cth).

## Expanded coverage of the PRA

4.8 Since Report 36, the PRA's coverage has been widened to include same-sex couples and persons in close personal relationships.[9] The adjustive jurisdiction conferred by the PRA on the court also applies to these new categories of personal relationships. This includes the capacity to opt out of the legislative scheme by entering into a cohabitation or separation agreement.

4.9 People in gay and lesbian relationships are probably more used to making their own financial arrangements because, until 1999, the law did not recognise any legal rights arising out of their relationships. In many areas of the law, this is still the case.[10] Also, because of prejudice and homophobia, people in same-sex relationships may enter into financial agreements more readily than heterosexual couples in order to keep their affairs private and to stay outside the courts, where prejudicial views from the community may be reflected.[11]

## Pre-nuptial agreements under the Family Law Act

4.10 This policy shift towards private ordering in Australia has, until recently, been confined to de facto couples. Agreements between married persons were also once considered to offend public policy on the grounds that they undermined marriage and were therefore void for illegality.[12] However, in light of an increasing divorce rate and a corresponding increase in the number of property disputes under the *Family Law Act 1975* (Cth) ("the FLA"), the move towards private ordering has gathered pace in the federal arena.[13] A number of jurisdictions abroad make

9. See para 1.11-1.12.
10. See para 2.28-2.32.
11. H Astor, "Mediation of Intra-Lesbian Disputes" (1997) 20(4) *Melbourne University Law Review* 953.
12. *Money v Money* [1966] 1 NSWR 348 at 350.
13. However, there is speculation that many couples will continue to avoid making financial agreements, even now that they are binding, as there are no capital gains tax concessions for assets transferred

provision for legally binding pre-nuptial contracts.[14] While previous recommendations by various bodies to introduce them into the FLA had been unsuccessful,[15] recent amendments to the FLA, which came into effect on 27 December 2000, now allow married couples to make legally binding financial agreements,[16] both before and during marriage, as well as after marriage breakdown.[17] Provided they comply with the procedural requirements set out in section 90G of the FLA these agreements will be binding on the Family Court.[18] Prior to the enactment of these provisions, the only agreements that ousted the jurisdiction of the court were maintenance agreements made after separation and approved by the court under section 87.

4.11 Previously, people were free to make pre-marital agreements but there was no guarantee that such agreements would be enforced.[19] In the recent Full Court decision of *G and G*,[20] for example, the Family Court upheld the decision of the trial judge to disregard a pre-marital agreement entered by the couple two days

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under a financial agreement, as opposed to assets transferred under consent orders: A Horin, "Divorcing couples run scared from out-of-court deals" *Sydney Morning Herald* (23 August 2001).

14. They are available in some parts of the USA, some Canadian provinces (see for example *Family Law Act RSO 1990* (Ont) Ch F3 Pt IV) and in New Zealand (*Property (Relationships) Act 1976* (NZ) s 21). Their introduction has been recommended in England.
15. Legally binding pre-nuptial agreements were first recommended by the Australian Law Reform Commission in 1987: see ALRC, *Matrimonial Property* (Report 39, 1987) at para 443 and then by a Joint Select Parliamentary Committee in 1992: see Australia, Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, Canberra, November 1992).
16. In 1999, the federal government introduced the *Family Law Amendment Bill 1999*. Schedule 2 of the Bill makes provision for the introduction of legally binding pre-nuptial agreements.
17. FLA s 90B, s 90C, s 90D.
18. See para 4.45-4.46.
19. See *In the Marriage of Plut* (1987) 11 Fam LR 687.
20. *G and G* (2000) 26 Fam LR 592.

before marriage. Justice Boland had found that although both the husband and the wife received independent advice, the wife seemed under pressure from her husband to sign and that this pressure was not alleviated by the independent advice. The wife gave evidence, for example, that her husband had said "I am not going to marry you unless you sign it".[21] Justice Boland also held that whilst the agreement may have been "just and equitable" at the time of signing, it was not at the time of separation due to changed circumstances. On appeal, the Full Court of the Family Court held she was correct in assessing these factors and not enforcing the pre-marital agreement.

4.12 In *G and G*, the Full Court endorsed its earlier statement that "it is the dominant and unwavering thread of all of the cases that the parties cannot by their conduct or agreement oust the jurisdiction of the court."[22] Therefore, whilst the Family Court could consider the agreement when making orders adjusting property and/or maintenance it was not bound by it and could alter the terms of any pre-marital agreement between married partners.[23] Now that couples can enter binding financial agreements,[24] the case law in this area may become less relevant. However, it will still apply to pre-marital agreements made prior to the amendments and those that fall outside the scope of the new provisions.

## FINANCIAL AGREEMENTS

### Lack of empirical evidence

4.13 There is very little empirical evidence in NSW, or indeed elsewhere,[25] documenting how often cohabitation agreements are

21. *G and G* (2000) 26 Fam LR 592 at para 16.
22. *Woodcock v Woodcock* (1997) 137 FLR 14.
23. FLA s 85A.
24. FLA s 90B.
25. In jurisdictions where pre-nuptial agreements are legally binding, such as the United States, Canada and New Zealand, there is, according to anecdotal evidence, little take up of them. Unfortunately, there is a dearth of empirical evidence internationally as well as locally.

entered into or how effective they are in producing outcomes which the parties consider fair. The little evidence that there is, mostly anecdotal, suggests that few cohabiting couples make agreements. There are also very few litigated cases dealing with cohabitation agreements. In the few cases involving financial agreements that do come before the courts, one party is usually asking the court that it be set aside.

4.14 The only empirical research that is available locally is the Australian Divorce Transition Project conducted in 1997 by the Australian Institute of Family Studies (AIFS).[26] However, this research only involved married couples and pre-marital agreements, which, at the time of the survey, were not binding under the FLA. As part of the detailed research into the financial arrangements made by couples who have separated, those surveyed were asked whether they had made a pre-nuptial agreement. Of the 650 people surveyed, only 13 said that they had entered into an agreement. The data also revealed a general perception among respondents that pre-nuptial agreements did not help them, or would not have helped them, reach a fairer or more equitable settlement.[27] Given that, at the time, pre-nuptial agreements lacked enforceability,[28] it is probably not surprising that the research suggests that married couples have rarely made pre-nuptial agreements.[29]

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26. The Australian Divorce Transitions Project was a random national telephone survey of divorced Australians (excluding Western Australia due to legislative differences), which examined the divorce transition and its consequences for parents.
27. B Fehlberg and B Smyth, "Binding pre-marital agreements: Will they help?" (1999) 53 *Family Matters* 55 at 57.
28. Under the FLA, at the time of the survey, only those agreements made after separation and approved by the Family Court under the FLA s 87 or via consent orders ousted the court's power to make property adjustment orders. Agreements made before marriage were considered by the Family Court when making orders relating to property and/or maintenance, but they did not exclude or limit the court's powers: see *In the Marriage of Plut* (1987) 11 Fam LR 687.
29. Defined as agreements made prior to marriage which set out how the property should be divided in the event of marriage breakdown: see B Fehlberg and B Smyth, "Binding pre-marital agreements: Will they help?" (1999) 53 *Family Matters* 55 at 56.

4.15 Consequently, apart from the few instances where there has been some judicial comment on financial agreements, the Commission's review is based predominantly on an analysis of the legislative provisions in the PRA and the legislation in other jurisdictions.

4.16 In order to assist the Commission in this research, the Commission welcomes information on domestic relationship agreements. Case studies and information from practitioners about how often they are used and in what circumstances would be particularly helpful.

## Who makes financial agreements?

4.17 Certainly, many people would find broaching the subject of making a financial agreement at the beginning of (or during) a healthy and strong relationship to be far from romantic or conducive to trust. On the contrary, it might be interpreted as sounding the death knell of the relationship. For others, however, romantic notions give way to pragmatism.

4.18 People may enter, or wish to enter, into cohabitation agreements for a variety of reasons. Some may wish to avoid the financial and emotional costs that generally accompany litigation over property and maintenance. Other people may not want to leave these issues to the court's discretion, as they may disagree with the way it is exercised, and want to make it clear which of them owns what property. People who have been in previous relationships, and who may have gone through a division of family property at the end of that relationship, may be more likely to enter into cohabitation agreements in order to quarantine their assets from their current partner, and keep it either for themselves or for children of their previous relationship. There was, and perhaps still is, a public perception (as is frequently reported of Hollywood pre-nuptial agreements), that financial agreements are most often used by the "rich and famous" – usually drawn up by the wealthier partner who wants to protect his or her assets from any potential property or maintenance claims by the other partner.

Suzie, 43, and John, 55, have been having a relationship for some time and are thinking of living together. Suzie was previously married and there are two teenage children of that relationship who live with her. When she and her former husband separated, her children were very young and the property arrangement was that the house should be transferred to her in full after she bought out her husband's share. She has only a small amount left to pay on the mortgage. John, who has a high paying job, does not own any property and plans to move into the house with Suzie. Her concern is to ensure that the house remains hers, and that ultimately it will be available for the benefit of her children.

4.19 In public hearings conducted by the Australian Law Reform Commission as part of its review of matrimonial property in the mid 1980s, people indicated that there were two other situations where they might want to contract out of the legislative framework for property division.[30] The first is where there is a vast disparity in wealth between the parties, in which case the agreement would be used as evidence of one partner's greater contribution to property. The second situation is where there are businesses or farms that have been in the family for generations. Pre-marital agreements may be used by some persons to protect such businesses and farms from any eventual property settlement.[31]

30. ALRC, *Matrimonial Property* (Report 39, 1987) at para 439.
31. Much emphasis was placed on this issue in the Joint Standing Committee Report in 1992: Australia, Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, Canberra, November 1992). In its response to the Committee's recommendations, the Government stated that it did not believe that farming properties should be distinguished from other types of matrimonial property: see Australia, Attorney General's Department, *Family Law Act 1975: Directions for Amendment Government response to the report by the Joint Select Committee on certain aspects of the operation and Interpretation of the Family Law Act 1975* (AGPS, Canberra, 1993) at para 16.

## Advantages of making financial agreements

4.20 In theory at least, legally binding financial agreements between parties in personal relationships offer certain advantages. They enable the parties to:

- plan their future financial affairs with some degree of certainty;
- avoid the costs, time and emotional trauma of a court-imposed decision;
- keep their personal affairs private, rather than airing them publicly in open court proceedings; and
- tailor the agreement to best suit their particular circumstances.

4.21 For those who make a deliberate choice to enter into a de facto relationship in order to avoid the financial rights and obligations that apply to people who marry, provision for legally binding financial agreements offers the opportunity to opt out of the court's adjustive jurisdiction under the Act. It also gives this opportunity to people who cannot marry.

4.22 There is also an argument that parties are more likely to be satisfied with agreements they negotiate themselves and are therefore more likely to comply with agreements made voluntarily. Also, apart from reducing litigation generally, financial agreements can be a useful tool if there is a dispute. Although they may not satisfy all the necessary conditions to make them binding, financial agreements can be used as evidence of what the parties intended with respect to their financial affairs. They can also be a useful register of the parties' assets and liabilities, so long as those assets and liabilities are fully disclosed.

Paul and Brian have been living together for 18 months. They decided that since each owned a house before they moved in together (they are living in Brian's house because it is bigger: Paul's is now rented out), and there are a number of other assets, it would be a good idea to set out their intentions in the event they separate. They have drawn up an agreement that indicates that each owns his own house and that neither intends that their business assets be shared if they

separate. They have also listed the original ownership of the furniture in the house (including whitegoods and electrical appliances). The solicitor they consulted advised them that if after they have lived together for a longer period, they feel differently about things, they can either come back and revise the agreement, or they can revoke it in which case the property issues would be decided under the Act.

## Criticisms of private ordering

### *Unequal bargaining power*

4.23 The major criticism of private ordering is that it presupposes that the parties in a domestic relationship have equal bargaining powers in negotiations. In many domestic relationships, this is simply not the case. In both heterosexual and same-sex relationships, and in the more amorphous category of close personal relationship, those with the weaker economic resources may be disadvantaged by private ordering, particularly when the agreement is made, as it often is, to protect the assets and income of the wealthier partner.[32]

### *Power imbalances arising from gender inequalities*

4.24 In heterosexual relationships the party with the weaker economic resources is usually the woman who also most commonly has primary care of the children. Marcia Neave argues that women fare poorly when negotiating "family contracts" because these are negotiated "against the background of pervasive gender inequality".[33] She says:

> Women's inferior social and economic position constrains their ability to make agreements that benefit them. Our bargaining power is directly affected by the public/private distinction.[34]

32. G F Brod, "Premarital Agreements and Gender Justice" (1994) 6 *Yale Journal of Law and Feminism* 229; and B Atwood, "Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act" (1993) 19 *Journal of Legislation* 127.
33. M Neave, "Private Ordering in Family Law – Will Women Benefit?" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 168.
34. Neave (1995) at 168.

4.25 There are numerous well-documented structural factors that affect women's economic positions. While more and more women are in the paid workforce, women's workforce patterns are still punctuated by breaks due to child care responsibilities with resultant costs, far more so than is the case for men. Women continue to be less likely to be in full-time employment and still earn less than men.[35] Indeed, the move away from a centralised wage-fixing system toward enterprise bargaining has not helped bridge the divide between men's and women's earnings.[36]

4.26 Research by the AIFS consistently shows that women bear a disproportionate share of the economic costs of marriage breakdown.[37] Women who have not re-partnered and who have primary care of dependent children incur the greatest risk of being economically disadvantaged after separation.[38] Women's economic positions are especially precarious immediately after separation, particularly if they have no independent income. They are quite often unable even to meet short-term living expenses let alone afford to bring proceedings for property division or maintenance. Significantly, legal aid is seldom available in property cases. Women, therefore, tend either to make separation agreements or rely on cheaper methods of dispute resolution.

4.27 Most people in fact, settle their property and maintenance claims by negotiation and mediation. AIFS research shows that less than 5% of property disputes between married couples end up being determined by the Family Court. One could reasonably assume that there are even fewer litigated cases under the PRA

35. Australian Bureau of Statistics, *Australian Social Trends* (Cat No 4102.0, 2000) at 151.
36. NSW Department of Industrial Relations, "Why is there a gap between men's and women's earnings?" (as at 19 November 2001) «http://www.dir.nsw.gov.au/action/policy/equity/gap.html».
37. See generally P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1986); K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents After Divorce* (AIFS, 1993). See Chapter 5 at para 5.59.
38. B Smyth and R Weston, "Financial living standards after divorce" (2000) 55 *Family Matters* 10 at 15.

given the greater complexity and expense in bringing actions in the Supreme Court. This is particularly true for those people in same-sex relationships or in other close personal relationships who had no avenue other than equitable principles at common law before the 1999 amendments. This means that well over 95% of disputes about property are settled by agreement.

4.28 Neave argues that this can pose serious concerns for women. "Bargaining in the shadow of the law",[39] that is, when the law disadvantages women, means that private ordering will entrench gender inequalities.[40] Her argument is that the law disadvantages women by:

- consistently undervaluing non-financial domestic contributions by women;
- not adequately recognising the costs (in terms of earning capacity) experienced by women as a result of child care responsibilities; and
- ignoring, or not making orders about, superannuation, which after the family home, has become the next largest single asset of persons in a relationship.[41]

4.29 Women's bargaining powers are not only affected by economic circumstances but also by social factors. In the *Settling Up* study, the AIFS found that men and women attached different values to their contributions to family resources. While women tended to acknowledge their male partners' financial contributions, men often overlooked their wives' financial contributions.[42] Further, both men and women regarded financial contributions as more significant than the non-financial ones which women more often provide.[43] Research shows that "people express their preferences in

39. See also R Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law" (1979) 88 *Yale Law Journal* 950.
40. Neave (1995) at 159-60.
41. See Chapter 7.
42. P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1996).
43. P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1996).

terms of what they perceive to be their entitlements" and that these perceptions are moulded by social context.[44] Hence, because they believe that their contributions are worth less or are not as important, women will bargain for less during negotiations.[45] The courts, in turn, reinforce this view.

4.30 Supporters of private ordering say that if women have the ability to make agreements then they are as "free" as men, to make agreements which suit them. Private ordering enhances this freedom. If women are more co-operative than men, this is a result of their freedom of choice.[46] Neave is very critical of this view:

> The "choices" made by men and women negotiating such agreements are shaped by their relative power or powerlessness. Such agreements are negotiated against a background of a division between market and family, and between state and family, which perpetuates women's economic and social disadvantage.[47]

4.31 She warns of the dangers of increased reliance on private ordering:

> … cohabitation and separation agreements consign the financial consequences of marriage breakdown to private negotiations, thus upholding the status quo. The confinement of family disputes to the private sphere has been a major factor in gender oppression in the past. There is little reason to believe it will improve the situation of women in the future.[48]

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44. R Graycar, "Matrimonial Property Law Reform – what lessons have we learnt?", paper presented at the *Family Court of Australia Second National Conference – Enhancing Access to Justice* (Sydney, 20-23 September 1995) at 94 (citing research discussed by Neave).
45. Neave (1995) at 169-170.
46. M Trebilcock and R Keshvani, "The Role of Private Ordering in Family Law" (1991) 4 *University of Toronto Law Journal* 533 in M Neave, "Private Ordering in Family Law – Will Women Benefit?" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 173.
47. Neave (1995) at 173.
48. Neave (1995) at 173.

4.32 While it might be suggested that women stand a better chance of obtaining a more equitable share of the assets of the relationship by private agreement than by court order, given some of the recent decisions of the courts,[49] there remains an underlying concern that "unequal bargaining positions for most women will result in unequal bargains".[50] Women are also more likely to enter into financially disadvantageous agreements in order to protect children, who can be used as "hostages" in the bargaining process.[51]

4.33 Many commentators argue that in the light of such unequal bargaining power, cohabitation and pre-nuptial agreements have the effect of perpetuating the gender inequalities that exist in heterosexual relationships.[52] While the Commission recognises that higher education retention rates and increasing workforce participation rates have resulted in some degree of financial independence for women, there is empirical evidence showing that these changes are very limited and major disparities continue.[53]

### *Other factors affecting bargaining power*

4.34 The major concerns with private ordering in the area of property division both in the federal sphere and in the pre-1999 NSW context are clearly, and understandably, highly gendered. But other considerations, apart from gender differences, will be relevant in NSW especially now that the Act covers different populations.

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49. See, for example, *Grech v Jones* [2000] NSWSC 61 (McLaughlin M). This case has been overturned on appeal: *Jones v Grech* (2001) 27 Fam LR 711.
50. B Atwood, "Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act" (1993) 19 *Journal of Legislation* 127 at 129.
51. C Rose, "Women and Property: Gaining and Losing Ground" (1992) 78 *Virginia Law Review* 421 at 447 cited in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 171. See also R Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 *Yale Law and Policy Review* 168.
52. See Neave (1995). See also F Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harvard Law Review* 1497 for a discussion of some of the concerns about bargaining power.
53. See Chapters 5, 6 and 8.

4.35 Power imbalances can and do occur among same-sex cohabiting couples. These are likely to be a result of other (non-gendered) factors. For example, a disparity in the wealth of the partners or difference in age, education and/or social status may be factors affecting power imbalances between persons in a same-sex couple relationship. The division of labour in a same-sex household may also be a determining factor and may that of a heterosexual relationship. For example, the roles of the partners in a lesbian family with a newborn child are likely to be similar to those usually apparent in heterosexual relationships. That is, one of the partners might stay at home and take on all or most of the child care responsibilities while the other works in some form of paid employment.

Lisa and Kaye have been in a relationship for five years. They decided to have a child together. Lisa has a well paid job as an accountant and is hoping to be made a partner in her downtown firm; Kaye is a primary school teacher. They have agreed that, at least for their first child, Kaye will be the birth mother. Kaye is planning to take the maximum statutory period of unpaid leave and then will seek some part-time work, which she hopes will be for no more than two days per week till the child starts school. Lisa presents Kaye with a draft financial agreement. Kaye does not have a great deal of financial knowledge and, even though she has obtained independent legal advice, does not fully appreciate what her financial position will be if her relationship breaks down and the agreement is implemented. Specifically, she does not consider the impact of forgoing full-time work, and hence the payment of superannuation, whilst she stays at home to care for their child.

### *Agreement might create other causes of dispute*

4.36 Some critics have argued that many of the perceived benefits of legally binding agreements are not realistic. For example, rather than reduce litigation, financial agreements may create more disputes, as parties argue over the validity of the agreement and the interpretation of terms.[54]

54. B Fehlberg and B Smyth, "Pre-nuptial Agreements for Australia: why not?" (2000) 14 *Australian Journal of Family Law* 80; B Fehlberg and B Smyth, "Binding pre-marital agreements: Will they help?" (1999) 53 *Family Matters* 55.

4.37 Of course, this assumes that those who wish to challenge a financial agreement have the requisite means to bring legal proceedings to set aside or vary the agreement, on one of the grounds examined below. This is indeed another significant criticism of private ordering: while it is relatively easy to make a financial agreement which satisfies the requirements of the Act such as to make it binding on the parties and the court, challenging it is not quite so simple. There is no process for registering the agreement with a court or other body, and in that process, for the agreement to be vetted for fairness. However, a party wishing to challenge it will need to bring court proceedings, possibly at great cost.[55]

## Support for legally binding financial agreements

4.38 The Commission recognises that there is some community support for making legally binding financial agreements available to those who wish to opt out of the protective regime under the Act. Submissions supporting cohabitation agreements were made to the Commission leading up to Report 36. The Women Lawyers Association of NSW submitted that cohabitation agreements allow de facto partners the freedom to regulate their relationships.[56] The Social Issues Committee of the Anglican Diocese of Sydney also supported a law to encourage de facto partners to "make their own conscious amendments with regard to property".[57] However, there were also submissions warning against the enforceability of cohabitation agreements, emphasising the need to protect the party in the weaker bargaining position.[58]

4.39 More recently, in a submission to the Commission following the release of its 2000 preliminary paper,[59] the Gay and Lesbian Rights Lobby argued that gay and lesbian adults with no

55. See Chapter 9.
56. NSWLRC Report 36 at para 11.12.
57. NSWLRC Report 36 at para 11.12.
58. NSWLRC Report 36 at para 11.20.
59. NSW Law Reform Commission, *Relationships and the Law* (Preliminary Paper, February 2000).

dependent children should have the freedom to manage their own affairs by way of cohabitation agreements.[60] However, given the potential for such agreements to disadvantage people in weaker bargaining positions, effective safeguards are essential.

# MAKING AGREEMENTS UNDER THE PRA

## Definitions

4.40 The Act provides that notwithstanding any rule of public policy to the contrary, two persons who are not married to each other may enter into a domestic relationship agreement or a termination agreement.[61]

### *Domestic relationship agreement*

4.41 A domestic relationship agreement is defined as an agreement made by two people, either before or during their relationship, that makes provision for financial matters. This includes matters such as maintenance for either or both parties to a domestic relationship and property and financial resources belonging to each or both of them. Parties can, for example, set out what property or financial resources each of them owns and how such property and financial resources should be divided in the event that the relationship breaks down.[62] They can stipulate which property should be completely excluded from division, or agree that the value of a particular asset (such as a business) will be included in the total pool of assets but cannot be divided. Parties can also set out in the agreement who has responsibility to pay which debts.

4.42 Agreements can also cover non-financial matters.[63] They might include for example, what accommodation arrangements should apply if the parties separate, how furniture and gifts are to be divided and who keeps the pets. "Lifestyle clauses", such as who is

60. Gay and Lesbian Rights Lobby, *Submission* at para 2.2.
61. PRA s 45(1).
62. PRA s 45(1).
63. PRA s 44(1)(b).

responsible for various household tasks and how often holidays are taken, can be included but are not generally advisable. They are easily breached, which raises questions about the validity of the more significant financial provisions. To avoid such questions, it is probably advisable to add a clause in the agreement that preserves the validity of the rest of the agreement even if one or other of the provisions is void or voidable.

### *Termination agreement*

4.43 People in a domestic relationship can also enter into a termination agreement,[64] either after the relationship ends or in contemplation of the relationship ending. Termination agreements can deal with any financial or other matters. But if the relationship does not end within three months of the parties entering into a termination agreement, the agreement is treated as a domestic relationship agreement.[65]

4.44 The procedural requirements that apply to domestic relationship and termination agreements are outlined below. They differ in one major respect: while a court may set aside or vary a domestic relationship agreement on the ground that enforcement of all or part of it would lead to serious injustice, no similar power applies to termination agreements. This is why a termination agreement becomes a domestic relationship agreement if the parties do not separate. Section 44(1) of the PRA is a safeguard against the making of termination agreements early in the relationship, thus avoiding the court's special power under the Act to set aside an otherwise properly made domestic relationship agreement.

64. Also sometimes referred to as a "separation agreement".
65. PRA s 44(1).

## WHAT CONDITIONS NEED TO BE MET IN ORDER TO MAKE A BINDING AGREEMENT?

4.45 In order for the financial agreement to be binding and enforceable under the PRA, the following requirements must be satisfied:[66]

- it must be in writing and signed by each of the parties;
- parties must have independent legal advice;
- the agreement must be accompanied by a certificate from a solicitor for each of the parties, which certifies that the solicitor advised the party, independently of the other, as to:
  - (1) the effect of the agreement on the party's rights to apply for a property adjustment order under Part 3 of the Act;
  - (2) whether or not, at the time, it was to the party's advantage (financial or otherwise) to enter into the agreement;
  - (3) whether or not, at the time, it was prudent for the party to sign the agreement; and
  - (4) whether or not, at the time and in light of circumstances that were reasonably foreseeable then, the provisions of the agreement seemed fair and reasonable.[67]

4.46 Similar provisions appear in those recently adopted by the Commonwealth in relation to married couples under the FLA.[68]

66. PRA s 47(1).
67. Form 8 is prescribed by the Regulations: see *Property (Relationships) Regulation 2000* (NSW) Sch 1.
68. FLA s 90G: In order to be legally binding, an agreement must be in writing, signed by both parties and each party must have received independent legal advice, a certificate of which must be annexed to the agreement. Two added clauses, namely that the agreement cannot have been terminated by a court and one party is to retain the original and the other a copy, are not included in the PRA.

## Independent legal advice

4.47 Agreements between parties in a personal relationship are not like contracts signed at arms-length by business partners. The importance of the emotional and social context in which these agreements are negotiated cannot be overstated. Too often, parties are influenced by these factors in the negotiating process rather than by objective factors that might apply when making business decisions. For this reason, independent legal advice may not be an absolute safeguard to ensure that parties to a domestic relationship are fully aware of the terms and impact of the agreement and will only sign an agreement if it is prudent to do so. Independent legal advice is not a guarantee that the agreement is fair and reasonable, as Justice Bergin noted in a recent case:

> There is no doubt that the plaintiff received independent advice. However I am of the view that by reason of the fear of the termination of the relationship, or the stormy course of any remaining relationship, combined with the deceased's suggested purpose of the deed and the expectation that the deceased would ultimately provide for her if they remained together, the plaintiff did not give due consideration to the advice she received.[69]

4.48 A similar example, but in the context of third party guarantees, is the English case of *BCCI v Aboody*,[70] where the wife was required to obtain legal advice before signing the guarantee for her husband's loan. She was under pressure from her husband, and the solicitor advised her not to sign. However, in the end she did sign the guarantee, despite the fact that she was crying because of her husband's bullying and shouting at the solicitor's office. At the bottom of the certificate of advice the solicitor wrote: "Husband is a bully. Under pressure and she wants peace."[71]

69. *Russell v Quinton* [2000] NSWSC 322.
70. *BCCI v Aboody* [1990] 1 QB 923.
71. Even though the court found that the husband's pressure constituted actual undue influence over the wife, the contract was not set aside for other reasons.

4.49 In other jurisdictions, however, the absence of independent legal advice will not affect the enforceability of an agreement. Queensland, for example, requires only that the parties sign the written agreement before a justice of the peace or a solicitor.[72] In the Northern Territory, an agreement in writing and signed by both parties is enforceable.[73] The signatures need not even be witnessed. When initially drafted, the *Family Law Amendment Bill 2000* (Cth) also did not make obtaining independent legal advice mandatory. The original bill would have required the parties to obtain *either* financial or legal advice. However, following criticism of the provision by the legal profession, the Government moved an amendment to make independent legal advice a condition of enforceability. The bill was passed in its amended form in November 2000 and became effective on 27 December 2000.

### *Shifting responsibility to solicitors*

4.50 There is a concern that the requirement to append certificates of independent legal advice to financial agreements shifts responsibility from the parties to solicitors, thus exposing solicitors to actions in negligence. Both the Law Society of NSW and the Victorian Law Institute have issued guidelines to their members suggesting that they explain the law to clients and limit these certificates to existing clients. In South Australia, the Supreme Court has noted that the South Australian Law Society has advised its members not to provide certificates of advice.[74] Whilst this concern has generally arisen in the context of independent legal advice to third party guarantors, the warning may be applicable to domestic financial agreements. Both situations can involve the interplay of emotional interdependency with financial matters. In both situations the aim of the independent advice is to ensure that the parties understand the transaction and their legal position as a result of it, and are empowered to make a truly independent decision.

72. *Property Law Act 1974* (Qld) s 266(1).
73. PRA s 45(2).
74. *Micarone v Perpetual Trustees* (SA, Supreme Court, No S6438, Duggan J, 19 November 1997, unreported) at 80.

## Should solicitors be required to give financial advice?

4.51 There is a particular concern with the requirement, under section 47(1)(d) of the PRA, for a solicitor to advise the client as to whether the agreement is advantageous, "financially or otherwise" and is "prudent to sign". The issue of solicitors giving financial advice has also been raised in the context of third party guarantees.[75] In the case of *Citicorp v O'Brien*,[76] an action in negligence was brought against the solicitor acting for the O'Briens in a mortgage matter. The O'Briens claimed that part of the solicitor's duty was to provide advice as to their financial situation and whether they could afford the loan. The NSW Court of Appeal held that providing financial advice was outside the scope of the retainer[77] and outside the responsibility assumed and relied upon by the O'Briens. The court held that to impose a duty of financial advice would require solicitors to give opinions they are not qualified to give.[78] This case was followed in the more recent case of *Davies v Camilleri*,[79] where the court held that the retainer did

75. See also NSW Law Reform Commission, *Guaranteeing Someone Else's Debts* (Issues Paper 17, 2000) at para 3.34-3.47.
76. *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398.
77. A retainer is the agreement between a solicitor and the client which sets out what services are contracted and the fee for those services.
78. There was an appeal to the High Court against the solicitor, Mr Eliades, who provided their independent legal advice. Only the transcript for the application for special leave to appeal is available because, while leave was granted, the case was discontinued before the actual appeal was heard. In the transcript, however, some of the Justices make comments which suggest that they may have disagreed with the Court of Appeal decision: *O'Brien v Eliades* (High Court of Australia, S193/1996, 6 June 1997, unreported). McHugh J stated it is a 19th century view that a solicitor only advises on points of law. Here, he pointed out, the solicitor was heavily engaged in the financial aspects of the matter. Both McHugh and Gaudron JJ suggested that a solicitor's duty is wider than what is found in the retainer and the additional assumed responsibility relied upon by the client.
79. *Davies v Camilleri* [2000] NSWSC 904 (Bell J).

not require the solicitor either to give financial advice to the client or to advise her to seek it elsewhere.[80]

### *Position of the NSW Law Society*

4.52 The NSW Law Society supports the principle established in these cases and has directed its members that in giving independent legal advice and issuing certificates, they are not to give financial advice. This directive follows an increase in the number of LawCover claims relating to certificates of independent legal advice, which in 1998-1999 rose to 15 per cent of the total claims that year.[81] Solicitors who had provided advice and certificates for loan documents were increasingly being joined in proceedings arising out of default by borrowers, mortgagees and guarantors.

4.53 Consequently, Rule 45.6.4.1 of the *Professional Conduct and Practice Rules 1995* now states that whilst independent legal advice is required to be given to third party guarantors, solicitors are to advise clients that they are not able to give financial advice and clients should consult a financial adviser if required. This caveat is even written into the certificate which acknowledges that a guarantor has received legal advice. In contrast, the solicitor's certificate required for financial agreements under the PRA states that the solicitor has advised whether the agreement "was to the advantage, financially or otherwise" of the client.[82] This highlights the inconsistency in laws which require certificates of independent legal advice – some appear to require more than just legal advice.

4.54 The PRA suggests that solicitors are to give advice as to whether an agreement is financially advantageous, contrary to policy espoused by the NSW Law Society. The case law in NSW

80. But compare *State Bank v Sullivan* [1999] NSWSC 596 where although the court found that there was no express or implied term in the retainer requiring the solicitor to provide financial advice, the solicitor did have an obligation to advise the client to get independent financial advice elsewhere (even though this may have been more than what he was specifically retained to do).
81. Law Society of NSW, *Caveat* (No 207, 30 December 1999) at 1-2.
82. *Property (Relationships) Regulation 2000* (NSW) Sch 1 Form 8.

regarding mortgagees and guarantors supports the Law Society position. It may be desirable in the interests of consistency and fairness for the PRA to be amended so that solicitors are required only to give legal advice.[83]

## Should financial advice be required for an agreement to be binding?

4.55 There is a further question, namely, whether parties to a financial agreement should be required to obtain independent financial advice from a financial adviser as well as legal advice from a solicitor. When the Senate Legal and Constitutional Legislation Committee reported on financial agreements proposed in the *Family Law Amendment Bill 1999*, they concluded that both legal *and* financial advice were needed.[84] This recommendation was not, however, implemented in the amended *Family Law Amendment Bill 2000*. Instead, a provision similar to section 47(1)(d) of the PRA was adopted, namely that a solicitor is required to advise on whether the agreement is financially advantageous.[85]

4.56 As stated above, there are problems with solicitors providing the requisite financial, as well as legal, advice. However, the Chief Justice of the Family Court of Australia, Justice Nicholson, has also expressed doubts about financial advisers giving advice in

83. In early March 1998, the Attorney General wrote to the Chief Executive Officer of the Law Society confirming his "in principle" support for an amendment to s 47(1)(d) to clarify that a solicitor's certificate of independent advice should refer only to the provision of legal advice *(Memo from Victoria Sarfaty to Francesca Di Benedetto on 22 February 2000 on Commission file).* The Law Society of NSW is also lobbying for a similar amendment to the equivalent provision in the FLA: see "Solicitor's can only offer legal, not financial, advice" (2001) 39(3) *Law Society Journal* at 31.

84. Australia, Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee, provisions of the Family Law Amendment Bill 1999* (December 1999) at ch 6 (emphasis added).

85. FLA s 90G(1)(b)(ii).

relation to financial agreements. His Honour has stated that, even with both legal advice from a solicitor and financial advice from a financial adviser:

> one would have to be doubtful … about what protection this involves. Many lawyers are not expert in family law and the same is even more likely to be the case in relation to financial advisers.[86]

4.57 Dr Fehlberg believes that despite legal advice, "disadvantageous agreements will still be made"[87] and this appears to be the experience at least in some of the cases that have come before the courts.[88] Further, Dr Fehlberg's study on wives acting as surety for their husbands' business transactions found that:

> more often, sureties considered that truly independent advice would have encouraged them to think more carefully about signing and would have encouraged them to discuss the issue with the debtor, but would not necessarily have changed their ultimate decision.[89]

4.58 The same could possibly be said of independent financial advice. But whilst it may not be a complete safeguard against unfair agreements, a requirement to obtain financial advice could act as an added protection against any power imbalance between the parties.

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86. Chief Justice Alastair Nicholson, *Proposed Changes to Property Matters under the Family Law Act* (Address to the Bar Association of NSW, Sydney, 20 May 1999) (as at 19 November 2001) «http://www.familycourt.gov.au/papers/html/nicholson7.html».
87. B Fehlberg and B Smyth, "Pre-nuptial Agreements for Australia: why not?" (2000) 14 *Australian Journal of Family Law* 80 at 97.
88. See eg *Russell v Quinton* [2000] NSWSC 322. Also, in the cases of *Stivactas v Michaletos (No 2)* [1994] ANZ Conv R 252 and *St Clair v Petricevic* [1989] ANZ Conv R 105 the court doubted whether the independent advice had rectified the party's weaker position. In the latter case, which involved claims of duress and undue influence, the court held that "there is no evidence that any legal advice lessened the effect of the threat".
89. B Fehlberg, *Sexually Transmitted Debt: Surety Experience and the English Law* (Clarendon Press, Oxford, 1997) at 172-173.

4.59 The Commission's view is that legal advice should continue to be mandatory in order for a financial agreement to be enforceable, but people should also be able to obtain financial advice from a financial adviser if they wish. However, electing not to obtain financial advice should not be a ground for setting aside the agreement. The Commission recognises that many people will be deterred from obtaining the two different types of professional advice due to the cost involved. By making only legal advice mandatory, people who wish to enter a binding financial agreement can still do so, without doubling their costs. The solicitor's certificate in the Regulations should be amended accordingly.

**ISSUE 11**

**Legal advice should continue to be a requirement for a binding financial agreement. Financial advice may also be obtained, but not receiving it will not affect the validity or enforceability of the agreement.**

**Solicitors should be required to give legal advice only. The Act and the Regulations (Form 8: solicitors certificates) should be amended to reflect this.**

## EFFECT OF A BINDING AGREEMENT

4.60 The court is able to make an order under Part 3 of the PRA, even if there is a provision in the agreement that states otherwise. However, provided that the agreement complies with the Act, the court cannot make an order that is inconsistent with the agreement.[90] In other words, an agreement cannot oust the jurisdiction of the court but it can limit the options available to the court when making its order. For example, an agreement may state that the home in which the couple resides is to remain the sole property of one partner and therefore the court cannot include it in the pool of assets for any property adjustment it may be called

90. PRA s 47(1).

upon to determine. Without the agreement, however, the home probably would have been included in the property adjustment, as the principal residence is a major asset of the couple and one which the court usually considers.

4.61 Although the court has power to depart from the agreement where it does not satisfy one or more of the conditions contained in section 47(1), it may nonetheless have regard to the terms of the agreement when making its order.[91] In these circumstances, the court is not precluded from making an order because of a stipulation in an agreement intended to remove its jurisdiction.[92]

## Matters relating to children

4.62 Domestic relationship and termination agreements are not binding in respect of matters concerning the custody, access and maintenance of children of the relationship.[93] Since the reference of powers,[94] matters relating to custody, access and maintenance of children are exclusively within the jurisdiction of the Family Court of Australia. As a matter of overriding public interest, there is no capacity to contract out of this jurisdiction. Section 45(2) is therefore redundant and there is a strong case for its removal. However, its retention may be useful in making it clear to practitioners and lay persons using the Act that provisions relating to the children of the relationship are not able to be negotiated in this context since they are now within the jurisdiction of the Family Court.

91. PRA s 47(2).
92. PRA s 47(3).
93. PRA s 45(2).
94. From 1986 to 1990, all of the States, except Western Australia, agreed to refer their powers over the custody, access and maintenance of children of non-marital relationships to the Commonwealth: see, for example, *Commonwealth Powers (Family Law – Children) Act 1986* (NSW).

## CURRENT POWERS TO VARY OR SET ASIDE AGREEMENTS

4.63 The PRA provides a limited number of grounds on which a court can set aside or vary an otherwise binding agreement. Basically, a financial agreement can only be varied or set aside according to the laws of contract, under statute and at common law,[95] although none of these is expressly outlined in the Act. Alternatively, an agreement may be varied or set aside where the court is of the view that circumstances between the parties have so changed since the agreement was made that to enforce it would lead to serious injustice.[96]

### Contracts Review Act 1980

4.64 Under the *Contracts Review Act 1980* (NSW) ("the CRA"), contracts that are found to be "unjust", that is, unconscionable, harsh or oppressive, can be rendered unenforceable or void or their terms can be varied by a court.[97] Section 9(2) of the CRA provides a list of factors for the court to look at when determining whether a contract is unjust, including:

- any inequality of bargaining power;
- whether there are conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party;
- whether the parties were reasonably able to protect their own interests;

95. PRA s 46. This is similar to FLA s 90K(1)(b) which states that an agreement can be set aside if it is void, voidable or unenforceable, which effectively invokes the common law grounds for setting aside a contract.
96. PRA s 49.
97. CRA s 7(1). The relief sought should only be that which specifically avoids the unjust consequences of the contract: see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 (Kirby J) and *Melverton v Cth Development Bank of Australia* (1989) ASC 55-921 (Hodgson J).

- the parties' relative economic circumstances, educational background, and literacy; and
- whether independent advice was given and whether the legal and practical effect of the contract was accurately explained and understood.

4.65 Although parties to a financial agreement cannot "contract out" of the provisions of the CRA,[98] applications under the CRA must be brought within two years of the making of the contract.[99] This protection of the CRA may be out of reach for many people since it is at breakdown when the agreement is most likely to become relevant and be challenged. If, however, the time requirement is satisfied, recourse to the CRA could be more effective than the common law as it gives the court a wider power to intervene in contracts than does the common law.[100] This is in part due to the broad scope of the term "unjust" used in the CRA which has been held not to be limited to harsh, oppressive and unconscionable contracts.[101] The factors in section 9(2) have also been held not to be exhaustive indicators of injustice.[102]

## Common law grounds to set aside or vary a contract

4.66 The four main grounds for setting aside a contract at common law which potentially have most application to financial agreements between persons in a domestic relationship are:

- duress;
- undue influence;
- unconscionability; and
- misrepresentation.

98. CRA s 17.
99. CRA s 16.
100. T Carlin, "The Contracts Review Act 1980 (NSW) – 20 Years On" (2001) 23 *Sydney Law Review* 125 at 127.
101. *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 620-621 (McHugh JA).
102. Carlin at 136.

4.67 While these common law grounds overlap to a certain extent with the statutory grounds set out above, an issue common to both is that they were formulated in the context of commercial contracts. Hence the principles of contract law developed thus far may not translate easily to cases involving financial agreements between two persons in an intimate relationship where different emotional, sexual and economic factors interplay. In particular, they may not afford adequate protection to persons who enter into financial agreements under threat or fear of violence or where they enter into agreements based on information about the other's financial position which later transpires to be false. Both of these specific scenarios are not uncommon in a domestic situation.

### *Duress*

4.68 Duress occurs where one partner applies unlawful pressure on the other either in the form of actual or threatened violence,[103] or by threatening to destroy the plaintiff's property[104] or threatening to cause him/her financial difficulties.[105] If it is proven that the first person applied unlawful pressure and because of this pressure[106] the other partner signed the contract, the agreement is voidable. The plaintiff can then choose to affirm it or have the agreement set aside.[107]

4.69 Evidence of domestic violence at the time that a financial agreement was made may constitute duress to the person, either to a partner or a third party, such as a child of the relationship. There may also be grounds for economic duress where one spouse threatens to withhold financial support from the other partner

103. *Barton v Armstrong* [1976] AC 104.
104. *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.
105. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705; *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.
106. But it need not be the only reason: *The Universe Sentinel* [1983] 1 AC 366.
107. For an affirmation to be effective, the plaintiff must know of the wrong done, that they have a right to rescind and then must communicate their affirmation unequivocally*: Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.

and/or their children. But because these forms of duress were developed in the context of commercial contracts, they may not be able to respond to all the different forms of duress that might arise in the context of domestic financial agreements. However, a recent case in the Northern Territory described a situation where a form of "emotional duress" was suffered by the female spouse. The judge stated that "[she] acted under duress in the sense that she felt substantial pressure from the [appellant] to sign the document, in order to secure the custody of her children."[108]

4.70 Emotional pressure is certainly much more likely in a domestic scenario than in most commercial contracts, and can be a powerful tool that drives people to accept less than fair terms. The question is whether proof of emotional pressure amounts to duress and is therefore sufficient to warrant setting aside an agreement.

### *Undue influence*

4.71 In general terms, undue influence was developed to protect a person who has entered a contract due to a relationship of trust and dependence with another party. Undue influence can either be presumed or actual. If proved, either will render a contract voidable, which means that, as in the case of duress, the court will have the discretion to set the contract aside.

### *Presumption of undue influence*

4.72 Undue influence is presumed where there is a recognised prior relationship of trust between the parties, such as between a doctor and patient or a parent and child, but not, it has been suggested, between a husband and wife.[109] This would appear to

108. *Jole v Cole* (2000) 26 Fam LR 228 at para 21. It should be noted though, that the agreement in that case was not set aside on the ground of duress as known in contract law, but instead was used as a factor to prove that enforcing the agreement would lead to "serious injustice" under the *De Facto Relationships Act 1991* (NT) s 46(2(a).

109. P Clarke and R Gamble, *Contract Law* (Butterworths, Sydney, 1997) at 203; *Midland Bank plc v Shephard* [1988] 3 All ER 17; P Parkinson, "Setting aside financial agreements" (2001) 15 *Australian Journal of Family Law* 26 at 40; *Mackenzie v Royal Bank of Canada* [1934] AC 468 as cited in T Chitty, *Chitty on Contracts – General Principles* (27th ed, Sweet & Maxwell, London, 1994) at 423. Note the rule in

extend to unmarried partners. However, some commentators suggest that rather than categorise relationships,[110] what is important is that one party trusts and depends upon the other.[111] In other words, it may be desirable to abandon presumptions that arise from defined relationships and instead rely on what can be demonstrated in each individual case. This is particularly important when considered in the context of the PRA, which recognises a range of relationships.

4.73 Once the presumption of undue influence is established the onus shifts to the defendant who must rebut it and show that the contract was freely, voluntarily and knowingly entered into by the plaintiff.[112] The factors used in determining this include evidence of independent legal advice, literacy, state of mind and consideration.[113] In the case of financial agreements this last factor would probably translate into an examination of any disparity between what each party receives under the agreement.

### *Actual undue influence*

4.74 If a party to a domestic relationship cannot claim presumed undue influence, they could claim *actual* undue influence. Here, there is no need to prove that there was a prior relationship of trust but it must be shown that the defendant has still been able to influence the plaintiff, who was unable to exercise independent

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*Yerkey v Jones* (1940) 63 CLR 649, confirmed in *Garcia v National Australia Bank Ltd*, which is based on a presumption that wives repose trust and confidence in their husbands. However, the rule is confined to the very specific case of wives providing surety for their husband's business transactions. It does not neatly fall under the general law of undue influence and was actually described in *Garcia v National Australia Bank Ltd* in terms of unconscionability: (1998) 194 CLR 395 at para 31 (Gaudron, McHugh, Gummow and Hayne JJ).

110. Carter and Harland at 485.
111. *Johnson v Buttress* (1936) 56 CLR 113.
112. See *Allcard v Skinner* (1887) 36 Ch D 145 and *Johnson v Buttress* (1936) 56 CLR 113.
113. *Johnson v Buttress* (1936) 56 CLR 113.

judgment in entering the contract. The plaintiff must prove "actual influence on the mind at the time of contract".[114]

### *Unconscionability*

4.75 Unconscionability arises when one party has exploited or taken advantage of the other party's weaker position. A two-part test has been formulated in order to determine whether a contract is unconscionable.[115] First, there has to be evidence of a special disability affecting the weaker party. This may be poor literacy or English skills, age or infirmity. One party's weaker financial position or lesser knowledge of financial or business matters may also constitute a special disability.[116] This has clear application in many domestic relationships. Research by the AIFS has shown that, in relation to superannuation for example, many people had no idea if their partners had superannuation or what its value was.[117]

4.76 "Emotional dependence" can also constitute a special disability. In one case, the court found that the plaintiff had bought the defendant a house because he was so in love with her that he was "vulnerable by reason of infatuation", which she manipulated.[118] It is likely that emotional dependence could be a relevant factor in many domestic financial agreements simply because of the nature of the personal relationship between the parties. However, because of the added requirement to show manipulation, which could be difficult to prove, the doctrine may not be as widely used in the context of financial agreements as it might otherwise have been.[119]

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114. Carter and Harland at 487.
115. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
116. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 where the Amadio's limited knowledge of business and finance was a seen as part of their "special disability".
117. See Chapter 7.
118. *Louth v Diprose* (1992) 175 CLR 621.
119. See L Sarmas, "Storytelling and the law: A case study of Louth v Diprose" (1994) 19 *Melbourne University Law Review* 701 at 722-723 where it is suggested that had "emotional dependence" alone been prima facie evidence of a special disability then more people, especially women, could have used unconscionability to set aside transactions entered for their partner's benefit.

4.77 Second, the stronger party needs to have had knowledge of the weaker party's disability, making it prima facie unfair or unconscionable for them to accept the weaker party's consent. The level of knowledge need not be great; only just enough to put the stronger party on notice.[120] Once both of these points have been proven, the onus is on the stronger party to show that the transaction was "fair, just and reasonable".[121] The remedies available for unconscionability are equitable in nature and include partially or wholly setting the contract aside.

4.78 Under the FLA, unconscionable conduct is expressly included as a ground for setting aside an agreement.[122] Its insertion in the Act was moved as a last-minute amendment by the Democrats. Although the Attorney General did not agree that it was necessary to include it as an added ground (as it is covered within section 90K(1)(b) which invokes the common law grounds of contract) it was passed unopposed. How the statutory concept of unconscionability will be interpreted by the court remains to be seen. Although it seems to add nothing to the common law concept, Patrick Parkinson has commented that it is questionable whether "a court can legitimately conclude that Parliament intended to enact a redundant provision" and hence it may find that there are cases of unconscionable conduct that fall under the statute but fall short of the common law ground of unconscionability.[123]

### *Misrepresentation*

4.79 The basic elements of misrepresentation are as follows. First, the misrepresentation must be a false statement. The misrepresentation usually consists of positive statements or conduct, but can also be a "half-truth", a statement which, although technically true, creates a false impression of the facts.[124]

120. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (Mason and Deane JJ).
121. *Fry v Lane* (1888) 40 Ch D 312, as approved in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
122. FLA s 90K(1)(e).
123. P Parkinson, "Setting aside financial agreements" (2001) 15 *Australian Journal of Family Law* 26 at 49.
124. *Balfour and Clark v Hollandia Ravensthorpe NL* (1978) 18 SASR 240.

A half-truth in the context of a domestic financial agreement may arise where one party discloses only a portion of their assets and liabilities. This half-truth may create the false impression in the other party's mind that the disclosure included all that the party owned and owed.

4.80 Second, the misrepresentation must be a false statement of existing fact, as opposed to mere opinion or promises or assurances for the future.[125] Third, the statement must be calculated to induce the party into contracting.[126] Hence, the party cannot be shown to have relied on his or her own judgment.[127] Last, the onus is on the party claiming misrepresentation to prove that they were in fact induced by the misrepresentation to enter the agreement.[128] However, if they can prove that the statement was calculated to induce and that they did actually enter the contract, the court can infer that they were in fact induced and the onus then shifts to the other party to prove otherwise.[129]

## Serious injustice under section 49

4.81 Even if the domestic relationship agreement satisfies each of the matters contained in section 47(1),[130] the court may set aside or vary the terms of the agreement if it considers that the circumstances of the parties have so changed since the date of the agreement that it would lead to serious injustice if any or all of the provisions of the agreement were to be enforced.[131]

4.82 While Part 4 of the Act is designed to facilitate the making of financial agreements, section 49 provides a limited opportunity for

125. Carter and Harland at 335-356.
126. *Redgrave v Hurd* (1881) 20 Ch D 1.
127. *Holmes v Jones* (1907) 4 CLR 1692.
128. Carter and Harland at 341.
129. *Redgrave v Hurd*; *Gould v Vaggelas* (1985) 157 CLR 215.
130. The requirements are that the agreement be signed and in writing, that the parties have obtained independent legal advice and a certificate of the advice is obtained. For more discussion of these requirements see para 4.45.
131. PRA s 49. For more discussion see para 4.63.

such agreements to be set aside or varied where the court believes the circumstances between the parties have so changed since the agreement was made that it would lead to serious injustice to enforce all or some of the terms of the agreement. Section 49 is a further safeguard against agreements which are unfair or unjust particularly when the agreement was made a number of years before separation and circumstances have changed considerably since then. For instance, children may have been born to the partners, or one may have suffered a serious injury that has left him/her incapacitated.

4.83 However, unlike the Northern Territory and the ACT, this power only applies to domestic relationship, not termination agreements.[132] There may be an argument that section 49 need not apply to termination agreements because they are, in any case, treated as a domestic relationship agreement if they are not made within 3 months of separation or after separation. However, the Commission is not persuaded by this argument. It is certainly not inconceivable that an event could occur within those 3 months or soon after separation, such as an accident or redundancy, which would cause serious injustice if the agreement could not be varied or set aside.

4.84 The parallel provision in the FLA has a somewhat narrower application. Section 90K(1)(d) of the FLA states that an agreement can be set aside if, "since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child … a party to the agreement will suffer hardship if the court does not set the agreement aside."[133] Hence, this provision only covers situations where hardship is caused by the addition of a child to the relationship, and would not cover, for example, cases where a party has been

132. *De Facto Relationships Act 1991* (NT) s 46(2)(a).

133. Note that the threshold was originally even higher, with parties having to prove that there had been an "exceptional" change. Compare s 90K(1)(d) of the *Family Law Amendment Bill 1999* (Cth) with the current provision.

injured. In comparison, the serious injury of one party would likely be enough to set aside an agreement under section 49 of the PRA.

Jim and Kerry separated last month on reasonably amicable terms. They decided that they wanted to make their own separation agreement rather than go to the expense of bringing any action under the PRA. Kerry agreed that Jim should have the house and also agreed to take less than his half share because he earned a lot more than Jim and knew that he would be able to put a deposit on another house and service a mortgage on his salary. But within a month of signing that agreement, Kerry had a car accident ...

## Revocation of the agreement

4.85 The court may also completely disregard an agreement if it considers that the parties have, by their words or conduct, revoked the agreement (or consented to its revocation) or that it has otherwise ceased to have effect.[134] It seems that the sort of conduct required to revoke an agreement includes agreeing to and then embarking upon a property division or maintenance scheme different to the one outlined in the agreement. For example, in one case the defendant submitted that the deed containing the separation agreement between himself and the plaintiff had been revoked due to her acceptance of a lesser amount of maintenance. The court held the following:

> The fact that the plaintiff accepted a lesser amount does not discharge the liability of the defendant under the deed. If it can be established that there was an agreement, albeit not under seal, between the parties that the plaintiff would accept $700 a week instead of $1000 a week, then the plaintiff was precluded from enforcing her rights under the deed whilst the defendant continued to pay the $700 a week. He has not done so since 28 June 1996. Accordingly…the plaintiff cannot thereby be precluded now from enforcing her rights under the deed.[135]

134. PRA s 50.
135. *Vial v Cossa* [1999] NSWSC 60 at para 26.

4.86 Had the defendant continued to pay the lesser amount, and the plaintiff continued to accept it, their conduct would have amounted to a revocation. The Family Court has held that agreements made under the FLA can also be revoked by the parties' conduct.[136] Such conduct could include:

- an agreement to terminate the contract and a waiver by one party of his/her right to insist upon the contract's performance;[137]
- the party abandoning his/her right to enforce the performance of the other party's obligations under the agreement, which can be "inferred from a long period of inaction on both sides";[138] or
- making a later agreement which substitutes for some or all of the terms in the original contract.[139]

## SHOULD THERE BE OTHER GROUNDS FOR VARYING OR SETTING ASIDE A FINANCIAL AGREEMENT?

### Domestic violence

4.87 The existence of domestic violence, or even just the threat of it, creates a power imbalance where the abused party is placed in a much more precarious bargaining position. Many victims of domestic violence are, as a result, incapable of negotiating equitable property settlements with their violent partners.[140]

136. Note that the following cases concern agreements made prior to the recently enacted provisions for binding financial agreements under the FLA.
137. *Drew & Drew* (1985) FLC 91-601 at 79,863.
138. *Drew & Drew*; see also *In the Marriage of Wray* (1990) 99 FLR 34.
139. *In Marriage of Knowles* (1987) FLC 91-811; *In the Marriage of Turner* (1987) FLC 91-820.
140. See H Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995); G Sheehan and B Smyth, "Spousal Violence and Post-

This is equally true of their capacity to negotiate fair and reasonable financial agreements. Women with violent partners feel pressured to make agreements with their partners to end the violence and protect the children.[141] However, family violence is not limited to heterosexual families. It can also arise out of same-sex relationships and those in the new category of close personal relationship.[142]

### *Enforceability of agreements where there is evidence of violence*

4.88 Violence is, and should be, a relevant factor for a court when determining whether an agreement is enforceable under the PRA. Currently, agreements where violence is a factor can be challenged under the CRA as being unjust or on the common law grounds of duress, undue influence or unconscionability.

4.89 Physical violence at the time a financial agreement is made may constitute duress to the person. Domestic violence can also amount to actual undue influence, which was used in one case to challenge various contracts in which the wife guaranteed her ex-husband's business debts.[143] The judge found that:

> even from the early days of the marriage there was a tone of aggression, particularly if any inquiry was made about business matters, and an undertone of threat. … I accept that she signed [the relevant documents], whatever legal advice she had then, under the real fear of a repetition of the actual violence which had by then been applied to her.[144]

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Separation Financial Outcomes" (2000) 14 *Australian Journal of Family Law* 102; Illawarra Legal Centre, "A Human Right to Justice: Experiences of Women in the Illawarra Region" (prepared by J Stubbs, 1993) cited in ALRC, *Equality before the law: women's access to the legal system* (Report 67 (interim), 1994).

141. R Graycar, "Matrimonial Property Law Reform – what lessons have we learnt?", paper presented at the *Family Court of Australia Second National Conference – Enhancing Access to Justice* (Sydney, 20-23 September 1995) at 94.
142. See Chapter 5.
143. *Armstrong v Commonwealth Bank of Australia* (1999) 9 BPR 17,035.
144. *Armstrong v Commonwealth Bank of Australia* (1999) 9 BPR 17,035 at para 30.

4.90 In that case, the court found that Mr Armstrong's behaviour, along with the fact that the nature and effect of the documents were not adequately explained, succeeded in overbearing Mrs Armstrong's will and hence the contracts were set aside for actual undue influence.

4.91 Hence, the court is increasingly likely to use general law principles to set aside an agreement made in fear of *physical* violence. However, obtaining relief from agreements made due to domestic violence in the form of threats of violence or emotional harassment may be more difficult to obtain under the general law. As stated above, the emotional and personal nature of financial agreements does not fall squarely within doctrines that have been developed in a more commercial context.

### *At what point must the domestic violence occur?*

4.92 Analogous to the setting aside of financial agreements are cases where a spouse seeks to have a marriage annulled on the basis of duress. As with other contracts, a marriage contract can be void for duress where "threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual."[145] Evidence is required to show that the duress was operating at the time of the wedding ceremony. Whilst this can be induced by threats or pressure that occurred prior to the wedding, the extent of any time lapse between this event and the ceremony will be a relevant consideration.[146]

4.93 However, this approach does not acknowledge the fact that domestic violence can affect the level of control one party has over another in a relationship even when there is no evidence of it at the time the contract was made. Domestic violence can be inflicted in varying forms over a period of time. In cases where evidence of physical assault or explicit threats is only available for instances after the contract was made, this may be indicative of pressure that the party was under when he or she signed earlier.

145. *Hirani v Hirani* (1983) 4 FLR (Eng) 232 at 234, cited with approval in *Teves and Campomayor* (1994) 122 FLR 172 at 181.
146. *Teves and Campomayor* (1994) 122 FLR 172.

***Should domestic violence be added as specific ground for setting aside agreements or is the common law wide enough to incorporate it?***

4.94 Subsuming domestic violence into general law principles of when a contract can be set aside may further the risk that it will continue to go unnoticed in many cases. Domestic violence is a distinct issue, which raises factors specific to it. These issues include silencing of the victim, the fact that the violence generally occurs over a long period of time and may not always be in the form of separate instances of physical violence.[147] By making domestic violence an express ground for relief, the law will be specifically recognising it as the serious issue that it is and will perhaps allow the court greater scope to develop an approach that takes account of its complexities.

4.95 The Commission therefore agrees that recourse to the CRA or principles at common law may not always be adequate to challenge agreements made under threat or fear of domestic violence. To the very limited extent that survivors of domestic violence will challenge agreements made with violent partners, there needs to be clear and explicit recognition in the Act of both the relevance and the impact of domestic violence on the fairness of the bargain and its enforceability. The PRA should give the court express power to vary or set aside an agreement where it is satisfied that the applicant signed the agreement because of actual or threatened violence (either at the time of negotiations or at any time before the agreement was made) and that it would cause serious injustice to enforce the agreement or any of its terms.

4.96 Can this simply be achieved by saying that an agreement can be set aside if it is "void, voidable or unenforceable"? If this type of provision is found to be inadequate to protect parties who have signed financial agreements from fear of domestic violence, then domestic violence could be expressly included in the Act as a relevant factor to be considered. It could be expressly included in one of two ways. First, by adding that an agreement can be set aside if it is "void, voidable or unenforceable (including where one of the parties has made the agreement under fear of domestic

147. See Chapter 5.

violence)". Or second, by including a separate section, similar to section 43 of the FLA, that outlines the principles to be applied by the court when exercising its jurisdiction under the Act. One of these principles could be that the court is to recognise that domestic violence can affect people in domestic relationships, especially with respect to the execution of financial agreements and the negotiation of property settlements. However, including the reference to domestic violence in a separate section may result in it being overlooked in many cases, especially by parties, or solicitors, who are not familiar with the Act.

### *Should agreements be screened for domestic violence?*

4.97 A submission from the Department for Women suggests that the law of contract may not be an appropriate or adequate means of challenging agreements made under fear of domestic violence. Instead, it suggests that the PRA should provide for the screening of agreements (for incidences of domestic violence) and that legal aid priority be given to women in such circumstances.[148] Both of these suggestions, however, are problematic.

4.98 To the Commission's knowledge, there is no instance, in any area of law, where the contents of agreements are screened for evidence of domestic violence. In federal family law, to the extent that there is a "screening process" it is one that goes to the procedures and process by which matters are resolved. Where there is evidence of family violence, parties are strongly discouraged from using mediation to resolve their dispute. Screening of agreements for their content raises issues of practicality. Because it would be impossible to identify those agreements where violence may be a factor, it implies that all agreements would need to be "approved" and perhaps also registered by (probably) a court when they are first made. This would require the court to assess whether the agreement is fair and in order to make this assessment, evidence would have to be called. Such screening will inevitably add to the cost and complexity of making agreements. It will also make revising or revoking the agreements when circumstances change inordinately difficult. An unintended effect of such screening is that it would

148. Department for Women, *Submission*, at 3.

discourage people from making agreements. For these reasons, the Commission is not persuaded that screening of agreements is a feasible option.

### *Legal aid funding for victims of domestic violence*

4.99 The suggestion with regard to legal aid, while laudable, is limited as a result of the severe cuts to legal aid funding earmarked for family property disputes. The provision of legal aid is beyond the Commission's control. In federal family law, those who manage to secure any legal aid funding are directed towards the court's mediation services, which is widely acknowledged to be an inappropriate means for resolving disputes when violence is a factor.[149] Although those who receive legal aid for family law disputes are directed to consider primary dispute resolution,[150] this will not be used where it would be inappropriate to do so, such as "where a parties safety or ability to negotiate effectively is jeopardised by behaviour such as violence, intimidation, control or coercion, or a history of such behaviour."[151]

## Non-disclosure of assets

4.100 Another major issue in property proceedings (for both married people and people in de facto relationships) is ensuring that each of the parties has disclosed all their assets and liabilities. Frequently, particularly where there are businesses, farms, trust structures and superannuation accounts, the party

149. See for example, H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992); H Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995).
150. See Chapter 9 for more discussion on primary dispute resolution in the Family Court.
151. Legal Aid Commission, "Commonwealth Family Law Guidelines" (as at 19 November 2001) «http://www.lawlink.nsw.gov.au/lac.nsf/pages/cfmguide».

with the weaker economic resources has little idea of the other party's finances.[152]

4.101 Significantly, there is presently no statutory duty to make full disclosure when negotiating a financial agreement. In some (albeit limited) areas, such as insurance, the court has imposed a duty to disclose so that complete or partial non-disclosure constitutes a misrepresentation.[153] In fact, some earlier cases had held that property agreements between family members also entailed a duty to disclose.[154] Currently, the only way in which a financial agreement can be challenged for non-disclosure of assets is by invoking the common law principles of misrepresentation.[155]

4.102 In some other jurisdictions, however, a partner's failure to make full disclosure of all his or her assets at the time the agreement was signed is sufficient to render the agreement unenforceable.[156] In South Australia, for example, a "certificated agreement" must contain a warranty of asset disclosure.[157] After criticism of the *Family Law Amendment Bill 1999*, the Federal Government moved an amendment to it which expressly provides that non-disclosure of relevant assets will constitute fraud,[158] and thus give grounds for setting aside the financial agreement.

4.103 The Commission believes that a similar provision is warranted in the PRA. Although there is no financial statement form that parties must submit in section 20 proceedings, there is an acknowledged duty to the court for parties to make full and frank disclosure of their assets and liabilities in property

152. See, for example, P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1986) at 222 and 230.
153. Carter and Harland at 339.
154. *Greenwood v Greenwood* (1863) 46 ER 285.
155. PRA s 46. See para 4.79.
156. See, for example, *Family Law Act RSO 1990* (Ont) s 33(4).
157. *De Facto Relationships Act 1996* (SA) s 3.
158. FLA s 90K(1)(a).

proceedings under the PRA.[159] Not only is this duty acknowledged for contested proceedings, but also during the negotiations and drafting of consent orders, where issues of bargaining power arise as they do in the formation of financial agreements. Therefore, a similar duty of disclosure should be required of each party to a financial agreement. Contracts negotiated between persons, one of whom deliberately conceals or only partially reveals the extent of all that he or she owns (or owes) or any other relevant fact, are fraudulent deals. If private ordering is to be encouraged and gain widespread community support, it has to be honest and fair. The Commission believes that the PRA should be amended to give the court power to vary or set aside contracts on the ground of fraud. This should be expressly defined in the relevant section to include failure to disclose a material fact, as is recommended for the existing ground of fraud for setting aside or varying property orders.[160]

## Impracticability

4.104 The Northern Territory Act allows the court to set aside or vary a cohabitation or separation agreement where "circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out".[161] Arguably, this would cover those situations where, for example, the agreement makes provision for the division of a particular asset that no longer exists at separation. There is no similar provision in NSW. However, it is one of the grounds on which a legally binding financial agreement under the amended FLA can be varied or set aside.[162]

159. *Parks v Thompson* (NSW, Supreme Court, No 4298/94, McLaughlin M, 6 March 1997, unreported). See Chapter 6 at para 6.80.
160. See Issue 12 at para 4.113.
161. *De Facto Relationships Act 1991* (NT) s 46(2)(b).
162. FLA s 90K(1)(c). This resembles s 87(8)(d) which states that the court can set aside maintenance agreements on the ground of impracticability.

4.105 The Commission believes there is a good case in favour of adopting a similar provision in NSW. Currently, a party may be able to set an agreement aside under section 9(2)(d) of the CRA which states that the court is to consider whether the contract is "unreasonably difficult" to comply with. Impracticality could possibly fall under this section.

4.106 It might be possible to set aside the agreement under the common law doctrine of frustration.[163] This doctrine allows contracts to be set aside when a supervening event that was not reasonably foreseeable[164] has rendered it incapable of being performed. Hence, it would only apply to the rare cases where assets are destroyed by earthquake, accidental fire or a similar exceptional event.[165] Merely liquidating an asset constitutes self-induced frustration, for which there is no relief under the doctrine.[166] Further, as with other common law doctrines, the case law and established principles regarding frustration are commercially based and are sometimes difficult to translate to cohabitation agreements. Rather than forcing people to rely on complex and circuitous concepts at common law, or on provisions in other pieces of legislation, the Commission believes that it would be preferable for the Act to provide expressly that an agreement can be set aside or varied if impracticable to carry out any of its terms.

4.107 Early cases held that impracticable does not mean impossible,[167] but rather is a term that imports a question of fact and degree.[168] In more recent cases, the term impracticability has been given a meaning that is fairly narrow in scope, similar to that of frustration. In *Cawthorn and Cawthorn*,[169] the court considered the interpretation of "impracticable" as a ground for setting aside a

163. PRA s 46.
164. *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.
165. Carter and Harland at 716.
166. Carter and Harland at 734-735.
167. See for example *Rohde and Rohde* (1984) FLC 91-592.
168. *Rohde and Rohde*; *Jayne v National Coal Board* (1963) 2 All ER 220.
169. *Cawthorn and Cawthorn* (1998) 144 FLR 255.

property order. The court cited a passage from the judgment of Kay J in *La Rocca and La Rocca*:

> My own view is that the concept of impracticability, as referred to in this section, is akin to the application of the doctrine of frustration in contractual matters. What the Parliament is concerned with and what ought to be concerning the Court is the happening of events which cannot be reasonably foreseen, which will have the effect of causing an injustice to one of the parties if the happening of such events is not given effect to.[170]

4.108 Although the court did warn against interpreting "impracticability" by merely equating it with frustration, it was held that:

> the circumstances that have arisen in which it becomes impracticable to carry out the orders are circumstances that could not reasonably have been contemplated and that in such circumstances, whilst impossibility is not the test and impracticability is, it may then become just and equitable to change the orders.
>
> The potential insolvency of one of the parties in the future is not such a matter, in my view. In every case before the Court property values may change, go up or down, business may flourish or not flourish, the vicissitudes of life may affect one of the parties.[171]

4.109 Hence it seems there are only a limited number of cases to which impracticability would apply where the general law of frustration would not. As with frustration, the court limits its application of impracticability to cases where it is not reasonably foreseeable and it is not self-induced. However, it has been suggested that the legislature actually intended to cover "obvious" contingencies when it made impracticability a ground for setting aside agreements under the FLA.[172] These contingencies may

170. *La Rocca and La Rocca* (1991) 103 FLR 366 at 372.
171. *Cawthorn and Cawthorn* (1998) 144 FLR 255.
172. M Broun, A Dickey, S Fowler and J Wade, *Australian Family Law and Practice Reporter* (CCH Australia, Sydney 1993) at para 30-930.

include a partner losing his or her job, falling ill, uninsured property being stolen or destroyed, or an asset being liquidated. On this interpretation, impracticability has a wider application than the doctrine of frustration.

4.110 If the term "impracticability" is used in the PRA, there is a risk that this ground for setting aside financial agreements may be construed too narrowly. Whilst a narrow interpretation promotes finality in agreements, it may not provide adequate relief for parties who find themselves in a situation where fulfilling their obligations under the agreement would be unreasonably difficult. To avoid this, the legislation could perhaps include a non-exhaustive list of the contingencies that the impracticability ground is intended to cover.[173] However, the definition of impracticability should not be widened to the extent that mere difficulty in complying with the agreement would suffice in setting it aside. The courts have avoided taking such a wide interpretation as the stability of agreements would be so threatened that there would be little advantage in entering one.[174]

David and Amanda entered an agreement stating that David would receive the house they lived in whilst Amanda would receive an investment property they owned together. However, during the course of their relationship the couple sold the investment property. They have now separated and the clause in the agreement that states Amanda is to receive the investment property is clearly unable to be put into practice.

173. Note that, depending on the width of the terms, "impracticability" may overlap to an extent with "serious injustice", discussed above at para 4.81-4.84.

174. M Broun, A Dickey, S Fowler and J Wade, *Australian Family Law and Practice Reporter* (CCH Australia, Sydney 1993) at para 30-920 citing *Fellows v Fellows* (1988) FLC 91-910 at 76, 601 (Nathan J).

## Powers to vary or set aside consent orders

4.111 Orders made under the PRA, for either division of property or the provision of maintenance, can be varied or set aside where the court is satisfied that:

> (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance,
>
> (b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out, or
>
> (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or set the order aside and make another order in substitution for the order.[175]

4.112 The section incorporates consent orders that the parties have drafted themselves and filed with the court.[176] The process of negotiating consent orders is not unlike that involved when parties create financial agreements. Similar issues of inequality of bargaining power arise and hence similar protection is required for weaker parties. Under the Act, it appears that the grounds for setting aside or varying a consent order under section 41 are broader than the grounds for setting aside or varying a financial agreement. For example, a consent order can currently be set aside on grounds of impracticability, whereas a financial agreement cannot. This may be considered as an anomaly in the legislation because impracticability arising from a change in circumstances is as likely to occur after executing a financial agreement as after filing consent orders. As stated above, the Commission believes that impracticability should be included as a ground for setting aside financial agreements[177]. The fact that it already applies to

175. PRA s 41.
176. PRA s 38(1)(j).
177. See para 4.104-4.105.

consent orders strengthens the case for applying it to financial agreements. A similar argument can be made for expressly including fraud, specifically non-disclosure of assets, as a ground for varying or setting aside financial agreements as well as consent orders.

4.113 It should be noted that the court is still able to make property or maintenance orders when a financial agreement exists; it just cannot make orders that are inconsistent with it.[178] If the terms of a financial agreement were implemented in a court order they would then be subject to the grounds for setting aside or varying orders as set out above.

**ISSUE 12**

**The Act should include a discrete section which makes provision for the various grounds for setting aside or varying a domestic relationship or termination agreement. Those grounds should be where:**

**(a) the agreement is void, voidable or unenforceable;**

**or the agreement is void, voidable or unenforceable (including where one of the parties has made the agreement under fear of domestic violence);**

**or the agreement is void, voidable or unenforceable AND include a separate section outlining the principles that the court is to follow, one of which highlights that domestic violence can affect people when they enter financial agreements;**

**(b) the circumstances between the parties have so changed since the date of the agreement that it would lead to serious injustice if any or all of the provisions of the agreement were to be enforced;**

178. PRA s 47.

**(c) circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out;**

**(d) the agreement was obtained by fraud (including non-disclosure of relevant assets and liabilities).**

## OTHER ISSUES

### What happens on the death of a party to an agreement?

4.114 The Act provides that where a domestic relationship or termination agreement requires a party to pay periodic maintenance to the other, that agreement shall continue to be enforceable against the estate of the paying partner in the event that he or she dies unless the agreement provides otherwise.[179] However, if the receiving partner dies, their estate is not entitled to enforce the payment of periodic maintenance as per the terms of the agreement.[180] Conversely, unless the agreement provides otherwise, the provisions of an agreement relating to the transfer of property or payment of lump sums will be enforceable on behalf of or against the estate of the party who has died.[181]

4.115 Section 90H of the FLA states that the terms of the agreement continue to operate despite the death of one of the parties and is enforceable by, or against, the estate of the deceased party. It makes no distinction between terms relating to periodic maintenance and those relating to property transfers or lump sum payments. The distinction in the PRA therefore seems unnecessary and hence there may be reason to abolish it.

179. PRA s 51(1).
180. PRA s 51(2). See Chapter 7.
181. PRA s 52.

## Rights of third parties

4.116 Section 43 of the Act requires the court to have regard to the interests of, and to protect, a bona fide purchaser or other interested person. However, this provision is expressed in terms of what the court should do or have regard to in proceedings for financial adjustment under Part 3 of the PRA. The provisions dealing with financial agreements are contained in Part 4. Therefore it is arguable that section 43 does not apply in relation to financial agreements.

4.117 The FLA, by contrast, provides that when determining whether a financial agreement is valid, enforceable or effective, the court is to have regard to contract law principles and is to have the same powers and may grant the same remedies as are available to the High Court. It must also have regard, as the High Court does, to the rights of third parties.[182]

4.118 There are sound public policy reasons for extending protection under the Act to third parties affected by financial agreements. Without the protection, the law may be seen as allowing couples to defraud creditors or other people with a bona fide interest in the property[183] and the courts may be seen as a party to that fraud.[184]

182. FLA s 90KA(1).

183. Note the much publicised financial agreement between Jodee Rich and his wife following the recent One.Tel collapse in which it was reported that he transferred many of the assets in his name, including his half share of the Craigend home (sold subsequently for $16m) to his wife, Maxine. Because of the timing, there is a public perception that the financial agreement was being used to protect his assets from the claims of One.Tel creditors: see, for example, P Barry, "On land and water, assets symbolise 'privilege of achievement'" *Sydney Morning Herald* (15 June 2001) at 6.

184. See Chapter 5.

## Should agreements be subject to a "sunset clause"?

4.119 One way of avoiding the situation where an agreement becomes out of date is to provide, legislatively, that they expire after a certain number of years. One advantage of imposing a sunset clause on agreements may be that it would avert some claims of impracticability and serious injustice, as the agreement is constantly being amended to reflect the couple's changing circumstances. Also, as each agreement would constitute a new contract that exists for a relatively shorter time, it is more likely that agreements will be subject to the safeguards of the CRA, which, as stated above, are only available for two years after the contract is executed.

4.120 The disadvantages of a sunset clause include the increased legal costs of redrafting agreements and obtaining legal advice with respect to each one. The practicality of a sunset clause, therefore, is questionable. The Commission notes that no similar clauses apply to other documents dealing with a person's assets, such as wills, which can exist unchanged for many years, yet remain enforceable.

4.121 Sunset clauses would probably be more useful in financial agreements which explicitly set out particular assets by name. If these assets are sold, which is not uncommon during the course of a relationship, that part of the agreement becomes irrelevant. Requiring that agreements have an expiry date would help ensure that they remain relevant and only include those assets that the couple currently owns. Conversely, sunset clauses may not be as necessary for agreements which are more general and include only what proportion of the couple's assets will go to whom.

# 5. Adjustment of property interests

- Background
- Issues for consideration
- Current approach under the PRA
- Criticisms of the current approach
- Other concerns
- Alternative approaches to property division
- The need for reform

5.1 In this chapter, the Commission examines the current approach under section 20 of the *Property (Relationships) Act 1984* (NSW) ("the PRA"). As mentioned in the preceding chapter, the Commission believes that a review of the operation of s 20 is long overdue. There have been numerous criticisms of its capacity to facilitate the making of just and equitable property division orders. These criticisms stem primarily from the fact that s 20 of the PRA focuses entirely on past contributions and makes no provision whatsoever for future needs. It has also been interpreted restrictively by a majority of judges of the Supreme Court although not without some controversy. This narrow approach is supported by the recommendations of this Commission in 1983 which concluded that while there was a clear need for legislation to facilitate the resolution of property disputes between persons who were in a de facto relationship, such relationships should not be equated with marriage. There was a deliberate policy decision, based on this, that when making property orders the court should be limited to a consideration of the parties' past financial and non-financial contributions.

5.2 Newer models of property division in other Australian states have veered away from the NSW approach. The question for the Commission, almost 20 years after its first investigation into this area of law, is whether the social, legal and economic landscape today require similar changes in NSW.

## BACKGROUND

5.3 People living as a couple, whether in a marriage or a de facto relationship, commonly own property either in their joint names or singly. In relation to a married couple, there is a general community expectation (particularly since the introduction of the *Family Law Act 1975* (Cth) ("the FLA")) that such property is to be divided equally between the partners regardless of who has the legal title at the end of the marriage. For those living in a de facto relationship, on the other hand, courts have tended to take the view that whoever has the legal title owns the property entirely; any adjustment to the ownership of that property is made cautiously.

5.4 Before the PRA was passed, a person whose de facto relationship broke down and who found themselves with no property in their name had to mount complicated actions in equity to seek a beneficial interest in property that was held in the other partner's name only. These actions were costly, onerous and often unsuccessful. Many of the equitable doctrines that were relied upon to claim beneficial interests had been developed in commercial contexts and did not translate well to personal relationships.

5.5 The Commission examined these doctrines in its 1983 Report and found that there were a number of anomalies that caused serious injustice.[1] In particular, the Commission found that equitable remedies at common law failed to give sufficient recognition to:

- indirect financial and non-financial contributions of a partner to the assets and financial resources of the parties, for example, by way of contributions to the general household expenses which free up the other partner to acquire assets in his or her name; and
- financial and non-financial contributions of one partner to the welfare of the other partner and the children of the relationship (including homemaker contributions).[2]

## Recommendations of Report 36

5.6 The Commission considered that the common law's failure to take into account a broader range of contributions effectively allowed the partner who acquired property in his or her name only to be unjustly enriched by the unrecognised contributions of the other partner. It was therefore recommended that the court should have power to adjust property rights, where just and equitable,

1. See NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 5.7. See also J Wade, "Discretionary Property Schemes for De Facto Spouses (1987) 2(1) *Australian Journal of Family Law* 75.
2. NSWLRC Report 36 at para 7.43.

having regard to a wider range of direct and indirect financial and non-financial contributions than was the case under the general law (which was limited to financial contributions to the acquisition of assets).[3]

5.7 Factors the Commission considered relevant to the adjustment of property rights included such things as direct financial contributions, physical labour in relation to building a house or working in a business, payment of household expenses, supporting the other partner while he or she studied to further a career, providing housekeeping or nursing services and caring for children. Further, the Commission made it clear that there was no need to establish a connection between the contributions made and the property claimed.[4]

5.8 The Commission's recommendations were based on the FLA model, with, however, one major difference. In determining property orders under the FLA, the Family Court can take into account not only past financial and non-financial contributions, but a number of other factors contained in s 75(2) of the FLA. These factors are often colloquially called the "needs and means" factors, and are matters which the Family Court may take into account when making spousal maintenance orders. The Commission did not favour including a consideration of the future needs of the parties when making property orders, preferring instead that claims for property and maintenance orders be made and considered separately:

> … contributions should be recognised through an order for adjustment of property, while needs (to the extent that they can be considered at all) should be recognised through a maintenance order.[5]

3. NSWLRC Report 36 at para 7.42-7.43.
4. NSWLRC Report 36 at para 7.46. Contrast *Green v Robinson* (1995) 36 NSWLR 96 where the majority (with Kirby P dissenting) held that there had to be a nexus between contributions and the superannuation entitlement. For detailed discussion, see Chapter 7.
5. NSWLRC Report 36 at para 9.31.

5.9 The Commission also recommended that in proceedings for property adjustment or for maintenance, a court should make orders that finally determine the financial relationship between the parties and avoid further proceedings between them. This principle of finality, espoused in s 19 of the PRA,[6] is intended to give the parties a "clean break" when their relationship ends.

## ISSUES FOR CONSIDERATION

5.10 The major issue considered in this chapter is whether, in its present form, the PRA is capable of producing just and equitable outcomes for persons seeking to resolve their financial affairs on relationship breakdown. Ensuring that the PRA can do so is one of the Commission's guiding principles for reform.[7] In our view, it should also be a primary object of the PRA.[8]

5.11 Precisely what is a just and equitable order for property adjustment under s 20 of the PRA has been the source of great controversy and judicial debate. There is still no real consensus on the breadth of the court's discretion under s 20, not even since a specially convened Court of Appeal attempted to resolve the debate in *Evans v Marmont*.[9] The major source of controversy is whether the section permits the court to take into account factors other than the financial and non-financial contributions of the parties. If, as appears to be the majority view, the answer is no, the overriding consideration becomes whether the current provision is therefore capable of producing just and equitable outcomes,

6. See also the similar provision in the FLA: s 81.
7. See para 2.11-2.17.
8. See para 2.11-2.17 for a discussion of proposed objects and principles.
9. *Evans v Marmont* (1997) 42 NSWLR 70. Even the judgments of the majority show different approaches. See O Jessep, "Financial adjustment in domestic relationships in NSW: some problems of interpretation" paper prepared for a seminar conducted by the NSW Law Reform Commission (Sydney, 7 July 2000) at para 2.4. See also more detailed discussion of the appeal decision at para 5.31-5.37.

not just for those whom the PRA has always covered but for those whom the PRA now covers following its amendment in 1999.[10]

5.12 Related to this broad issue is how homemaker contributions are valued and what weight they are given compared to financial contributions under the PRA. There is a concern that, despite the often repeated phrase that such contributions are to be given "substantial" and not "token" weight,[11] homemaker contributions continue to be undervalued by the court. Other reasons for the PRA's purported inability to effect just and equitable outcomes include the limited powers under the PRA to deal with the partners' superannuation entitlements and the limited legislative provisions for maintenance following separation. Both these issues are dealt with separately in subsequent chapters of this paper.[12]

5.13 Numerous other issues also arise in relation to the provisions for property division. For ease of reference and discussion, these are examined in Chapter 6. They include threshold requirements which must be met before a person can even institute an action under s 20, such as whom the Act covers, the requirement for parties to have cohabited for at least two years and the limitation period for bringing claims. Other ancillary issues are also discussed such as whether property that is inherited can be taken into account; what happens when the relationship is punctuated by breaks; and whether contributions made before or after the parties live together can be considered.

10. By the *Property (Relationships) Legislation Amendment Act 1999* (NSW). See para 1.11-1.12 and 1.23 and 2.7-2.10 for a discussion of the amendments made by this Act.
11. See for example, *Black v Black* (1991) DFC 95-113 and *Howland v Ellis* [1999] NSWSC 1142. See also discussion at para 5.44-5.61.
12. See Chapter 7 and Chapter 8 respectively.

# CURRENT APPROACH UNDER THE PRA

## Section 20

5.14 The PRA was intended to address the inadequacy of the common law and to make it easier (and fairer) for persons living in de facto relationships to resolve property disputes. Section 20 provides that the court may make property adjustment orders as it considers "just and equitable having regard to:

> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and
>
> (b) the contributions, including the contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:
>
> (i) a child of the parties,
>
> (ii) a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties."

5.15 The focus is entirely on the past financial and non-financial contributions of the parties to the acquisition of assets and on past contributions towards the welfare of the family. There is no specific provision allowing consideration of future needs as is the case under the FLA.[13] The PRA was based clearly on the recommendations of Report 36 which specifically rejected considering the future needs and means of the parties when determining orders for the adjustment of property.[14]

13. FLA s 79(4)(e) and s 75(2).
14. See NSWLRC Report 36 at para 7.44 and earlier discussion at para 5.6-5.9.

## Interpreting s 20

5.16 Section 20 provides that the court may make a just and equitable order "having regard to" the financial contributions towards the parties' property and financial resources and the non-financial contributions of the parties to the welfare of the family. The words "having regard to" are at the core of the debate which is, in short, whether the court can take into account factors other than those in paragraphs (a) and (b). As Priestley J stated in *Evans v Marmont*:

> [the] question that needs to be answered…is whether the words "having regard to" in s 20(1) of the … Act mean "having regard *only* to" or "having regard *principally* to".[15]

5.17 There have been a number of widely divergent judicial findings on the correct approach to be followed under s 20. This has made it very difficult for all concerned, including decision-makers, practitioners and parties, to reach consistent and predictable outcomes. These various approaches are examined below.

### *Adequate compensation approach*

5.18 The first notable approach to s 20 was that formulated by Powell J in *D v McA*.[16] His Honour set out a four stage process for dealing with applications under s 20:

- first, identify and value the assets of the parties;
- secondly, determine what financial or non-financial contributions the parties had made to the property and financial resources of the parties and to the welfare of the family;
- thirdly, determine whether the applicant has already been sufficiently recognised and compensated for his or her contributions; and

15. *Evans v Marmont* (1997) 42 NSWLR 70 at 90. Note that Priestly J answered this question by adopting the latter interpretation, although his was a dissenting view.
16. *D v McA* (1986) 11 Fam LR 214.

- if not, then determine what order is appropriate to recognise and compensate the applicant sufficiently for his or her contributions.

5.19 Essentially, the court required the applicant to show that there was a need for redress, that is, that the applicant had made contributions that had not been adequately recognised nor compensated. Before the court would consider whether even to make an order, the applicant had to demonstrate that they were in a worse position at the end of the relationship than at the beginning whereas the other partner was in a better position than before. Thus the approach has been coined the "adequate compensation approach".[17]

5.20 The approach is onerous, not least because of the greater weight generally accorded to direct financial contributions and the persistent undervaluing of indirect financial contributions and contributions as a homemaker and/or parent.[18] For example, applicants who relied on homemaker contributions (who tended to be mostly women) were often considered to have been adequately compensated for those contributions by living rent-free in property belonging to the other partner.[19] Thus many applications where homemaker contributions were principally relied upon had very little chance of success, even in cases where the relationship had lasted many years.[20]

5.21 The adequate compensation approach dominated for years,[21] and is arguably still current, although some judges have avoided

17. D Kovacs, *De Facto Property Proceedings in Australia* (Butterworths, 1998, Sydney) at 4.5.
18. See para 5.44-5.61.
19. See, for example, *Fowler v Zoka* [2000] NSWSC 1117, where Master Macready held that the defendant's homemaker contributions were balanced out by the plaintiff's greater financial contributions to the mortgage, and also Master McLaughlin in *Kolacek v Brezina* [1999] NSWSC 578 at para 79-83.
20. For a recent example, see *Grech v Jones* [2000] NSWSC 61 (McLaughlin M). The decision has been overturned on appeal.
21. See for example, *Roy v Sturgeon* (1986) 11 NSWLR 454; and *Wilcock v Sain* (1986) DFC 95-040.

mentioning or commenting upon it,[22] and it has been subject to extensive criticism. Scholars have argued that it has the effect of reducing or limiting the amounts awarded while leading feminist lawyers and womens' groups maintain that the approach undervalues contributions made in the capacity of homemaker and parent to the detriment of women who tend to take on these roles.[23]

5.22 In *Black v Black*, however, Clarke JA departed slightly from the adequate compensation approach.[24] The NSW Court of Appeal held, in this case, that the factors listed in s 20 were not the only ones the court could have regard to when determining what was a just and equitable order under the PRA. While they were "the fundamental matters" to consider, he said that other factors such as the duration of the relationship and the needs of the parties could also be important in certain circumstances. Hodgson J followed this approach to some extent in the initial decision in *Dwyer v Kaljo*. He said that other factors could be considered such as length of the relationship and the "needs" of the parties provided, however, that there was a link between these other factors and the contributions of the parties.[25]

### *Reliance and expectation approach*

5.23 The adequate compensation approach was specifically rejected by the majority in the NSW Court of Appeal decision in

22. *Davey v Lee* (1990) 13 Fam LR 688.
23. See for example, H Charlseworth and R Ingleby, "The Sexual Division of Labour and Family Property Law" (1988) 6 *Law in Context* 29; N Seaman, *Fair Shares? Barriers to Equitable Property Settlements for Women* (Women's Legal Services Network and National Association of Community Legal Centres, 1999, Canberra); M Neave, "Living Together – The Legal Effects of the Sexual Division of Labour in Four Common Law Contries" (1991) 17 *Monash University Law Review* 14; L Young, "Sissinghurst, Sackville-West and Special Skill" (1997) 11 *Australian Journal of Family Law* 268.
24. *Black v Black* (1991) DFC 95-113.
25. *Dwyer v Kaljo* (1987) 11 Fam LR 785. This was approved by Gleeson CJ and McLelland CJ in Eq in *Evans v Marmont* (1997) 42 NSWLR 70: see para 5.31-5.37.

*Dwyer v Kaljo.*[26] Handley JA (with whom Priestley JA agreed) said that s 20 did not speak of compensation at all. He noted that the word is used in s 17(2), which empowers the court to allow an application out of time where it considers that the applicant would otherwise not be adequately compensated. However, this was an entirely separate consideration from s 20. Handley JA held:

> It does not follow … that the section is limited to providing adequate compensation. Such a view would impose a restriction on the section which cannot be derived from its language.[27]

5.24 While His Honour accepted that s 20 lays down the "fundamental matters" which the court must consider, he was of the view that they were by no means the only matters the court could take into account in determining what was a just and equitable order. Other relevant factors that a court could consider include the length of the relationship and, referring to the judgment of Hodgson J at first instance in *Dwyer v Kaljo*, "the needs" of the parties.

5.25 Handley JA was also of the view that the power to make an order which was "just and equitable" entitled the court to apply equitable remedies "by analogy". He said that the section authorised the court to make orders to:

> ... remedy any injustice the applicant would otherwise suffer because of his or her reasonable reliance on the relationship (reliance interest) or his or her reasonable expectations from the relationship (an expectation interest). The section would also authorise orders which restored to the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest).[28]

26. *Dwyer v Kaljo* (1992) 27 NSWLR 728.
27. *Dwyer v Kaljo* (1992) 27 NSWLR 728 at 744.
28. *Dwyer v Kaljo* (1992) 27 NSWLR 728 at 744.

5.26 *Dwyer v Kaljo* was followed, albeit reluctantly by some judges,[29] in subsequent cases.[30] In one case involving a complicated business relationship, the trial judge said that:

> … the matter is left to my perception of justice and equity, having regard to the expectation which ought to be attributed to the parties in this relationship and of the influence which their reliance on the relationship had on the positions they are in.[31]

5.27 The reliance and expectation approach has also been extensively criticised.[32] The model has, however, received some endorsement.[33]

### *Contributions approach*

5.28 A strict contributions approach is evident in the majority judgment of Mahoney JA in *Wallace v Stanford.*[34] In this case, the parties had lived together for nearly 14 years. They had had a child together, who lived with the mother following separation. For the first 7 years of their de facto relationship, they lived in rented accommodation before moving to a rural property that was owned by the defendant's parents. With their consent, Mr Stanford built a new house on the property which the parties then moved into. Ms Wallace did no paid work as such but kept the house and helped to care for stock, including raising a number of poddy calves

29. See Powell JA in *Green v Robinson* (1995) 36 NSWLR 96 at 110, who refused to follow it though it was still precedent at the time and Kirby's rebuke in that case. Kirby P warned that if judges went off on frolics of their own, the system would fail.
30. See for example, *Blonk v Welch* (NSW, Supreme Court, No S2488/94, Macready M, 7 November 1995, unreported). This case is also discussed in Chapter 7.
31. *Ellison v Farkash* (1995) DFC 95-163 at 77,373 (Bryson J) (NSW SC).
32. Jessep and Chisholm; see also Powell's comments in *Green v Robinson* (1995) 36 NSWLR 96 and *Evans v Marmont* (1997) 42 NSWLR 70.
33. For example, it was incorporated in the model of property division proposed in the Bill introduced into NSW Parliament by Clover Moore MP in 1998. That Bill lapsed without further discussion when Parliament was prorogued: see para 1.9.
34. *Wallace v Stanford* (1995) 37 NSWLR 1 (Mahoney JA).

which were subsequently sold. When the parties separated, she continued to live in the new house and he moved into the home of his parents who had, by this time, both died. He had been left the entire property subject only to a charge to pay $10,000 each to his brother and sister. The plaintiff claimed she was entitled to a share of the property. The trial judge at first instance, awarded her $30,000 which included half of the $20,000 that was paid to the brother and sister from their joint account. She appealed. The issue for the appeal court was to what extent a party to a de facto relationship could claim an interest in a property that was acquired by the other via an inheritance and to which the appellant made no contribution.

5.29 Mahoney JA held that what is a just and equitable order under the PRA is constrained by the terms of s 20, which require the court to have "regard to" the two factors listed therein, namely the financial and non-financial contributions in paragraph (a) and the homemaker contributions in paragraph (b). To support his view that the powers conferred on the court by s 20 are not "at large", Mahoney gave three reasons. First, he ascribed to the words "having regard to" their ordinary meaning namely that the court should take into account only those factors that are expressly mentioned in the PRA, and not (unspecified) others. Secondly, he pointed to Report 36 which specifically rejected equating de facto relationships with marriage. It proposed that the court should be given powers to make adjustments to property interests having regard to a wide range of contributions in order to address the inadequacy and injustice of the law. Thirdly, Mahoney JA said that the court should not read into "social" legislation, such as the PRA, an intention which the Parliament did not have. In his view, Parliament adopted the recommendations of Report 36 and granted a discretionary power to the court that was limited by the considerations outlined in s 20.

5.30 Handley JA delivered a dissenting judgment in this case, in which he reaffirmed his view in *Dwyer v Kaljo*, namely that the court's "essential" duty under s 20 is to make an order that is just and equitable. The factors in paragraphs (a) and (b) are "fundamental elements" which the court must take into account

when making an order under s 20 but it is not confined to those factors.[35] In *Wallace v Stanford*, Handley JA thought that the Master's decision to award the de facto wife just 10% of the parties' total assets, after a relationship spanning 13 years and in which a son was born, was patently unfair. The Master had completely disregarded the house that they had built and lived in as part of the parties' assets simply because it passed to the de facto husband on inheritance.[36] According to Handley JA, this fact did not entitle the Master to disregard the property as irrelevant. The parties had built a house and lived on the property since 1980 and they had also worked the land since that time.

### *Evans v Marmont*

5.31 Leave to appeal to the High Court in both *Dwyer v Kaljo* and *Wallace v Stanford* was refused. Consequently, a specially constituted five-member bench of the Court of Appeal was convened to clarify the correct approach to s 20 in an appeal from the Master's decision in *Evans v Marmont*.

5.32 This case concerned a couple in their fifties who were in a de facto relationship for 15 years. At the beginning of the relationship, the de facto wife had very few assets while the de facto husband had quite significant assets including a house, a share portfolio, a number of insurance policies and superannuation. During their relationship, the parties planned for their retirement carefully. The arrangement was that she would contribute all her income to general household expenditure while he paid a substantial portion of his income into his life insurance policies. These were eventually cashed to pay out the mortgage on his house and on another property that the parties had bought, in the de facto husband's name only, during the relationship. At the end of the relationship, the de facto husband had assets of $759,000 while the de facto wife had assets of just over $53,000. The Master ordered the husband to pay the wife an additional $110,000, representing approximately 13.5% of their total property.

35. *Wallace v Stanford* (1995) 37 NSWLR 1 (Handley J).
36. See para 6.66-6.68 for a discussion of inheritances and property.

5.33 On appeal, Gleeson CJ (as he then was) and McLelland CJ in Eq delivered a joint majority judgment on what they saw as the essential dispute, namely the interaction between s 20, which states that the court is to have regard to certain contributions by the parties, and the power of the court to make a just and equitable order. They concluded that the approach taken in *Dwyer v Kaljo*[37] should be overruled:

> The concept of remedying an injustice the applicant would otherwise suffer because of his or her reasonable reliance on a relationship or his or her reasonable expectations from the relationship seems to us, with respect, to involve a major shift in the focus dictated by s 20, as does the notion of importing, by analogy, the principles according to which equity awards compensation for breach of equitable duties.[38]

5.34 Instead, endorsing the narrower view espoused by Mahoney JA in *Wallace v Stanford,* they held that the "focal points" of a property order under s 20 are the contributions referred to in paragraphs (a) and (b). However, they also quoted with approval the judgment of Hodgson J at first instance in *Dwyer v Kaljo*,[39] which suggests that whilst contributions may be the focus, they are not the only relevant consideration:

> … if one considers the plaintiff's contributions and nothing else, this cannot lead to any view on what is just and equitable in the circumstances. However, it seems to me that the other factors can have no independent bearing on, what is just and equitable. Their relevance is only by reason of such relevance as they may have to the question: what is just and equitable having regard to the plaintiff's contributions?
>
> … in most cases the needs and means of parties will have general relevance, as subsidiary factors, to the question of what is just and equitable having regard to the plaintiff's contributions …

37. *Dwyer v Kaljo* (1992) 27 NSWLR 728.
38. *Evans v Marmont* (1997) 42 NSWLR 70 at 80.
39. *Dwyer v Kaljo* (1987) 11 Fam LR 785.

> Other circumstances which may be relevant include such matters as the length of the relationship, any promise or expectations of marriage, and also I think opportunities lost by the plaintiff by reason of the plaintiff's contributions.[40]

5.35 On one view, therefore, *Evans v Marmont* did not entirely resolve the controversy regarding what a court can or cannot consider when making a property order.[41] Although Gleeson CJ and McLelland CJ in Eq held that the contributions listed in s 20 are to be the focal point, they also gave a wide enough reading of the section to allow other relevant factors to be considered. This includes the length of the relationship, the needs of the parties and loss of opportunity costs. They did, however, give some indication that they still intended a fairly narrow approach by stating that these other considerations could not be made independently but must be made in the context of assessing contributions. Yet, they did not say how this was to be done nor how much weight it allowed the other considerations to be given.

5.36 In contrast, Meagher JA, who made up the majority, stated that "the court may have regard to each of the two [contribution] factors and *not to any other factors*".[42] He therefore settled the issue with more finality, albeit very narrowly, but his view was not explicitly endorsed by any other judges.

5.37 It might also be argued that Gleeson CJ and McLelland CJ in Eq did not completely overrule the approach of Handley JA in *Dwyer v Kaljo*. As President Mason commented in his dissenting judgment in *Evans v Marmont*, Handley JA did not purport to confer an unconfined discretion on the court.[43] Although he obviously gave a wider reading to the legislation, he insisted that the matters in s 20(a) and s 20(b) were of "fundamental

40. *Dwyer v Kaljo* (1987) 11 Fam LR 785 at 793 in *Evans v Marmont* (1997) 42 NSWLR 70 at 75.
41. O Jessep, "Financial adjustment in domestic relationships in NSW: some problems of interpretation" paper prepared for a seminar conducted by the NSW Law Reform Commission (Sydney, 7 July 2000) at para 2.4.
42. *Evans v Marmont* (1997) 42 NSWLR 70 at 97 (emphasis added).
43. *Evans v Marmont* (1997) 42 NSWLR 70 at 87.

importance" and that there was a limit to the other factors that could be considered, an example of an irrelevant consideration being fault in the breakdown of the relationship.

### *Decisions since Evans v Marmont*

5.38 Not surprisingly, decisions since *Evans v Marmont* have continued to be divergent. Some judges, for example, have held resolutely that the court can only take into account past contributions and nothing more.[44] Alternatively, other judges have been prepared to consider other factors such as the parties' current needs and their overall financial circumstances, etc.[45] In *Richardson v Hough,* for example, Santow J took into account other "subsidiary" factors such as the needs and means of the parties. In *Gazzard v Winders*,[46] Beazley JA[47] found that other matters can be relevant to s 20 proceedings provided there is a link with the contributions. She said that factors like length of relationship, whether the plaintiff has been adequately compensated (reintroducing the Powell approach), how the parties dealt with their incomes and organised their financial affairs would all be relevant considerations. In that particular case, she identified the relevant factors as being:

- the length of the relationship;
- the nature of the employment of each during the marriage;
- the manner in which each dealt with their individual income during the relationship;

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44. *Stroud v Simpson-Phillips* [1999] NSWSC 994 (McLaughlin M); *Wakeford v Ellis* (1998) DFC 95-202 at 77,812-77,813 (McLaughlin M); and *Flett v Brough* (NSW, Supreme Court, No 2638/97, McLaughlin M, 20 November 1998, unreported).
45. See for example, *Richardson v Hough* (1998) 24 Fam LR 94 (Santow J); *Gazzard v Winders* (1998) 23 Fam LR 716 (Beazley JA) (but compare Powell JA); and *Stelzer v McDonald* [1999] NSWSC 602 (Bergin J).
46. *Gazzard v Winders* (1998) 23 Fam LR 716.
47. Relying on the endorsement of Hodgson J's approach in *Dwyer v Kaljo* by Gleeson and McLelland in *Evans v Marmont*: see para 5.33-5.35 above.

- the manner in which the parties considered themselves entitled to deal with their combined earnings; and
- the manner in which the parties dealt with their assets.

5.39 Beazley JA noted that both parties contributed their whole incomes to their joint needs and that they had always treated themselves as being equally entitled to whatever their joint earnings enabled them to acquire. She also noted:

> … the parties drew no distinction between what they earned or gained from their employment, whether by way of weekly earnings or accumulated benefits such as superannuation funds and leave entitlements, or from other sources, such as compensation payouts. This is evidenced in a number of ways, two of which call for particular mention. First, the property was bought in the joint names of the parties, notwithstanding that the monies for its purchase came from the respondent's redundancy package and superannuation payout. Secondly, both parties applied the proceeds which they obtained for damages claims to their joint purposes …
>
> In my opinion, the Master failed to give proper weight to any of these matters save for the length of the relationship. His discretion, therefore, miscarried.[48]

## CRITICISMS OF THE CURRENT APPROACH

### Uncertainty of outcome

5.40 The difficulties of interpretation of s 20, which persist today despite the attempt by the Court of Appeal in *Evans v Marmont* to resolve the controversy, present a minefield for practitioners and clients. The divergence of opinion means that outcomes of cases cannot be predicted with any certainty. This in turn means that the vast majority of persons who have potential claims under the PRA will more than likely be advised to settle their claims. This in itself is not a negative outcome. What is concerning is anecdotal evidence that parties are settling on less than favourable terms, in preference to risking protracted and costly proceedings with

48. *Gazzard v Winders* (1998) 23 Fam LR 716 at 728.

doubtful prospects of success. This has a particularly detrimental impact on those who are more averse to risk, who tend to be those with fewer economic resources and less bargaining power.

## Failure to allow consideration of future needs

5.41 Assuming, however, that the majority decision of the Court of Appeal in *Evans v Marmont* confirmed that a strict interpretation of s 20 was the correct approach, this raises serious questions about the PRA's ability to facilitate a just and equitable resolution of the parties' financial affairs when their relationship breaks down. A strict narrow approach, which only takes into account the parties' past contributions, ignores some fairly fundamental facts and circumstances about the parties and their relationship. These include such things as the length of the relationship between them, how they arranged their financial affairs during the relationship, what decisions they made together and how relying on those decisions may have affected their present financial circumstances and their future earning capacity.

5.42 The narrow approach also ignores the remedial nature of the legislation. It was, after all, enacted following concerns that people in de facto relationships had no adequate avenue for redress (at common law) to resolve their property disputes on separation.

5.43 While the FLA gives the Family Court a broad discretion to consider both past contributions and the future needs of the parties when making property orders, a consideration of future needs was specifically excluded from the property adjustment provisions applying to de facto couples under the PRA. As mentioned previously, this was a deliberate policy decision based on the view that people living in de facto relationships should not be treated the same as people who make a public and life-long commitment to each other by getting married. Regardless of the rationale for their exclusion, the non-consideration of future needs necessarily calls into question the PRA's ability to resolve property disputes between de facto partners in a just and equitable way, particularly for the partner who retains primary care of the children of the relationship after separation.

## Homemaker contributions undervalued

5.44 In its submission to the Commission, the Department for Women maintained that:

> Property continues to be divided in a way that reflects the continued undervaluing of women's non-financial contributions during property settlement and a tendency to underestimate the impact of the primary caregiver and homemaker roles on future earning capacity.[49]

5.45 Section 20(b) expressly provides that the contributions of a homemaker or parent to the welfare of the other party or to the children of the relationship should also be taken into account. These contributions, it has been held, should be recognised in a "substantial and not token way".[50] It has also been held that s 20 establishes no hierarchy of contributions; the homemaker contributions provided for in paragraph (b) are no less significant than the financial contributions to be considered in paragraph (a).[51]

5.46 Despite these pronouncements, there continues to be widespread criticism that the court attaches far less weight to homemaker contributions than to direct financial contributions. This has a detrimental impact on the partner who forgoes a career to stay at home and take care of the family. In heterosexual relationships, this person is most often the female partner.[52]

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49. NSW Department for Women, *Submission* at 1.
50. *Black v Black* (1991) DFC 95-113 (Clarke J); see also *In the Marriage of Mallett* (1984) 52 ALR 193.
51. *Wallace v Stanford* (1995) 37 NSWLR 1 (Handley JA).
52. For a general discussion of how homemaker contributions have been valued under the FLA, see H Charlesworth and R Ingleby, "The Sexual Division of Labour and Family Property Law" (1988) 6 *Law In Context* 29; M Neave, "Private Ordering in Family Law – Will Women Benefit?" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995); L Young, "Sissinghurst, Sackville-West and Special Skill" (1997) 11 *Australian Journal of Family Law* 268.

### *Difficulties valuing homemaker contributions*

5.47 How to value homemaker and parenting contributions is one of the major difficulties in the property adjustment provisions, under both the PRA and the FLA. In early cases, the non-financial contributions of a homemaker or parent were valued in a very restrictive manner, mostly according to evidence of the cost of housekeeping.[53] Under the PRA, the benefits that the homemaker/parent were then entitled to were often offset against the benefits received by them in the form of rent-free accommodation and food.[54] Indeed, very few applicants who have relied solely on homemaker contributions to claim a share of the property have been able to show that they had not been adequately compensated and therefore "deserved" an adjustment in their favour. Those that have succeeded have received only a minimal lump sum payment for their "services".[55]

5.48 In *Wilcock v Sain*, for example, Young J dismissed the homemaker contribution as "jargon … used in the Family Law." He said that the purpose of the legislation was not to compensate people simply for having been in a de facto relationship.[56] However, in *Black v Black*, Clarke JA noted that the legislation was remedial and should be accorded a "beneficial construction".[57] While acknowledging that the court was required to consider different matters under the PRA, and thus should not uncritically apply Family Court decisions to s 20 matters, he said that recourse could nonetheless be had to the greater experience of the Family Court where there were similar provisions. One of these areas was the treatment of homemaker contributions. In relation to these,

53. See for example, *Watt v Watt* (1988) 12 Fam LR 589.
54. See for example, *Brown v Byrne* (1988) DFC 95-061; *Watt v Watt* (1988) 12 Fam LR 589. But cf *Walter v de Jong* (NSW, Court of Appeal, No 40620/96, 5 September 1997, unreported) (Stein JA) where it was queried whether this is a contribution envisaged under s 20(1) of the Act.
55. See for example, *Watt v Watt* (1988) 12 Fam LR 589; *Green v Robinson* (1995) 36 NSWLR 96 and, most recently, the initial decision in *Grech v Jones* [2000] NSWSC 61.
56. *Wilcock v Sain* (1986) DFC 95-040 at 75,453.
57. *Black v Black* (1991) DFC 95-113 at 76,429.

His Honour rejected the notion that a de facto partner's contribution as homemaker or parent should be worth less than (his or) her married counterpart. Clarke JA said that:

> the purpose of the subsection is to give recognition to the position of a woman who, by her attention to the home and children, frees her partner to earn income and acquire assets. … Obviously where a woman has over a long period assumed virtually all the responsibility of maintaining the home and bringing up the children, has done so in a responsible and energetic manner, and has devoted most of her time to doing that and thus freed her partner to earn income to be used in the general betterment of the family, her contribution would have to be regarded as substantial and significant.[58]

5.49 However, he added:

> Whether her contribution should be regarded as less than, equal to or greater than the financial contribution by the wage earning partner must depend upon the circumstances of the case which undoubtedly include the length of the relationship, the nature of the wage earner's contributions and the *care, devotion and services of the home-maker*.[59]

5.50 These comments suggest that, in ascribing a value to homemaker contributions, a court will assess how dutifully the homemaker partner performed her services vis a viz the other partner's (generally, financial) contributions. Thus, what weight is given to her contributions will depend on how much the wage earner partner earns. The most notorious example of such a comparison is probably the case of *In the Marriage of Ferraro*. The parties had been married for 27 years, and though they had few assets at the beginning of their marriage, the property in dispute at separation exceeded $10 million. In this case, Treyvaud J held:

> The parties' property empire blossomed because the husband had the innate drive, skills and abilities to enable him to succeed in his chosen occupation, whereas the wife's

58. *Black v Black* (1991) DFC 95-113 at 76,433.
59. *Black v Black* (1991) DFC 95-113 at 76,433. Emphasis added.

> contribution was neither greater nor less than when the husband had been a carpenter. To equalise the contributions is akin to comparing the contribution of the creator of the Sissinghurst Gardens, whose breadth of vision, and imagination, talent drive and endeavours led to the creation of the most beautiful garden in England, with that of the gardener who assisted with the tilling of the soil and the weeding of the beds.[60]

### *Value of unpaid work in economic terms*

5.51 Despite the difficulties inherent in valuing non-financial contributions, it has been estimated that the value of unpaid work was about $261 billion in 1997, equivalent to approximately 48% of Australia's gross domestic product. 91% of this work comprised unpaid household work, such as cleaning, and childcare.[61]

5.52 The bulk of this work continues to be performed by women, even when they engage in paid work outside the home.[62] Yet, there is a view that as more and more couples both do paid work outside the home, each contributes a roughly equal share of the household work. This was, for example, the view taken at first instance in *Green v Robinson.*[63] Dissenting on appeal, Kirby P (as he then was), said that the Master's conclusion was not justifiable on the evidence. Ms Green had given substantial evidence of the various domestic tasks that she performed during the relationship whereas Mr Robinson gave no details at all. In evidence, he had merely agreed with a question by his own counsel that he had done about the same amount of work around the home as his partner had testified she did. His Honour commented:

> [M]y reading of the evidence leaves me with the strong impression that Ms Green's contributions were more

60. *In the Marriage of Ferraro* (1992) 111 FLR 124 at 151.
61. Australian Bureau of Statistics, *Unpaid Work $261 Billion – ABS Finding* (Cat No 5240.0, Media Release, 10 October 2000); Australian Bureau of Statistics, *Occasional Paper: Unpaid Work and the Australian Economy* (Cat No 5240.0, 1997).
62. Australian Bureau of Statistics, *ABS time use survey shows how we spend our day* (Cat No 4153.0, Media Release, 16 December 1998).
63. *Green v Robinson* (1995) 36 NSWLR 96 at 104 (McLaughlin M).

> intensive and diverse than Mr Robinson's. The unchallenged evidence was that she carried out multiple domestic chores, including washing, cooking, cleaning and ironing, both for Mr Robinson and for herself. She even polished his service boots.[64]

5.53 Similarly, Handley JA (dissenting in the appeal case of *Wallace v Stanford*) said:

> The view that no substantial order should be made where it could be said that the woman's personal and domestic contributions are balanced by the man's personal contributions devalues to zero the weight to be given to her contributions within par (b). In every happy relationship the contributions of each partner to the other's personal welfare will be approximately equal, but this does not mean that the Court should ignore a woman's personal and domestic contributions unless in some way they exceeded those of her partner.[65]

### *Disparate earnings*

5.54 Another trend is to assess financial contributions by direct reference to the parties' incomes. In *Baumgartner v Baumgartner* for instance, the property was divided 55% in the man's favour and 45% in the woman's. This reflected their direct financial contributions to the property acquired during the relationship, based on what they earned.[66] This approach ignores the fact that despite increasing education retention rates among women and their increasing participation in the paid workforce, women continue to be concentrated in employment areas where income levels are lower. Even when they perform work of roughly equal value as men, women are paid less.[67]

5.55 As one commentator notes, while strictly comparing the earnings of one party against the other (in terms of assessing financial contributions) suggests some sort of mathematical

64. *Green v Robinson* (1995) 36 NSWLR 96 at 104 (Kirby P).
65. *Wallace v Stanford* (1995) 37 NSWLR 1 at 21.
66. *Baumgartner v Baumgartner* (1987) 164 CLR 137 at para 38.
67. Australian Bureau of Statistics, *Australian Social Trends* (Cat No 4102.0, 2000) at 151.

accuracy, it can be quite misleading.[68] If a court is to assess more precisely the contributions of each of the partners to the acquisition of assets, she suggests that the court will have to look beyond just the wage slips and make an assessment of the partners' respective spending habits:

> For example, should a person who earns $1,000 per week, but withdraws $500 to spend on purely personal indulgences each week (gambling, partying or privately enjoyed hobbies, for instance), be entitled to twice as big a share of the family assets as a partner who leaves an entire salary of $500 per week in the kitty? Critics may complain that this proposal would be ridiculously complicated. So it would. So let us not pretend that we can determine actual financial contributions accurately merely by comparing the respective incomes of the parties.[69]

5.56 Beazley JA rejected a submission on behalf of the male partner in *Gazzard v Winders* that he contributed more simply because he earned more. Her Honour (with whom Stein J agreed) said that this disparity in earnings should make no difference as the Act does not intend to entrench the systemic inequality of wages between men and women. The parties had agreed that both contributed all that they had earned to the relationship. Leave to appeal to the High Court was sought, on the basis that the Court of Appeal had taken into account an irrelevant consideration. This was not the actual disparity in the parties' incomes but what Justice Beazley referred to as "the systemic imbalance" in our society with respect to men's and women's wages, in the absence of any evidence. In refusing to grant leave, Gleeson CJ said:

> … her reasoning is fairly simple, is it not? She says these people pooled the whole of their earnings during this period of 14 years. Their earnings were not large. They were people engaged in manual work. They contributed the whole of their respective salaries to their joint purposes. They treated themselves as being equally entitled to whatever their joint

68. J Riley, "The Property Rights of Home-Makers under General Law: Bryson v Bryant" (1994) 16 *Sydney Law Review* 412.
69. J Riley, "The Property Rights of Home-Makers under General Law: Bryson v Bryant" (1994) 16 *Sydney Law Review* 412.

> earnings enabled them to acquire. As a matter of discretion, notwithstanding the fact that his salary was more than hers, the position of equality should be preserved. Now that is not a startling discretionary proposition.[70]

## OTHER CONCERNS

5.57 Apart from these specific criticisms of s 20, there are also other (some overlapping) general concerns about property adjustment orders, under both the PRA and the FLA. Possibly one of the most significant of these is the impact of the partners' respective roles during the relationship on their financial circumstances after separation, discussed below. Other barriers preventing just and equitable outcomes in property adjustment proceedings include the impact of power imbalances,[71] specifically domestic violence,[72] non-disclosure of assets[73] and (limited) access to legal aid to receive independent advice.[74] These were among the factors identified in a report by the National Network of Women's Legal Services called *Fair Shares? Barriers to Equitable Property Settlements for Women.*[75] Although this report specifically examined women's experiences of property settlements under the FLA, it has been submitted that the same issues arise for women in (heterosexual) de facto relationships.[76] Power imbalances also arise in same-sex relationships and close personal relationships where, by definition, one is in a more vulnerable position than the other.

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70. *Winders v Gazzard* (High Court of Australia, S113/1998, 12 March 1999, transcript).
71. See para 4.23-4.35.
72. See para 5.62-5.83.
73. See para 4.100-4.103.
74. See Chapter 4 and Chapter 9.
75. N Seaman, *Fair Shares? Barriers to Equitable Property Settlements for Women* (Women's Legal Services Network and National Association of Community Legal Centres, 1999, Canberra).
76. NSW Department for Women, *Submission* at 2.

## Economic disparities arising out of division of labour during relationship

5.58 The failure of the courts to give real due recognition to homemaker and parenting contributions, under the FLA and the PRA, has been widely criticised as a major hurdle preventing just and equitable outcomes in property proceedings for women.[77] It is argued that, when the time comes for family property to be divided, women are disadvantaged by the sexual division of labour that occurs during the relationship. According to Neave, the sexual division of labour occurs both in the home and in the workforce; in the home because women continue to have greater responsibility for domestic tasks and in the workforce because, although women are entering the paid workforce in greater numbers, most work on a casual or part time basis.[78]

5.59 Research by the Australian Institute of Family Studies (AIFS) consistently demonstrates that economic hardship following separation and divorce falls disproportionately on women. In the 1986 *Settling Up* study, it was found that women living alone or as single parents experienced a drastic fall in living standards five years after separation. Their household income was just over half what it had been before the separation, whereas men who had not entered into a new relationship earned incomes closer to 80% of their pre-separation income.[79] More recent AIFS studies confirm these earlier findings that women are more likely to be financially disadvantaged than men. The recent *Australian Divorce*

77. H Charlesworth and R Ingleby, "The Sexual Division of Labour and Family Property Law" (1988) 6 *Law in Context* 29; L Young, "Sissinghurst, Sackville-West and Special Skill" (1997) 11 *Australian Journal of Family Law* 268. See also N Seaman, *Fair Shares? Barriers to Equitable Property Settlements for Women* (Women's Legal Services Network and National Association of Community Legal Centres, 1999, Canberra).
78. M Neave, "Private Ordering in Family Law – Will Women Benefit?" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 144-145.
79. P McDonald (ed), *Settling Up* (AIFS and Prentice Hall of Australia, Sydney, 1986) at 112 (Figure 6.5).

*Transitions Project* found that older women were the most disadvantaged group post-divorce, followed by younger women.[80]

5.60 No comparable studies have been conducted of the economic consequences of separation among men and women in de facto relationships. But one could surmise that the situation may be worse for women in (long term) de facto relationships with primary care of the children of the relationship given that they come within a much narrower and more conservative jurisdiction where there is no consideration for future needs and no presumption of equal sharing.[81]

5.61 The literature and criticism outlined above focuses on heterosexual relationships simply because these were the only relationships recognised. However, the same issues would arise, regardless of gender, in all kinds of relationships where the parties have agreed that one will work in paid employment while the other works in the home and/or raises children.

**ISSUE 13**

**Should the PRA redress the economic disparities between the parties that are a direct result of their functions during the relationship?**

## Domestic violence

5.62 Whilst domestic violence has gained increased recognition, "until recently both the law and society generally cast a veil of

80. Australian Institute of Family Studies, *Australian Divorce Transitions Project*, 2000 in B Smyth and R Weston, "Financial living standards after divorce: A recent snapshot" (AIFS, Research Paper 23, 2000) at Figure 2.
81. Not that there is any legislative authority for equal sharing as a starting point under the FLA: see *In the Marriage of Mallett* (1984) 52 ALR 193.

silence over it".[82] It was once seen, and still is by some people,[83] as a private matter to be dealt with by the people in the relationship. It has been suggested that the cause of the concealment "is not that individual women deny violence … it is that everyone denies violence".[84] Domestic violence is suffered mostly by women[85] and such violence escalates at the time of separation.[86] Hence, much of the discussion on how domestic violence can influence the process of obtaining a property adjustment is set in the context of violence that is perpetrated by men against women.

5.63 However, it has been estimated that the incidence of violence in same-sex relationships is comparable to that in heterosexual relationships[87] and, contrary to what is generally thought, it occurs in both gay male and lesbian relationships.[88] Whilst there is increasing legal and social acknowledgement that violence occurs in domestic relationships, it remains shrouded in secrecy, possibly more so in same-sex relationships than in heterosexual relationships. This may be because domestic violence is usually seen as male dominance over women and also because of a general tendency to

82. *Kennon v Kennon* (1997) 139 FLR 118.
83. S Parker, S Parkinson and J Behrens, *Australian Family Law in Context* (2nd ed, LBC, Sydney, 1999) at 361.
84. H Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 187.
85. A Howe, "'Social Injury' Revisited: Towards a Feminist Theory of Social Justice" (1987) *International Journal of the Sociology of Law* at 423 in J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *Australian Journal of Family Law* 9 at 22-23.
86. See R Graycar, "If it aint broke don't fix it: Matrimonial Property Law Reform and the Forgotten Majority", An address to the NSW Bar Association Public Forum (20 May 1999).
87. See N Christie, "Comment: Thinking About Domestic Violence in Gay Male Relationships" (1996) 4(1) *Waikato Law Review* available via «http://www.waikato.ac.nz/law/wlr/special_1996/8_christie.html»; L Vickers, "The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective" (1996) 3(4) *Murdoch University Electronic Journal of Law* at para 18.
88. Vickers at para 15.

deny recognition of gay and lesbian relationships.[89] Victims of violence in same-sex relationships may be reluctant to come forward for the same reasons heterosexual people do not. This may be because of fear of retribution or that they will be disbelieved or cause shame to be brought on themselves and their family. For gay and lesbian victims of violence, there may also be factors specific to them such as fear of being outed[90] or public misconceptions such as that incidences of violence in gay male relationships are merely "lovers' tiffs" or an extension of sexual play.[91]

5.64 Violence can also be a frightening reality in carer relationships. There has, for example, been increased recognition of "elder abuse" recently. This describes the physical, psychological and sexual abuse, neglect and financial abuse of elderly people.[92] The NSW Ageing and Disability Department estimates that up to 52,000 older people in NSW are subjected to abuse each year.[93] One of the main reasons for it is that the older person is dependant on others for care and thus in a vulnerable position.

### *Definition of domestic violence*

5.65 If the law is to recognise domestic violence, the issue arises of how it is to be defined, specifically what type of conduct should be included in its scope. The definitions can range from the fairly narrow one of physical assault which causes injury[94] to broader definitions which include not only physical assault but also "sexual

89. Christie at para 3.
90. Christie at para 4; Vickers at para 10.
91. Christie at para 5.
92. Ageing and Disability Department, *Abuse of older people: the hidden problem* (pamphlet available via «http://www.add.nsw.gov.au/PDF/ElderAbuse/English.pdf»); Ageing and Disability Department, *Abuse of Older People Gaining Recognition* (Media Release, 13 August 1998) available via «http://www.add.nsw.gov.au/releases/9808_abuse.html».
93. Ageing and Disability Department, *Abuse of older people: the hidden problem* (pamphlet available via «http://www.add.nsw.gov.au/PDF/ElderAbuse/English.pdf»).
94. G Sheehan and B Smyth, "Spousal Violence and Post-Separation Financial Outcomes" (2000) 14(2) *Australian Journal of Family Law* 102 at 108-109.

assault, verbal abuse, emotional and psychological abuse, social abuse, economic abuse and spiritual abuse".[95]

5.66 In a recent national random survey (of 244 divorced women and 152 divorced men) by the Australian Institute of Family Studies, the prevalence of domestic violence was difficult to estimate precisely because it varies in definition. Not surprisingly, the survey showed that the incidence of violence was higher when the broadest definition was used, with 65% of the women and 55% of the men stating they fell within the category of violence termed "legal abuse".[96] The other categories were fear-based violence,[97] which was suffered by 53% of women and 24% of men surveyed and injury-based violence[98] where the figures were 14% of women and 3% of men.

### *Impact of domestic violence on property settlements*

5.67 Aside from estimating the incidence of violence among divorcees, the aim of the AIFS survey was to see what impact it had on property settlements and post-divorce financial circumstances and workforce participation.[99] Of those surveyed who had finalised their arrangements, 65% did so through an agreement with some formal court involvement, whereas the other 35% settled privately, with little or no legal assistance.[100]

5.68 The study found that, for women, the "experience of spousal violence puts them at a disadvantage when dividing the matrimonial property".[101] For men, however, there was no such

95. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 11.
96. Sheehan and Smyth at 109. Legal abuse was defined as "actions considered an offence under criminal law, such as the occurrence, attempt or threat of physical or sexual violence".
97. Sheehan and Smyth at 109. Fear based violence was defined as "conduct – actual or threatened – that causes a person to be fearful about his or her wellbeing and safety".
98. Sheehan and Smyth at 109. Injury based violence was defined as "actions resulting in injury that requires medical treatment".
99. Sheehan and Smyth at 102, 105 and 106.
100. Sheehan and Smyth at 104.
101. Sheehan and Smyth at 111.

correlation.[102] The financial living standards and workforce participation of women, but not men, was also found to be related to domestic violence.[103] Due to the complex set of factors that surrounds domestic violence, it is unclear whether one is the *cause* of the other.[104] However, even if there is not a consistent causal connection, the Commission believes that the mere relationship between domestic violence and post-divorce disadvantage warrants legal attention.

5.69 One of the major findings of earlier research, conducted by the Illawarra Legal Centre,[105] was that "in cases of domestic violence … the need to escape this violence will often override a woman's desire to pursue her right to a share of the matrimonial property" and this is likely to contribute to the financial disadvantage of women after separation.[106] The research also found that even when victims of domestic violence do pursue their share of property, they are disadvantaged in Family Court mediation proceedings because of the assumption of equal bargaining power between the parties.[107] While the official approach is to exclude those who have suffered domestic violence from family mediation schemes, this assumes that the victims will identify themselves as such.[108]

102. Sheehan and Smyth at 113.
103. Sheehan and Smyth at 114-116.
104. Sheehan and Smyth at 117.
105. Illawarra Legal Centre, "A Human Right to Justice: Experiences of Women in the Illawarra Region" (prepared by J Stubbs, 1993) cited in ALRC, *Equality before the law: women's access to the legal system* (Report 67 (interim), 1994) at 74.
106. Illawarra Legal Centre in ALRC, Report 67 at 77.
107. "For many victims of domestic violence … the ability to negotiate equitable outcomes is not a reality": Illawarra Legal Centre in ALRC, Report 67 at 77.
108. Victims of domestic violence often remain silent in an effort to avoid further violence: H Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) at 175.

5.70 Apart from these two studies there is little other empirical information regarding domestic violence and its financial consequences.[109] There is some anecdotal evidence, however, that the majority of property settlements involving domestic violence are settled out of court to the disadvantage of the abused spouse "simply because of the inequalities of bargaining power that are manifold in such cases".[110] The economic vulnerability of many women in negotiated property settlements is exacerbated where there is violence during and after marriage.[111]

### *Dual approach of the Family Court*

5.71 The Family Court has taken two approaches to hold domestic violence as relevant to property adjustment proceedings. Either it is considered when assessing the future needs of the abused party or as a factor in determining the parties' contributions.

5.72 Factoring domestic violence in the assessment of future needs entails a consideration of the *consequences* of the violence rather than the violence itself. The violence and who is to blame for it is largely ignored. For example, *In the Marriage of Hack,*[112] Justice Bell made an adjustment for the future needs of the wife due to an "incident" that occurred during the marriage. The term "incident" was used to refer to an assault by the husband on the wife which rendered her a paraplegic.

5.73 The court has taken violence into account where evidence can be shown of its specific impact on the victim's health or his or her earning capacity or in a more general way as a relevant factor

109. Certainly none involving people in de facto or other domestic relationships. The Commission is of the view that the little empirical evidence there is in relation to the incidence of domestic violence among married couples is likely to be replicated for those in domestic relationships under the PRA. Even though not all of these relationships will encounter the same gender-specific issues, violence can still arise.
110. J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *Australian Journal of Family Law* 9 at 22.
111. Sheehan and Smyth at 114.
112. *In the Marriage of Hack* (1977) 6 Fam LR 425.

under s 75(2)(o).[113] However, in the most recent Full Court case where there was evidence of domestic violence, the majority said that they "have some reservations about this approach and prefer to express no final view about it".[114] This approach is currently not applicable to people in relationships covered by the PRA as there is no provision for consideration of the parties' future needs.

5.74 The second approach also places more emphasis on the effect, rather than the actual existence, of domestic violence. Earlier cases held that where violence made it more difficult for one spouse to contribute, the property division could be adjusted to reflect that spouse's diminished capacity to contribute.[115] The rationale was a desire to compensate the victim of the violence rather than to blame and punish the perpetrator.[116] This method has also been referred to as assessing "negative contributions". The majority in *Kennon v Kennon*,[117] however, held that these earlier authorities were no longer binding. Although they did not fundamentally change the law,[118] the majority purported to restate it as follows:

> Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage *which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage,* or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions

113. ALRC, *Equality Before the Law* (Report 69, 1994) at 9.50. For case examples, see *In the Marriage of Sheedy* [1979] FLC 90-719; *In the Marriage of Barkley* (1976) 11 ALR 403; and *In the Marriage of Soblusky* (1976) 12 ALR 699.
114. *Kennon v Kennon* (1997) 139 FLR 118 at 139.
115. *In the Marriage of Sheedy* [1979] FLC 90-719; *In the Marriage of Fisher* (1990) 99 FLR 357.
116. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 19, discussing *In the Marriage Fisher*.
117. *Kennon v Kennon* (1997) 139 FLR 118.
118. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 21.

> within s 79. We prefer this approach to the concept of "negative contributions" which is sometimes referred to in this discussion.[119]

5.75 This formulation of the law continues to require the abused spouse to prove the impact of the violence, not just that it occurred, and also that the impact was significant. As a result, there will only be a "relatively narrow band of cases to which these considerations will apply".[120] *Kennon* can be contrasted with *In the Marriage of Doherty* where Justice Baker reviewed the trial judge's account of drinking, domestic violence and aggression and stated that "it is clear from his findings that the wife's contributions as homemaker and parent may have been increased as a result thereof".[121] It seems that the existence of the abuse was enough to make an assumption regarding its negative impact, rather than requiring the abused spouse to explicitly prove its effect. This is in line with Behren's view that domestic violence "is, of itself, an indication of a negative contribution and is therefore relevant in the determination of how to adjust property interests following the breakdown of a marriage".[122] This, as opposed to *Kennon*, supports the argument that the existence of domestic violence itself should be a relevant factor, from which its negative impact can be implied.

5.76 *Kennon* is also authority for the view that domestic violence which occurs at the end of a marriage, causing its breakdown, is not covered by the above formulation and cannot be considered in property proceedings. This statement has been criticised because it may "lead to absurd differences" where single acts of domestic violence that cause a spouse to leave are not relevant but those who stay to suffer will be compensated.[123]

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119. *Kennon v Kennon* (1997) 139 FLR 118 at 140. Emphasis added.
120. *Kennon v Kennon* (1997) 139 FLR 118 at 141.
121. *In the Marriage of Doherty* (1995) 127 FLR 343 at 347.
122. J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *Australian Journal of Family Law* 9 at 16.
123. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 23.

### *Approach of the Supreme Court under the PRA*

5.77 In *Jackson v Jackson,* the defendant presented evidence of a history of abuse and denigration by the plaintiff, claiming four main physical assaults as well as abusive language. The Supreme Court assessed the impact of the domestic violence on the defendant's contributions, concluding that her homemaker contributions were affected by the assaults, and that this ought to be taken into account in her favour in assessing them.[124] Master Macready also found that the evidence of violence was relevant in assessing the plaintiff's contributions. He followed earlier authority that stated homemaker contributions involve the creation of emotional stability in the home and that the quality as well as the quantity of these contributions can be assessed.[125] The plaintiff's homemaker contributions were therefore assessed with regard to his abusive language, which it was held "should not be seen as a matter of penalising the plaintiff for his denigration of the defendant but more an assessment of the quality of the plaintiff's contribution".[126] A property adjustment was consequently made in the defendant's favour. The judge also awarded compensatory damages for the physical assaults, holding that the plaintiff cannot "escape civil liability simply on the basis that it was a domestic".[127] The result of the trial was confirmed by the Court of Appeal.[128]

### *"No fault" principle*

5.78 Making domestic violence relevant to marital property disputes has been criticised as heralding a return to the concept of fault. This was abolished in 1975 with the enactment of the FLA. Any misconduct of the parties is no longer relevant as a ground for divorce.[129] While the court has overcome this problem by concentrating on the consequences of the domestic violence rather than the violence itself, other commentators have argued that treating domestic violence as relevant in property proceedings does not mean reintroducing fault through the back door. The "no fault"

124. *Jackson v Jackson* [1999] NSWSC 229 at para 56.
125. *Green v Robinson* (1995) 36 NSWLR 96.
126. *Jackson v Jackson* [1999] NSWSC 229 at para 55.
127. *Jackson v Jackson* [1999] NSWSC 229 at para 57.
128. *Jackson v Jackson* [2000] NSWCA 303.
129. *In the Marriage of Soblusky* (1976) 12 ALR 699.

concept was introduced for the specific issue of divorce. Using the concept to disregard domestic violence in areas *outside* of divorce, namely children's issues and property adjustment, is unwarranted and unconvincing.[130] It has also been argued that courts need to recognise the existence of domestic violence because it is different from other types of matrimonial misconduct.[131] These differences stem from policy considerations such as the difficulties victims face in bringing civil actions, the power imbalance which domestic violence creates and the fact that most domestic violence actually constitutes criminal conduct.[132]

### *Claiming in tort*

5.79 Awards of damages are also available to victims of domestic violence. Making claims in tort instead of seeking property adjustment has both advantages and disadvantages. One advantage for people in domestic relationships is that the Supreme Court has jurisdiction to hear both the property proceedings as well as the claim in tort. Since the demise of cross-vesting, however, the Family Court cannot hear claims in tort to the disadvantage of married persons who are victims of violence.[133]

5.80 However, torts law does not generally provide adequate relief for victims of domestic violence.[134] Traditionally, damages can only be awarded for separate provable incidents whereas in most cases of domestic violence the abuse is ongoing and it is difficult to

130. J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *Australian Journal of Family Law* 9 at 24; R Graycar, "Matrimonial Property Law Reform – what lessons have we learnt?", paper presented at the *Family Court of Australia Second National Conference – Enhancing Access to Justice* (Sydney, 20-23 September 1995) at 66.
131. Behrens (1993) at 23.
132. Behrens (1993) at 12, 22 and 23.
133. *Wakim, Re; Ex parte McNally* (1999) 198 CLR 511.
134. See generally J Behrens and K Bolas, "Violence and the Family Court: Cross-vested Claims for Compensation" (1997) 11 *Australian Journal of Family Law* 164; P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 26.

isolate specific events that have caused the damage.[135] In *Kennon,* the trial judge, with whom the majority on appeal agreed, stated that whilst this may be unfair to the victim he was bound by authority to require proof of specific incidents.[136] There are also statute of limitation issues where the violence has occurred over a long period of time.[137] A further impediment is the frequently encountered lack of resources and/or insurance from which damages can be paid.[138]

5.81 An advantage of making a claim in tort is the availability of aggravated and exemplary damages as well as compensation.[139] However, in practice, the only instances where tort actions are brought is when they are attached to a property settlement, as in *Jackson* above. Warnings have been issued against double-counting, as in *Jackson*, where Master Macready held it should "not occur as it would be inappropriate for the [violence] to be taken into account on the property adjustment and also to give a verdict … for damages".[140]

5.82 An alternative to claiming in tort, which has been used in the Family Court, is to treat the claim as a valuable chose in action of the abused spouse which is paid out in the property adjustment, extinguishing any tortious claims.[141]

135. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 25.
136. *Kennon v Kennon* (1997) 139 FLR 118.
137. See, for example, *Jackson v Jackson* [2000] NSWCA 303 at para 47.
138. J Behrens and K Bolas, "Violence and the Family Court: Cross-vested Claims for Compensation" (1997) 11 *Australian Journal of Family Law* 164 at 165.
139. P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 29. A case where both aggravated and exemplary, as well as compensatory, damages were awarded is *Marsh v Marsh* (1993) 17 Fam LR 289.
140. *Jackson v Jackson* [2000] NSWCA 303 at para 48.
141. *In the Marriage of Barkley*, discussed in P Nygh, "Family Violence and Matrimonial Property Settlement" (1999) 13 *Australian Journal of Family Law* 10 at 31.

***Other legislative recognition of domestic violence***

5.83 The FLA recognises the need to ensure the parties' safety from family violence as a principle to be applied by the court when exercising its jurisdiction.[142] It also grants the Family Court power to make orders for the personal protection of a spouse and to restrain one spouse from entering the residence or workplace of the other.[143] The PRA gives the court power to grant similar injunctions to help protect parties in a domestic relationship from domestic violence and harassment.[144] However, these injunctions are rarely, if ever, sought and awarded.

**ISSUE 14**

**How should domestic violence be taken into account in property adjustment proceedings?**

**(a) as a factor affecting contributions? Does its impact need to be proved or should it be implied once domestic violence is established on a balance of probabilities?**

**or**

**(b) should the impact of domestic violence on the abused party's future needs be an express factor for the court to consider?**

**Should there be a statutory right to compensation for domestic violence? The amount of compensation could be assessed under the usual heads of damages, such as pain and suffering, past and future earning capacity, medical expenses etc. The claim for compensation could be brought at the same time as a property adjustment claim and damages could be awarded in the form of property.**

142. FLA s 43.
143. FLA s 114.
144. PRA s 53.

## ALTERNATIVE APPROACHES TO PROPERTY DIVISION

5.84 Those states and territories that have passed de facto relationship legislation more recently have moved away from the narrow provisions found in NSW, South Australia and the Northern Territory. They have, instead, preferred to give the court broader discretion to take into account factors other than contributions, including future needs, when adjusting property interests, along the same lines as the FLA confers on the Family Court.

### Family Law Act 1975 (Cth)

5.85 The FLA sets out a model for the division of matrimonial property based on a two-stage approach. The court is to consider, first, the direct or indirect contributions, both financial and non-financial, that each party has made to the financial resources or property of the parties and to the welfare of the other party or any child of the relationship, including parenting and homemaker contributions.[145] Thereafter, the Family Court can make a further adjustment by reference to the factors listed in the maintenance provisions of the legislation. These include:

- the parties' income, property and financial resources;
- their age and health;
- their earning capacity; and
- any responsibilities they have to support a child of the relationship or any other person.[146]

5.86 The Commonwealth legislation also allows the court to consider any other factor it considers relevant, thereby giving the court a very wide discretion.[147] This has the advantage of giving

145. FLA s 79; *Domestic Relationships Act 1994* (ACT) s 15; *De Facto Relationships Act 1999* (Tas) s 16.
146. FLA s 75(2).
147. FLA s 75(2)(o).

the Family Court great flexibility to consider all the relevant and inevitably varying circumstances in a relationship. However, this flexibility is at the expense of providing parties with certainty of outcome.[148]

## ACT and Tasmania

5.87 The ACT and Tasmania have adopted the FLA model in their respective legislation.[149] However, the ACT legislation has a less extensive list of future needs factors than the Commonwealth Act.[150] It does not, for example, contain the "catch-all" provision found in s 75(2)(o) of the FLA, which is, however, replicated in the more recent Tasmanian legislation.[151]

## Queensland

5.88 The recently enacted Queensland model is also more like the FLA than the PRA as it is based on both contributions and future needs factors. The Queensland Law Reform Commission recommended, in 1993, that the current NSW model not be adopted because it undervalued homemaker and parenting contributions and did not provide enough support for the future needs of partners who had assumed those roles during the course of the relationship.[152]

5.89 The Queensland legislation requires that the court make any order it considers "just and equitable" to adjust the property

148. R Ingleby, "Recent Australian Developments" in L Weitzman and M Maclean (ed) *Economic Consequences of Divorce: The International Perspective* (OUP, 1992, New York) at 143-161. See para 5.112-5.115 for a discussion of the FLA model.
149. *Domestic Relationships Act 1994* (ACT); *De Facto Relationships Act 1999* (Tas).
150. *Domestic Relationships Act 1994* (ACT) s 19.
151. *De Facto Relationships Act 1999* (Tas) s 23(2)(m).
152. Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 48-49.

interests of either or both spouses.[153] The matters which the court must consider in deciding what is just and equitable include contributions to the spouses' property and financial resources and to the family's welfare, and also the effect which the order may have on the spouses' earning capacity.[154] There are also additional factors that the court must consider, which are similar to those in s 75(2) of the FLA[155] such as:

- the partners' age and health;
- their income, property and financial resources;
- their capacity for employment;
- whether one spouse has the care of children;
- their commitments to support themselves or another person;
- their eligibility for government assistance;
- what standard of living is reasonable for each of them;
- the contributions made by each spouse to the other's income and earning capacity;
- the length of the relationship;
- the effect of the relationship on each spouse's earning capacity;
- whether either spouse has entered into a new relationship; and
- whether child maintenance is paid by either spouse.[156]

5.90 However the Queensland legislation adopts a far different approach from the FLA. It does not provide separately for periodic maintenance orders.[157] Rather, the factors which have traditionally

153. *Property Law Act 1974* (Qld) s 286(1). Section 260 of that Act defines a "de facto spouse" as either one of 2 persons, whether of the same or opposite sex, who are living or have lived together as a couple.
154. *Property Law Act 1974* (Qld) s 291-s 293.
155. See para 8.32.
156. *Property Law Act 1974* (Qld) s 297-s 308.
157. The Queensland legislation does not actually confer any right to maintenance on de facto couples. In its 1991 discussion paper, the

been used to determine maintenance orders are now listed, in discrete sections of the legislation, as separate factors the court may consider in claims for property adjustment. Under this integrated approach, therefore, the court determines property adjustment claims and claims for maintenance (although it is not referred to as such) at the same time.

## New Zealand

5.91 The recently passed *Matrimonial Property Amendment Bill 2000* (NZ) amends the *Matrimonial Property Act 1976* (NZ) in three principal ways. First, it has been renamed the *Property (Relationships) Act 1976*, following the NSW model. Second, it extends the division of property regime to people living in de facto relationships, be it heterosexual or same sex relationships.[158]

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Queensland Law Reform Commission said that because the legislation was concerned with beneficial entitlements to property it may be inappropriate to allow periodic maintenance to be awarded against de facto partners: Queensland Law Reform Commission, *Shared Property* (Discussion Paper 36, 1991) at 59. However, later publications by the QLRC did recommend that the legislation cover maintenance because of the serious injustices that could arise if it were not available, especially if one partner had assumed a homemaking role: QLRC Report 44 at 70; Queensland Law Reform Commission, *De Facto Relationships* (Working Paper 40, 1992) at 48. This is despite arguments against including maintenance, such as that de facto couples have not made a life-long public commitment to support each other, that some have actually consciously avoided legal obligations and that there is a trend away from ordering long-term spousal maintenance upon marriage breakdown: QLRC Report 44 at 70. See Chapter 8 for further discussion.

158. There was some opposition to including a regime for the division of property for de facto couples in the same piece of legislation that provides a property regime for married couples. The Select Committee subsequently recommended that the terminology distinguish between the two groups. New Zealand, Government and Administration Select Committee, *Report on Matrimonial Property Amendment Bill* (1999). This was implemented in the Act as passed.

Third, and quite significantly, it makes some radical changes to the way property is divided when a marriage or de facto relationship breaks down.

5.92 The starting point is of an equal division of *relationship* property,[159] defined as property acquired during, or in contemplation of, the relationship. The starting point of equal division also applies to the family home and family chattels, whether or not they were acquired before the relationship by one party alone.[160] The court can depart from this starting point if there are extraordinary circumstances that make equal sharing repugnant to justice, in which case each party's share will be determined according to their contributions to the relationship.

5.93 The starting point of equal sharing does not apply to de facto relationships which have lasted less than 3 years unless:

- there is a child of the relationship; or
- the applicant has made a significant contribution to the relationship;
- and the court is satisfied that failure to make the order would result in serious injustice.[161]

5.94 If the equal sharing starting point does not apply, the property is to be divided according to the contributions each of the partners has made to the relationship.[162]

159. *Property (Relationships) Act 1976* (NZ) s 11.
160. *Property (Relationships) Act 1976* (NZ) s 8. Note that special provision is made where both parties enter the relationship as owners of a residential property, yet only one residence is used as the family home. The court can make an order in whatever terms it considers just to compensate the party who owns the family home for the consequences of that property, but not the other party's, being treated as relationship property under the Act: *Property (Relationships) Act 1976* (NZ) s 16.
161. *Property (Relationships) Act 1976* (NZ) s 14A(2).
162. *Property (Relationships) Act 1976* (NZ) s 14A(3). The situation regarding marriages of short duration is slightly different, see *Property (Relationships) Act 1976* (NZ) s 14.

5.95 Another significant development in the legislation is the power of the court to make a further adjustment to redress any economic disparities between the parties. Section 15 allows the court to award a lump sum payment (on top of the initial division of property) where it is satisfied that the income and living standards of one partner are likely to be significantly higher than the other because of the effects of the division of functions within the relationship while the partners were living together.[163] The factors that the court may consider when making such an order include the parties' earning capacity, whether they have ongoing daily care of a child of the relationship and any other relevant factor.[164]

5.96 Separate property is defined as any property that is not relationship property, which mostly includes property acquired by either party whilst they are not living as de facto partners,[165] but can also include inheritances and gifts received during the relationship.[166] Upon breakdown of the relationship, separate property is held by the party who acquired it, unless it has been transformed into relationship property. This occurs when contributions of the other party, or the application of relationship property, has resulted in an increase in the value of the separate property, in which case the increase is treated as relationship property.[167]

## Developments in equity

5.97 The PRA preserves the right of parties to a domestic relationship to have their property dispute heard under the general law.[168] In its 1983 Report, the Commission found that the general law was inadequate for resolving disputes between de facto couples, mainly because it did not recognise indirect contributions, such as homemaker and parent contributions, to the welfare of the

163. *Property (Relationships) Act 1976* (NZ) s 15(1).
164. *Property (Relationships) Act 1976* (NZ) s 15(2).
165. *Property (Relationships) Act 1976* (NZ) s 9.
166. *Property (Relationships) Act 1976* (NZ) s 10.
167. *Property (Relationships) Act 1976* (NZ) s 9A.
168. PRA s 7.

other party or the family.[169] This view was also expressed by the then Attorney General, the Hon Jeff Shaw QC MLC when he introduced the 1999 amendments to the PRA. He stated that extended coverage of the Act was required so people in same-sex relationship would not have to rely on the "vagaries" of the general law.[170] However, since the Commission's 1983 Report there have been significant developments in the general law, especially with respect to the equitable remedy of the constructive trust.

5.98 Most of the general law remedies that parties to a domestic relationship rely upon are equitable. These soften the common law, which looks only to legal title, in other words, whose name the property is in. The equitable remedies most relevant in this area are the resulting trust, the constructive trust and proprietary and equitable estoppel.[171]

### *Resulting trust*

5.99 A resulting trust arises between parties in a domestic relationship when the legal title on the property does not reflect the parties' respective contributions to its purchase. It is presumed that the partner(s) hold the property on trust for themselves in direct proportion to their contributions. To rebut the presumption of a resulting trust, a contrary common intention must be found, that is, that the greater contribution by one partner was intended to be a gift to the other.[172] For example, in *Mauger v Pearson* a homosexual couple purchased a property at Marrickville as joint tenants. The defendant argued that a resulting trust should be

169. NSWLRC Report 36 at para 7.31.

170. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999, the Hon J W Shaw QC MLC, Attorney General, Second Reading Speech at 299 of the *Property (Relationships) Legislation Amendment Bill 1999*.

171. Parties may also find relief under an express trust, however these are uncommon as they must be evidenced in writing (*Conveyancing Act 1919* (NSW) s 23C). Another equitable remedy is unjust enrichment, a doctrine which invokes restitutionary principles. Although Australian courts have been slow to embrace restitution, it has found favour in Canada: see, for example, *Pettkus v Becker* (1980) 117 DLR (3d) 257.

172. *Brown v Brown* (1993) 31 NSWLR 582.

imposed in his favour because he had made greater contributions to the property than the plaintiff. Windeyer J, however, found that there was a contrary common intention:

> So far as the Marrickville property was concerned the defendant's evidence was quite clear that the property was purchased as joint tenants because he and the plaintiff had a relationship; that he wanted himself and the plaintiff to feel that they were on the same footing financially; that he told both the plaintiff and the plaintiff's children that there was an equality between them and that this was because he thought they had a future together.[173]

5.100 However, there are limitations to applying a resulting trust upon the breakdown of a domestic relationship. First, a contrary common intention to imposing a resulting trust must be found at the time of purchase. Hence, if a property is purchased in the name of one partner only before the relationship begins, contributions made by the other partner during the relationship will not give rise to a resulting trust.[174] Only financial contributions to the purchase price are relevant. This ignores the fact that most homes are normally purchased with a small initial deposit and a 30-year mortgage. It also ignores the fact that the property may have been significantly improved following its initial purchase. For this reason, the principle of the resulting trust is of little assistance to the de facto partner who makes contributions towards the purchase, maintenance or improvement of the property after the initial acquisition.[175] In the case of *Bryson v Bryant,* it was argued

173. *Mauger v Pearson* [1999] NSWSC 268 at para 12. Cf *Calverley v Green* (1984) 155 CLR 242 at 271 where no inference could be drawn from the parties' intention other than a resulting trust reflecting their respective contributions to the purchase price.
174. See, for example, *Bryson v Bryant* (1992) 16 Fam LR 112 (Samuels AJA) at 149 discussed in J Riley, "The Property Rights of Home-Makers under General Law: Bryson v Bryant" (1994) 16 *Sydney Law Review* 412 at 416.
175. M Neave, "The New Unconscionability Principle – Property Disputes Between De Facto Partners" (1991) 5(3) *Australian Journal of Family Law* 185 at 188. See also J Riley, "The Property Rights of Home-Makers under General Law: *Bryson v Bryant*" (1994) 16 *Sydney Law Review* 412 at 417.

that the financial and non-financial contributions made by a female de facto partner during the relationship should give rise to an "extended" form of resulting trust. However, these arguments were rejected on the basis that she did not have a mercenary motive for making those contributions, but did so out of love and affection for her partner.[176]

5.101 Also, a resulting trust might be inferred from an intention that existed at the time of purchase that never came to fruition. For example, in *Muschinski v Dodds*[177] the appellant provided the whole of the purchase price for a property, but the parties were named as joint tenants because the respondent planned to make contributions to the purchase price and to renovation costs at a later date. These plans were never carried out, but the court nonetheless looked to the intention at the time of purchase.[178]

5.102 Resulting trusts can be qualified by the competing presumption of advancement, which presumes that a gift was intended if the parties are in a requisite relationship.[179] However, neither opposite sex[180] nor same-sex[181] de facto couples have been held to be in a requisite relationship.

### *Constructive trust*

5.103 The most recent formulation of the constructive trust originates in the judgment of Deane J in *Muschinski v Dodds*, articulated by the majority in *Baumgartner v Baumgartner* as:

> … the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour

176. See, for example, *Bryson v Bryant* (1992) 16 Fam LR 112 (Sheller JA at 142) and (Samuels AJA at 149) in J Riley, "The Property Rights of Home-Makers under General Law: Bryson v Bryant" (1994) 16 *Sydney Law Review* 412 at 416.
177. *Muschinski v Dodds* (1985) 160 CLR 583.
178. However, the appellant in this case did obtain relief under a constructive trust: see para 5.103-5.106.
179. *Brown v Brown* (1993) 31 NSWLR 582.
180. *Calverley v Green* (1984) 155 CLR 242; *Brown v Brown* (1993) 31 NSWLR 582.
181. *Mauger v Pearson* [1999] NSWSC 268 at para 10.

> which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them.

5.104 Hence, unlike resulting trusts, a constructive trust can be imposed where one partner has made contributions to the property *during* the relationship which are not reflected in the legal title. These contributions also need not be made directly to the purchase price of the property, but only to the joint endeavour of the relationship.[182] The law relating to constructive trusts has also developed so that the party seeking relief does not have to prove that there was an actual common intention that the property was held on trust, only that such an intention should be implied.[183] Instead of a common intention, the underlying principle for imposing the trust is that it would be unconscionable for the partner who has legal title to retain the benefit of contributions by the other partner.[184] Deane J has stated that determining whether to impose a constructive trust does not involve:

> … indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles.[185]

5.105 In the context of the "failed joint endeavour" of a de facto relationship, the court has looked to factors such as how long the parties have lived together, the pooling of resources and efforts by

182. *Baumgartner v Baumgartner* (1987) 164 CLR 137.
183. See, for example, *Lipman v Lipman* (1989) 13 Fam LR 1 (Powell J) at 19. Prior to *Baumgartner*, to impose a constructive trust required proof of an actual common intention to create a trust, which could be inferred from the conduct of the parties. This, it has been argued, did not adequately recognise indirect or non-financial contributions to the property: M Neave, "The New Unconscionability Principle – Property Disputes Between De Facto Partners" (1991) 5(3) *Australian Journal of Family Law* 185 at 190.
184. *Muschinski v Dodds* (1985) 160 CLR 583.
185. *Muschinski v Dodds* (1985) 160 CLR 583 at 615.

both to create a joint home.[186] However, in *Dries v Ryan*[187] a constructive trust was imposed even though the parties had never resided together. They purchased a property as tenants-in-common in unequal shares. The defendant was credited with more of the deposit, but both he and the plaintiff were jointly and severally liable for the mortgage that was used to pay the remainder of the purchase price. Master McLaughlin held that as the plaintiff contributed to the deposit and was liable for at least half and possibly the whole of the mortgage, a constructive trust should be imposed giving the plaintiff an equal share in the property.

5.106 The law of constructive trusts has also been sufficiently expanded so that non-financial contributions, such as homemaker and parenting contributions, can be taken into account.[188] However, there have been many criticisms that despite this, non-financial contributions have not been adequately recognised. This is due to the requirement in many cases that there be evidence of a pooling of finances,[189] which indicates that homemaker and parenting contributions will only be relevant when they are made in conjunction with financial contributions.[190] It may also be difficult to establish a link between non-financial contributions by one partner and the acquisition of property by the other. In *Brown v George* it was held that although the appellant made financial and non-financial contributions to the home, these "had little if anything to do with the respondent's acquisition of

186. *Baumgartner v Baumgartner* (1987) 164 CLR 137.
187. *Dries v Ryan* [2000] NSWSC 1163.
188. Contributions "in kind": *Baumgartner v Baumgartner* (1987) 164 CLR 137.
189. Much of the case law suggests that only situations that are analogous to *Baumgartner* and involve a pooling of resources will give rise to a constructive trust: see, for example, *Lipman v Lipman* (1989) 13 Fam LR 1; cf *Miller v Sutherland* (1990) 14 Fam LR 416.
190. *Richardson v Hough* discussed in "Equitable Principals and Legislative Provisions for Property Adjustment both applied to Adjust Property Between De Factos" (1999) 5 *Current Family Law* 85; S Wong, "When Trust(s) is Not Enough: An argument for the use of unjust enrichment for home-sharers" (1999) 7(1) *Feminist Legal Studies* at 52.

property." It was found that the respondent already owned real estate and was established as a bookmaker at the commencement of the relationship. Although he did benefit from the appellant's contributions, she made these contributions as much for her own benefit as his.[191]

### *Proprietary and equitable estoppel*

5.107 The leading case on proprietary estoppel with respect to commercial dealings is *Waltons Stores (Interstate) v Maher*.[192] However, the doctrine has been applied to more personal situations, such as in *Foster v Evans* where a claim of proprietary estoppel was made by the plaintiff on behalf of herself and her child against the child's father, who was also the plaintiff's former de facto partner. To substantiate a claim of proprietary estoppel, it must be shown that one partner induced the other to rely on an assumption that he or she would be entitled to a share in the property, that the other partner did in fact rely on the inducement and has consequently suffered detriment.[193] Equitable estoppel has been used to enforce a promise by a partner in a lesbian relationship to support a child born into the relationship.[194] However, Australian courts have tended to rely on the reasoning behind constructive trusts rather than estoppel in order to give equitable relief to de facto partners.[195]

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191. *Brown v George* [1999] FCA 285 at para 22 (Miles, Mathews and Lehane JJ).
192. *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387.
193. *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 (Brennan); *Foster v Evans* (1997) DFC 95-193 at 77,678-77,679.
194. *W v G* (1996) 20 Fam LR 49. See Chapter 3.
195. Cf position in England, where estoppel has been the favoured remedy: M Neave, "The New Unconscionability Principle – Property Disputes Between De Facto Partners" (1991) 5(3) *Australian Journal of Family Law* 185 at 188. Unmarried cohabitants in Great Britain have no statutory rights to claim a share of property of the relationship or maintenance from the other partner when the relationship ends. The common law operates. However, since the release of the UK Law Society's paper calling for a reform of the law in this area [UK Law Society, *Cohabitation: The Law Society's Proposals for Reform of the Law* (September 1999, London)],

### *Conclusion*

5.108 While the advances in the constructive trust principle are promising and have yielded some positive results in some cases,[196] equity should not be a substitute for a clear statutory body of law which delivers just and equitable outcomes and produces a degree of certainty and predictability such as to enable people whose relationships have broken down to negotiate fair out of court settlements. This is especially so regarding the uncertain position at equity for parties who have made only indirect, non-financial contributions to the property.

## THE NEED FOR REFORM

5.109 The criticisms of the current approach to s 20 and the introduction of newer models of property adjustment regimes in other jurisdictions suggest that reform of the PRA is necessary. Back in 1983, the problem was that the common law was incapable of producing a just and equitable result when one partner sought to claim a beneficial interest in property held solely in the other partner's name. This was so because it only had regard to the partners' direct financial contributions.[197] The Commission therefore recommended that the court be given clear statutory powers to make property adjustment orders as it considered just

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a review is under way. In particular, the UK Law Society has recommended that cohabitees be given statutory rights to bring proceedings against their former partner for a share of the parties' property and finances; to be able to apply for maintenance; and to apply for a share of the former partner's pension. The Law Society also recommends that parties be able to enter into binding financial agreements. Though similar to rights and remedies enjoyed by married persons, the Law Society's proposals for reform do not intend to give the same level of protection to cohabitees. There is a deliberate policy of not equating cohabitation with marriage.

196. See, for example, *Lipman v Lipman* (1989) 13 Fam LR 1 where, according to the legislation, the parties were only in a de facto relationship for a fairly short time but the plaintiff was able to obtain equitable relief arising from a previous period of cohabitation not covered by the Act.

197. *Allen v Snyder* [1977] 2 NSWLR 685 at para 7.1-7.29.

and equitable taking into account a much wider range of contributions, including indirect financial contributions and non-financial contributions.[198] The Commission agreed that the FLA provided a useful model for dealing with property disputes between de facto couples, because:

> … in general the financial arrangements, or the variety of financial arrangements, made by de facto partners appear to be similar to the arrangements, or variety of arrangements, made by married couples.

5.110 However, it also took the view that contributions alone should be considered when making a property adjustment order. It considered that future needs (to the extent that they can be considered at all) should only be taken into account when deciding a claim for maintenance (but for which there should be no general right).[199] The rationale for this policy was the view that a de facto relationship differed from marriage because marriage required a public commitment and that the law should reflect this difference. As Chapters 1 and 2 of this Discussion Paper demonstrate, the changed social, demographic and legal environment make this rationale difficult to justify today.

## What features should a system for property division have in order to facilitate a just and equitable outcome?

5.111 In Chapter 2, the Commission proposed that the PRA contain four principles stating the objectives of the legislation. The third of those objectives, facilitating a just and equitable resolution of financial matters, is most relevant here. To assist in developing options for reform capable of achieving that object, the Commission has developed eight principles. These are based in part on principles developed by the Family Law Council to test

198. NSWLRC Report 36 at para 7.44.
199. NSWLRC Report 36 at para 9.31.

proposals for reform of the equivalent provisions of the FLA.[200] The eight principles are:

- The Act is beneficial legislation and should be so interpreted.
- In resolving disputes as to property, the contributions of each of the partners are to be treated as equally valuable though they may be different in nature.
- Any adjustments to property should be made after taking into account a wide range of relevant factors, other than contributions, including, for example:
  - the length of relationship;
  - who has primary child care responsibilities;
  - inequalities that stem from the division of responsibilities during the relationship and their impact on the parties' earning capacity on separation; and
  - the impact of domestic violence on future needs of the parties.
- Acknowledge and respect how people wish to arrange their financial affairs.
- Ensure that the law is as clear as possible so that practitioners, litigants and the community generally can easily understand it.
- Ensure that the law is able to recognise and accommodate diversity and be capable of applying to all kinds of domestic relationships contemplated by the Act whether they are long or short, with or without dependent children and whether there are few or substantial assets.
- Ensure that settlement is promoted and litigation should be a last resort.
- Where a dispute cannot be settled, facilitate the resolution of disputes by an appropriate court or a division of a court with specialised knowledge of this area of law.

200. Family Law Council, *Part VII of the Family Law Act 1975: Principles and Objects* (Letter of Advice to the Attorney General, March 1999) available online at «www.law.gov.au/flc/letters/».

## Option 1: Family Law Act model

5.112 The PRA could be amended to reflect more closely the provisions of the FLA principally, to allow the court to take into account the parties' future needs. Several other state and territory jurisdictions have followed the FLA approach, with some modifications. The advantage of doing the same is that the FLA is a model that has been tested and one on which there has been substantial caselaw to guide interpretation. It would mean retaining the current contributions-based approach although with a more beneficial interpretation. While there is no legislative authority for it, depending on circumstances such as length of the marriage, whether there are children etc, there is a "partnership approach" under the FLA which assumes a starting point of equal sharing.[201] Adopting the FLA model would also, importantly, allow the court to make a further adjustment to the parties' property interests based on a range of future needs factors.

5.113 However, adopting the FLA model may not address all the criticisms of the current approach. For example, it too has been criticised for undervaluing homemaker contributions by comparison to financial contributions, and disregarding superannuation (although recent amendments allowing the Family Court to treat superannuation as property will address this criticism). Other criticisms of the FLA are that maintenance and property orders are blurred because of the inter-relationship between s 79(4) and s 75(2). This raises a number of issues, including some concerns that this has led to double counting, and that it is contrary to the clean break principle. There are also criticisms that the Family Court is given too broad a discretion which makes outcomes uncertain and unpredictable. This, in turn, makes it very difficult for persons who "bargain in the shadow of the law" to negotiate. As regards the treatment of domestic violence, as discussed above, allowing a consideration of future needs would permit the court to take into account the impact of

201. P Parkinson, "The Property Rights of Cohabitees – Is Statutory Reform the Answer?" in A Bainham et al, *Frontiers of Family Law* (2nd ed, Centre for Family Law and Family Policy, Norwich, 1995) at 308.

any violence on the abused party's future needs. Or it could be taken into account as a contributions factor in the abused partner's favour.

5.114 There have been several attempts over the years to amend the property provisions of the FLA, which have been criticised for being too vague[202] and for giving the court too wide a discretion.[203] Most of the proposals support a rule or starting point of equal sharing, but differ considerably with regard to the level of discretion to be accorded to the court to depart from the rule. Some reforms recommend that the court adopt the rule of equal sharing as a starting point and be given the power to adjust orders to take into account a wide range of circumstances, such as child care responsibilities, significant past contributions, and future disparities in income earning capacities that have resulted from the marriage. Others have recommended that the power to depart from the principle of equal sharing be exercised only in exceptional circumstances,[204] although this rigid approach has been criticised.[205]

5.115 The most recent attempt at reform was put forward by the Commonwealth Attorney General's Department, which considered two options. The first was to retain the current separate property regime, but with a presumption that the parties had made equal

202. Australia, Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, Canberra, November 1992) at para 8.89.
203. ALRC, *Matrimonial Property* (Report 39, 1987) at para 278.
204. Australia, Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, Canberra, November 1992) at para 8.89.
205. Australia, Family Law Council, *Comments on the Report of Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act* (Report, January 1993) at para 7.08, available online at «http://law.gov.au/flc/reports /act.html». See also Australia, Commonwealth Attorney General's Department, *Family Law Act 1975: Directions for Amendment* (AGPS, Canberra, December 1993) at para 15.

contributions and therefore the equal division of matrimonial property is the starting point. This could be adjusted by retrospective and prospective factors.[206] The second option was to adopt a community property regime based on the assumption of an equal partnership during the marriage. Communal assets would be divided equally upon separation, subject to adjustment at the court's discretion. However adjustments can be made for purely prospective factors, according to either an assessment of the party's future needs or an assessment of the economic consequences of the parties' marriage and separation.[207] None of the above attempts at reform have been successful.

## Option 2: Queensland model

5.116 The Queensland approach is broadly based on the FLA model in terms of requiring an assessment of past contributions but also allowing consideration of future needs. Each factor is set out in a separate section. Apart from contributions towards the property of the parties and to the welfare of the family, the court can also take into account the financial circumstances of the parties at the end of the relationship and can make a compensatory adjustment for lost earnings or reduced future earning capacity due to the role taken by one of the partners in the course of the relationship. There is also a provision allowing the court to consider any fact or circumstance that the justice of the case requires.[208] Hence, as with most newer models for property division, the court has a wide discretion. In addition, because these factors are listed in separate sections, there is little danger that the court would link any of these other factors to the parties'

206. Australia, Commonwealth Attorney General's Department, *Property and Family Law: Options for Change* (AGPS, Canberra, 1999) at 5.14-5.15.
207. Australia, Commonwealth Attorney General's Department, *Property and Family Law: Options for Change* (AGPS, Canberra, 1999) at 5.43, 5.45.
208. *Property Law Act 1974* (Qld) s 309.

contributions, as the NSW Court of Appeal said it was bound to do in relation to interpreting what is "just and equitable".[209]

5.117 There is, however, one very significant difference between the Queensland model and the federal counterpart: the Queensland Act makes no provision for periodic maintenance. The maintenance factors are considered as part of the property orders. This avoids criticisms commonly made of the FLA: for example, that awards for property adjustment and maintenance are not distinct, that double counting occurs and that periodic maintenance defeats the objective of achieving finality between the parties. Alternatively, it means that where there is little or no property to adjust, the partner with the ongoing care of the children and/or who has little capacity for meaningful employment because he or she has been out of the workforce for a long period has no redress, even when the other partner has a generous income or high income-earning capacity.

## Option 3: New Zealand Model

5.118 The most radical option for reform is to adopt the model recently implemented in New Zealand.[210] This model incorporates a starting point of equal sharing of relationship property, which meets with the recommendations for reform of the FLA that have been put forward over the years. It also includes a further adjustment stage to redress any significant economic disparity between the parties. This was implemented in part because the strict presumption of equal sharing that existed in New Zealand "was failing to produce equitable results"[211] and a more prospective approach that considers the future needs of the parties was required.[212] Also, by shifting the focus from assessing the value of

209. See *Evans v Marmont* (1997) 42 NSWLR 70.
210. For an outline of the model see para 5.91-5.96.
211. B Atkin and W Parker, *De Facto Property Developments in New Zealand: Pressures impede progress* (seminar paper at Brisbane Family Law Conference 2000) at 4.
212. New Zealand, Royal Commission on Social Policy, *The April Report* (Vol IV, 1988) at 217 in B Atkin and W Parker, *De Facto Property*

contributions made during the relationship to the economic consequences of its breakdown, the disadvantages suffered by parties who take the role of homemaker and parent are likely to be lessened.[213]

5.119 The New Zealand model combines both rules and discretion in its provisions for property law reform, both of which have their advantages and disadvantages. Whilst a discretionary system provides greater flexibility to consider all the relevant and inevitably varying circumstances in a relationship, rules offer more certainty and predictability. Ingleby argues that the uncertainty engendered by a discretionary framework "cannot be borne equally by the parties" and thus operates to the disadvantage of the weaker economic partner.[214] An approach that is partly rules based may also mean that parties are better able to "bargain in the shadow of the law", as outcomes are more predictable. The New Zealand approach, which is mainly rules-based, but also allows discretion to be exercised at the "edges", is a compromise which provides predictability, as well as some flexibility to enable a just and equitable outcome to be achieved across the particular types of relationship that come before the court.[215]

**ISSUE 15**

**Which is the preferable option for reforming s 20 of the PRA? Why?**

*Developments in New Zealand: Pressures impede progress* (seminar paper at Brisbane Family Law Conference 2000) at 5.

213. See para 5.44-5.61 above for a discussion of economic disparity occasioned by the division of labour during a relationship.
214. R Ingleby, "Recent Australian Developments" in L Weitzman and M Maclean (ed) *Economic Consequences of Divorce: The International Perspective* (OUP, 1992, New York) at 143-161.
215. B Atkin and W Parker, *De Facto Property Developments in New Zealand: Pressures impede progress* (seminar paper at Brisbane Family Law Conference 2000) at 14.

# 6. Property adjustment proceedings: other related issues

- Threshold tests to invoke jurisdiction
- Residency
- Contributions made before or after the relationship
- What property is taken into account under section 20?
- Disclosure requirements
- Consent orders

6.1 The previous chapter addresses the broader policy questions regarding what model of property division is appropriate for NSW. This chapter deals with the more peripheral issues that surround the making of a property adjustment. While the issues raised may seem quite technical, determining which approach the court should take on each one has a considerable impact on the amount of property each party will receive. As theses issues are discussed it should be remembered that the *Property (Relationships) Act 1984* (NSW) ("the PRA") is intended to be a beneficial piece of legislation and that the aim of the court is to facilitate an adjustment that is just and equitable between the parties.

## THRESHOLD TESTS TO INVOKE JURISDICTION

6.2 Before an order for an adjustment to property interests or an application for maintenance can be made under the PRA, the court has to be satisfied on the balance of probabilities that:

- there was a domestic relationship between the plaintiff and the defendant;
- the parties lived together for at least two years prior to the breakdown of the relationship;
- the domestic relationship ceased after the date that the legislation came into operation;
- the parties, or one of them, was resident in NSW at the time of making the application; and
- the application for property adjustment orders and/or maintenance under Part III of the PRA was brought within two years of the date that the relationship is taken to have ceased.

Each of these jurisdictional requirements is examined more closely below.

## Is there a de facto relationship between the parties?

6.3 In many cases that have come to the Supreme Court, either under the PRA or more frequently, under the *Family Provisions Act 1982* (NSW) ("the FPA"), there has been a dispute as to whether a de facto relationship existed between the parties at all. In *Miglietta v Biesiada,*[1] for example, the plaintiff said they had lived in a de facto relationship for 20 years. The defendant denied this, claiming that she hardly knew the plaintiff. According to her, he was simply a boarder in her house. In cases like this where it is virtually impossible to reconcile the completely conflicting versions, the case inevitably turns on the credibility of the parties.[2] Here, the Master found that both parties were unreliable but preferred the evidence of the plaintiff and found that there had been a de facto relationship within the meaning of the FPA.[3]

6.4 Under s 4 of the FPA, to determine whether the parties were in a de facto relationship the court is required to make a value judgment having regard to the following factors:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not a sexual relationship existed;
- the degree of financial dependence or interdependence and any arrangements for financial support between or by the parties;
- the ownership, use and acquisition of property;
- the care and support of children;
- the performance of household duties;
- the degree of mutual commitment and mutual support; and
- the reputation and "public" aspects of the relationship.

1. *Miglietta v Biesiada* [1999] NSWSC 1206.
2. See *Berg v Mullins* [1999] NSWSC 451 and also *Marinis v Jeweller* [2000] NSWSC 135 and *Bar-Mordecai (Estate of Hillston) v Rotman* (NSW, Supreme Court, No 120009/94, 18 June 1998, unreported), both brought under the FPA.
3. *Miglietta v Biesiada* [1999] NSWSC 1206 at para 45-47.

This list of factors is based on an early judgment of Powell J in *Roy v Sturgeon.*[4]

6.5 The list is inclusive and is intended as a guide only. While the court may consider these factors and attach whatever weight to them it considers appropriate, a finding in relation to any of them is not in itself determinative of whether or not a de facto relationship exists.[5] This is because the factors may not be appropriate for all types of relationship. For example, some people in same sex relationships would dispute the importance of the public aspects of the relationship given that, because of homophobia, they may possibly avoid holding themselves out as a couple. The list is a guide only, and therefore the incidence of homophobia should be taken into account when determining whether a same sex de facto relationship exists.

6.6 When dividing property upon breakdown of a relationship, arguably the most important factors are financial dependence and interdependence. Specifically, the court should focus on how the parties shared their property and financial resources, the care and support of children and how the paid and unpaid work was shared between the parties.

**ISSUE 16**

**Are these factors appropriate? Are there any other factors that should be included?**

## Is there a close personal relationship between the parties?

6.7 Under the PRA, a close personal relationship is defined as a relationship "between two adult persons, whether or not related by family, who are living together, one or each of whom provides the

4. *Roy v Sturgeon* (1986) 11 NSWLR 454. Powell J also included procreation of children as a factor to be included in the assessment.
5. PRA s 4(3).

other with domestic support and personal care".[6] The PRA also provides that a close personal relationship does *not* exist where the care and support is provided either for a fee or a reward or on behalf of another person or organisation (including a government agency or charity).[7] The limited scope of the "close personal relationships" category was stated in the Bill's second reading speeches. The then Attorney General stated:

> … it is clear that there is no intention to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way flatmates might.[8]

6.8 The Hon I Cohen confirmed this limitation:

> "Close personal relationship" is not necessarily restricted to people related by family, but they have to be living together, and one or each of them has to provide the other with domestic support and personal care. Thus there are three main criteria to the 'close personal relationship' definition, which is intended mainly, if not exclusively, to cover carers. Examples of those relationships would be a son or daughter caring for an elderly parent. It is not intended to cover flatmates or paid carers.[9]

6.9 There is no checklist of factors to be considered by the court to establish whether a close personal relationship exists. This may mean there is greater scope for people to argue that they come within the definition.[10] However, it is difficult to imagine property disputes arising between people in carer relationships in the same way, and with the same frequency, that they arise between people in de facto relationships. Rather than "breaking up", a carer-type

6. PRA s 5(1)(b).
7. PRA s 5(2).
8. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999 at 229.
9. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 May 1999 at 296.
10. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform* (Report 20, Parliamentary Paper 127, 1999) ("Social Issues Committee Report") at 68.

relationship is more likely to end by the death of one party. The definition of a close personal relationship will be relevant in these situations too, as the same definition is used under family provision legislation.[11]

6.10 The category of close personal relationship has recently been considered by the Supreme Court in a property dispute between two gay men.[12] In this case, it was argued before Master Macready that the parties were in a de facto relationship for a period of time, and after the sexual relationship ended, they continued to live together in a close personal relationship. In determining whether a close personal relationship existed between the two men, the Master examined the two statutory requirements that must be satisfied. In relation to the requirement for the parties to have lived together, it was held that this would be satisfied simply by evidence that the parties shared accommodation;[13] it does not require them to have lived together as a couple.[14] In relation to the second requirement, the court found that there must be evidence of domestic support and personal care.[15] Master Macready held that domestic support includes supplying free accommodation and meals and performing tasks such as shopping and laundry for the other party.[16] He found evidence of this, but not enough evidence of personal care, which he considered entailed more than just "emotional support". It requires a level of care such as "assistance with mobility, personal hygiene and physical comfort".[17]

6.11 Master Macready followed this interpretation in a recent case under the FPA.[18] He again emphasised that the second requirement was "cumulative"; both domestic support and personal care are

11. FPA s 6. For an application of the definition see, for example, *Jurd v Public Trustee* [2001] NSWSC 632 outlined at para 6.11.
12. *Dridi v Fillmore* [2001] NSWSC 319.
13. *Dridi v Fillmore* [2001] NSWSC 319 at para 103.
14. *Dridi v Fillmore* [2001] NSWSC 319 at para 13.
15. *Dridi v Fillmore* [2001] NSWSC 319 at para 13.
16. *Dridi v Fillmore* [2001] NSWSC 319 at para 104.
17. *Dridi v Fillmore* [2001] NSWSC 319 at para 108.
18. *Jurd v Public Trustee* [2001] NSWSC 632.

required.[19] The Master found that the plaintiff had lived with the deceased and provided him with domestic support. The evidence also showed that the deceased was diabetic, very obese and suffered deteriorating health in his last year. The Master inferred from these facts that the deceased would have required personal care and as the plaintiff lived with the deceased, it was likely that the plaintiff in fact supplied the requisite care under the FPA.[20]

6.12 These cases highlight the restrictive nature of the definition of close personal relationship in that it only covers relationships involving a degree of personal care. A preferable approach may be for the PRA to include a more inclusive definition rather than one which automatically excludes otherwise meritorious claims. A high evidentiary burden to prove financial and personal dependency or interdependency could then be imposed to ensure that the claim has merit.

6.13 The Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee") considered the current definition of a close personal relationship in its inquiry into De Facto Relationships Legislation. They found that the provision was too narrow and that a more general definition was required, one that could be applied on a case by case basis.[21] The Social Issues Committee received many submissions, which argued that interdependence should be the defining factor in the legislation,[22] rather than a definition that only includes a specific type of relationship such as carer relationships. The Social Issues Committee recommended that the definition of close personal relationship "be broadened to encompass a wider range of interdependent personal relationships".[23] Any relationships considered inappropriate for the PRA to cover, such as flatmates, could be expressly precluded from its operation.[24]

19. *Jurd v Public Trustee* [2001] NSWSC 632 at para 25.
20. *Jurd v Public Trustee* [2001] NSWSC 632 at para 38.
21. Social Issues Committee Report at 50.
22. Social Issues Committee Report at 52.
23. Social Issues Committee Report at 55 (Recommendation 7).
24. Social Issues Committee Report at 54.

**ISSUE 17**

**What factors should be taken into account when determining whether a close personal relationship exists between the parties?**

## Age requirement

6.14 Both the definitions of a de facto relationship and a close personal relationship require that the relationship exist between two adults.[25] It therefore applies only to persons over the age of 18 years.[26] In her submission, the NSW Commissioner for Children and Young People argued that restricting access to the provisions of the PRA to adults is discriminatory and has no rational basis, especially since people under the age of 18 years may live together.[27] The restriction also raises an anomaly; a person who is 16 or 17 can be married and have access to the provisions of the FLA.[28] The Commissioner further contends that a younger person may have an even greater need for the protection of the PRA, especially if they are in a relationship with an older person and consequently are in a weaker bargaining position.[29]

**ISSUE 18**

**Should the PRA be amended to allow people under the age of 18 years access to its provisions?**

**If so, what should be the new age limit, if any?**

25. PRA s 4, s 5.
26. PRA s 3.
27. NSW Commissioner for Children and Young People, *Submission* at 5, 6.
28. FLA s 78; NSW Commissioner for Children and Young People, *Submission* at 5.
29. NSW Commissioner for Children and Young People, *Submission* at 5.

## Two year cohabitation period

6.15 The date at which the relationship is taken to have begun and the date that it is said to have ceased are very important preliminary facts that must be established to determine whether the court has jurisdiction to make an order for property adjustment or maintenance. It cannot make any order unless it is satisfied that the parties have lived together for at least 2 years.[30] In *Kolacek v Brezina*[31] for example, the parties agreed that the relationship began in about April 1987 but there was considerable dispute about when it ended. The plaintiff contended that it ceased in December 1994 but the defendant submitted that the relationship ended in January 1989 and thus did not meet the duration required under s 17.

6.16 Questions as to when a relationship is taken to have begun and when it is said to have ended raise other important considerations in terms of what contributions the court may take into account when making an order for property adjustment. These issues are discussed below.

### *Should there be a minimum cohabitation period?*

6.17 This was an issue visited by the Commission in 1983, in Report 36. The Commission then considered that it was appropriate to require the parties to have cohabited for a minimum period of time in order to be able to make a claim for maintenance or property adjustment, but there was disagreement about the length of time that ought to be required. Two members believed the minimum period should be two years while another two members believed a three year period should be required.[32]

6.18 There is a view, supported by some community and interest groups, that the legislation should not require a minimum period

30. PRA s 17(1).
31. *Kolacek v Brezina* [1999] NSWSC 578.
32. NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 173.

of cohabitation at all.[33] For example, the Gay and Lesbian Rights Lobby argue that cohabitation should not be required, partly for the reason that many gay and lesbian people choose not to live together because of homophobia in the community.[34] The Social Issues Committee recommended that whilst the cohabitation requirement should remain in the definition of a de facto relationship, it should not be included in the definition of a close personal relationship. As they recommended a broader definition for close personal relationship, based on interdependence, any non-cohabiting de facto couples, same-sex or heterosexual, would be covered by the PRA as a close personal relationship.[35] The Anti-Discrimination Board also suggested that instead of a minimum period of cohabitation the definition of both a de facto and domestic relationship should be based "on a primary relationship of mutual emotional interdependency".[36] Removing the cohabitation requirement would allow maximum flexibility and the court could make an order as the circumstances warrant. Supporters of this view say that since there is no automatic right of adjustment it would be up to the court, having regard to the factors outlined in the PRA, to make an order as it considered just and equitable. Also, unfounded claims can be discouraged by costs orders against the unsuccessful party.

6.19 As noted above, the view that prevailed in 1983 required a minimum period of cohabitation. This would clearly discourage unmeritorious claims. The Commission at the time thought it was inappropriate to create rights and obligations on persons as soon as they enter into a de facto relationship. For example, it considered that a right to rehabilitative maintenance when the parties had lived together a short time and where there were no children was

33. Note also that the cohabitation requirement was dispensed with in the *Significant Personal Relationship Bill 1997* s 5(2)(a)(i) and s 7(1)(b)(iii) and the *De Facto Relationships Amendment Bill 1998* s 3(1).
34. Gay and Lesbians Right Lobby, *The Bride Wore Pink: Legal Recognition of Our Relationships, A Discussion Paper* (February 1993, first edition).
35. Social Issues Committee Report at 50.
36. Anti-Discrimination Board of NSW, *Submission* at 3.

inappropriate.[37] However, it recognised that a disadvantage of requiring a minimum period of cohabitation is that applicants who cannot prove they lived with their partners for the requisite time have no opportunity to have the court consider their contributions. So the Commission proposed that there be no minimum period of cohabitation requirement where there was a child of the relationship; or where the applicant had made substantial contributions; or where the applicant has the care and control of the other partner's child or children.

6.20 Other Australian jurisdictions require varying lengths of cohabitation; some two years[38] and others three.[39] The ACT does not require cohabitation at all in its definition of a domestic relationship.[40]

## Exceptions to the minimum cohabitation requirement

6.21 Under the PRA, parties may apply for property division or a maintenance order even if they have not lived together for two years provided they satisfy one of two exceptions:

(a) the parties have had a child together;[41] or

(b) the applicant:

  (i) has made substantial contributions for which he or she would not be adequately compensated if the order were not made; or

  (ii) has the care and control of a child of the respondent,

and the failure to make the order would result in serious injustice to the applicant.[42]

37. NSWLRC Report 36 at para 9.5.
38. *De Facto Relationships Act 1991* (NT) s 16(1); *De Facto Relationships Act 1999* (Tas) s 13(1); *Property Law Act 1958* (Vic) s 281(1).
39. *De Facto Relationships Act 1996* (SA) s 9(2)(c). See also *Property (Relationships) Act* (NZ) s 2E(1)(b), s 14A.
40. *Domestic Relationships Act 1994* (ACT) s 3.
41. PRA s 17(2)(a). See Chapter 3 at para 3.6-3.9 for a discussion of when the law recognises that parties have had a child together.
42. PRA s 17(2)(b).

### *Substantial contributions exception*

6.22 In determining whether the applicant has made a substantial contribution, the court needs "to be satisfied on a prima facie basis and take a 'broad brush' approach to the applicant's s 20 contributions".[43] Whether the court allows the applicant to proceed depends on whether the court considers that such contributions would otherwise not be adequately compensated and a serious injustice would result.[44]

6.23 In assessing whether the contributions have already been adequately compensated, the court generally looks at whether they have been offset by the other party's contributions.[45] In *Reilly v Gross* it was found that the plaintiff's financial contributions towards renovating the defendant's home and paying for a holiday for them both, and also contributions as homemaker for the defendant and his son, were substantial and far outweighed the defendant's contributions.[46] In *Kolacek v Brezina,*[47] on the other hand, it was held that the plaintiff's financial and homemaker contributions were more than offset by the defendant's contributions, who provided her with rent-free accommodation and a high standard of living.[48] In a recent case, it has been held it would be unrealistic to assess whether substantial contributions had been made in isolation from the nature and incidents of the relationship as a whole.[49]

43. *Street v Bell* (1993) 114 FLR 167 (Renauld J) (Family Court heard under cross vesting legislation).
44. *Street v Bell* (1993) 114 FLR 167 (Renauld J).
45. See for example *Reilly v Gross* (1986) DFC 95-035.
46. See also *Weston v Castle* (NSW, Supreme Court, No 1813/89, 23 August 1989, unreported) where a disparity in contributions was found and an adjustment made.
47. *Kolacek v Brezina* [1999] NSWSC 578.
48. See also *Dorman v Beddowes* (NSW, Supreme Court, No 1314/96, 22 April 1996, unreported).
49. *Stelzer v McDonald* [1999] NSWSC 602 at para 31 (Bergin J). Her Honour found that the plaintiff had made very large contributions to the property and financial resources of the parties as well as homemaker contributions, but so too had the defendant.

6.24 This type of assessment is a very subjective one that tends to produce varying judicial decisions. For example, becoming a joint mortgagor (albeit never being required to make mortgage repayments) was not considered a substantial contribution in the 1993 case of *Street v Bell*[50] but it was in *Dries v Ryan*.[51] The reluctance of appeal courts to overturn decisions based on the exercise of statutory discretion has meant that a clear precedent has not developed. Consequently, it is very difficult for parties to arrive at negotiated resolutions.

### *Serious injustice*

6.25 It is not clear how the additional requirement of "serious injustice" is to be applied to the two exceptions under this section. There are two possibilities for its application. First, the requirement of serious injustice may be merely illustrative. That is, if substantial contributions are made and these are not compensated for, then a serious injustice will always arise and hence an order is needed to rectify this injustice. Alternatively the requirement of serious injustice adds a second threshold that a party must satisfy to fall under the exception. In other words, if there have been substantial contributions made and these have not been compensated for, then a serious injustice may or may not arise. The court is required to make a determination and invoke the exception only if a serious injustice has arisen.

6.26 The Commission believes that the former construction is preferable as the requirement that a serious injustice would result only adds a further burden on the plaintiff and one which again demands a subjective assessment by the court. Hence, the reference to serious injustice is possibly not necessary, at least in so far as it applies to the substantial contributions exception.

50. *Street v Bell* (1993) 114 FLR 167 (Renauld J).
51. *Dries v Ryan* [2000] NSWSC 1163. But note this case arose in the context of commercial litigation.

**ISSUE 19**

**Should the PRA require cohabitation at all?**

**If so, should a minimum period of cohabitation be required? If yes, what should the period be?**

**Should the PRA limit the court's discretion in determining whether there has been a "substantial contribution"? If so, how? Should the requirement of "serious injustice" apply to this exception?**

## Retrospectivity

6.27 The PRA has no retrospective element. In relation to heterosexual cohabiting couples, the PRA only applies to those de facto relationships that were current on the date that it first came into operation, namely 1 July 1985, and end after this date. In relation to persons in domestic relationships, which includes persons in same sex relationships and in close personal relationships, the PRA only applies if those relationships ended after the *Property (Relationships) Legislation Amendment Act 1999* came into operation, that is, 28 June 1999. Parties to relationships that ended before these operative dates have recourse to the common law and equitable principles.[52] The first case to be decided by the Supreme Court under the new amendments, *Dridi v Fillmore,*[53] failed in this regard. The Master found that though there had been a de facto relationship within the meaning of the PRA, as extended in 1999, the relationship ended before 28 June 1999 and the action was therefore unsuccessful.[54]

### *When does a relationship end?*

6.28 In *Dridi v Filmore*, Master Macready traced the law relating to how the court is to determine whether a de facto relationship

52. PRA s 7.
53. *Dridi v Fillmore* [2001] NSWSC 319.
54. *Dridi v Fillmore* [2001] NSWSC 319 at para 109.

has terminated.[55] It is a question of fact and one that cannot be answered merely by determining when the parties were cohabiting. Although the cessation of full-time common residence will be significant in many cases,[56] periods of separation for holidays, business or illness will not affect the continuation of the relationship.[57] However, there is some dispute as to whether one party leaving the common residence for a short while after a fight, in order to think about the relationship, will constitute a termination. In *Hibberson v George*, Mahoney JA drew a distinction between parties who are married with those in a de facto relationship:

> The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to "live together" with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as was suggested in the present case, to enable one party or the other to decide whether it should continue.[58]

6.29 This was a much narrower view than the view of Cohen J, at first instance, who had held that the relationship will continue even if one party moves out for a short while after an argument, so long as he or she manifested an intention to return.[59]

6.30 The reasoning of Mahoney J has been approved by Powell JA in subsequent cases,[60] although in one case he stated that he did not fully reject the notion that a relationship can continue whilst parties separate in order to work through a difficulty.[61] In *Gazzard*

55. *Dridi v Fillmore* [2001] NSWSC 319 at para 19-29.
56. See, for example, *Kolacek v Brezina* [1999] NSWSC 578 at para 63-64.
57. *Howland v Ellis* [1999] NSWSC 1142 at para 38.
58. *Hibberson v George* (1989) 12 Fam LR 725 at 740.
59. *George v Hibberson* (1987) DFC 95-054.
60. *Theodoropoulos v Theodosiou* (1995) 38 NSWLR 424; *Gazzard v Winders* (1998) 23 Fam LR 716.
61. *Lipman v Lipman* (1989) 13 Fam LR 1. However, Powell JA found that the relationship had in fact ended because the de facto husband had required that the de facto wife leave the home and had "installed" another in her place not long after.

*v Winders*, Beazley JA refused to endorse Mahoney JA's comments and held that a small hiccup in a long relationship (in that case, six weeks out of fourteen and a half years) should not be enough to interrupt it.[62] In *Thomson v Badger*,[63] Young J viewed the living-apart periods in the context of the whole relationship. He found that the relationship was a volatile one, punctuated by a number of separations, but the parties got back together after each one. In *Dridi v Fillmore*, Master Macready read down these two cases as applicable only when a behavioural pattern of separation and reconciliation is evidenced.[64] The Master held that "if one party withdraws from the relationship and determines thereafter it is to end, this is an effective end to the relationship."[65]

6.31 In *Howland v Ellis*, the parties became physically separated when the plaintiff was sent to prison. Master McLaughlin stated that the intention of one or both parties that the relationship would continue cannot be the sole consideration when the parties are going to be continually separated for such a lengthy time, distinguishing a prison sentence from a holiday or business commitment.[66] He found that whilst there may have been an intention that the relationship would continue if the plaintiff was granted bail and released from custody pending his trial, at the very least, the relationship must be taken to have ended on the day the plaintiff was sentenced.[67] This finding was overturned on appeal, however, with the court determining that more than physical separation is necessary to end a de facto relationship. The Court of Appeal considered that there was evidence to suggest that the relationship continued beyond the date of the plaintiff's sentencing.[68]

62. *Gazzard v Winders* (1998) 23 Fam LR 716.
63. *Thomson v Badger* (1989) 13 Fam LR 559.
64. *Dridi v Fillmore* [2001] NSWSC 319 at para 28.
65. *Dridi v Fillmore* [2001] NSWSC 319 at para 29.
66. *Howland v Ellis* [1999] NSWSC 1142 at para 38.
67. *Howland v Ellis* [1999] NSWSC 1142 at para 46.
68. *Howland v Ellis* [2001] NSWCA 456.

**ISSUE 20**

**Should the PRA specify in what circumstances a relationship will be taken to have ended?**

**If so, what should these circumstances be?**

## RESIDENCY

6.32 The court has no jurisdiction to hear an application for property adjustment unless the requirements for residency, under s 15(1)(a) and s 15(1)(b), are both met. The first is that one or both of the parties to the application must have been living in NSW at the time the application was made. The second comprises two limbs, offered in the alternative: either the parties must have lived in NSW for a substantial period of their relationship or, the applicant must have made substantial contributions of the kind referred to in s 20.[69]

6.33 The PRA further provides that the parties will satisfy the requirement that they lived in NSW for a "substantial period" if they lived in the State for at least one-third of the duration of their relationship.[70] In the case of *Flett v Brough*, it was held that the failure of the parties to have lived in NSW for one-third of the length of their relationship was not in itself determinative of whether they had lived in NSW for a "substantial period". It was not an essential requirement.[71] Master McLaughlin considered that, due to the lengthy relationship between them, which spanned 21 years, a continuous period of almost three years living in NSW could properly be regarded as substantial.

69. PRA s 15(1)(b)(i) and s 15(1)(b)(ii).
70. PRA s 15(2).
71. *Flett v Brough* (NSW, Supreme Court, No 2638/97, 20 November 1998, unreported). See also *Summers v Swan* (NSW, Supreme Court, No 1895/94, McLaughlin M, 9 May 1997, unreported) and *McKnight v Anderson* (NSW, Supreme Court, No 1482/94, Macready M, 30 May 1997, unreported).

6.34 The reason for the residency requirement appears to be to dissuade a flood of claims from persons in other jurisdictions. Being the first legislation of its kind, it was considered to have been a unique, and for this reason, attractive forum for people living in de facto relationships in other parts of Australia. In its 1983 Report, the Commission did not want to allow parties to invoke the legislation simply by moving to NSW after the breakdown of a relationship.[72]

6.35 Similar residency requirements apply in South Australia, the ACT, the Northern Territory and in Victoria.[73] There is no residency requirement in Queensland and Tasmania. However, there is the argument that because same sex relationships and close personal relationships are not covered in all jurisdictions, NSW may still be an attractive forum. But, unless the provisions for property adjustment in the PRA are reformed, Queensland and the ACT may be more attractive as their respective Acts offer better protection, especially to parties whose contributions are mostly non-financial. Another reason for dropping the residency requirement may be that people are more mobile today; they are more likely to move interstate and to own property in other parts of the country.[74]

6.36 If the residency requirement is omitted, the issues to consider are enforcement of court orders interstate, "forum shopping" and conflict of laws across jurisdictions. If residency is not required, the NSW court may have to make orders with respect to property that is located interstate. For the NSW order to be effective it must be

72. NSWLRC Report 36 at para 9.16.

73. In the latter three jurisdictions, a "substantial period" is not defined. Legislation covering heterosexual and same sex de facto relationships has been introduced into WA Parliament: *Family Court Amendment Bill 2001* (WA). The Bill contains a residency requirement: Pt 3 s 45.

74. The Queensland Law Reform Commission found that the uncertainty in the common law was outweighed by the difficulties of proof, extra delay and costs that are associated with including a residency requirement in the legislation, so it dispensed with the residency requirement in its final report: Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 38.

recognised and enforced by a court in the other State.[75] In principle, Australian courts do recognise the judgments of courts in other jurisdictions.[76] Also, even if the PRA dispenses with the residency requirement and allows parties from all jurisdictions within Australia to apply, the court's jurisdiction could still be challenged under common law principles. At common law, a particular court will not have jurisdiction when it is a "clearly inappropriate forum" for deciding the case at hand.[77] However, there is uncertainty regarding whether the principle applies to the State courts, with some cases suggesting that, in practice, Australia is already one jurisdiction.[78] If it does apply across State courts, the argument could be made that NSW is an inappropriate forum for determining property disputes between couples from a State that has their own de facto relationships legislation.

**ISSUE 21**

**Should the residency requirement be retained in its current form? Is there any need for it?**

**If there is reason to keep it, should it be modified to make it less onerous as in the initial model recommended by the Queensland LRC?**

## Limitation period

6.37 An application under s 20 must be brought within two years of the parties ceasing to live together.[79] However, the court can allow a claim to be brought out of time where it considers that the applicant would suffer greater hardship if it did not allow the claim

75. P Nygh, *Conflict of Laws in Australia* (6th ed, Butterworths, Sydney, 1995) at 6.
76. P Nygh, *Conflict of Laws in Australia* (6th ed, Butterworths, Sydney, 1995) at 6.
77. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
78. See for example *Schmidt v Won and Ors* [1998] 3 VR 435.
79. PRA s 18(1).

than would be suffered by the respondent if leave were granted.[80] However, where maintenance is sought, there is no provision for an extension to be granted; an application must be brought within two years. This means that a prompt application and hearing for maintenance is vital because absolute time limits run from the moment of separation under both s 18 and s 30.[81]

6.38 There are many reasons why persons might not be able to bring an application within the two year time frame. One of the partners might not consider that the relationship has ceased on a particular day, even if the other has moved out of the home, or it may be that people are not aware that they have statutory rights under the PRA. Alternatively, it could be because their legal representative has delayed filing an application.

6.39 The court has taken a somewhat strict position regarding when it will allow an application to be brought out of time, such that few applications are granted.[82] In *Parker v McNair,*[83] the court held that although hardship was a prerequisite to granting leave it would not necessarily suffice. It was found that the use of the word "may" in s 18(2) gives the court a discretion to consider other matters of justice, such as whether there is an adequate explanation for the delay. In this case, the adequate explanation was that part of the delay was the fault of the plaintiff's solicitor. Other explanations found to be adequate by the court include where the applicant had strongly hoped for a reconciliation after the parties' initial separation. She did not know of her rights under the PRA until well after final separation.[84] In another case, the court found that the defendant's ill-health and poor financial circumstances made it not unreasonable for him to wait to make a

80. PRA s 18(2).
81. See Chapter 8.
82. O Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation", paper prepared for NSW Law Reform Commission seminar (Sydney, 7 July 2000) available via «www.lawlink.nsw.gov.au/lrc.nsf/pages/seminar01.04».
83. *Parker v McNair* [1990] DFC 95-087.
84. *McKone v Maretta* [1999] NSWSC 438.

claim under the PRA until the plaintiff had instituted her proceedings in equity.[85]

6.40 In *Trelore v Romeo*, however, no such adequate explanation was found and the court was firm in stating that leave would not be granted:

> … where the only hardship the defendant would suffer was in actually having the case heard and where the plaintiff might otherwise be deprived of the fruits of the action. Parker's case does not say that at all. It says that whilst hardship must be evaluated the case for an extension is to be considered on all the circumstances as to whether it is just in the court's discretion to extend time.[86]

6.41 Justice Bryson in *Beavan v Fallshaw*[87] also refused to grant leave. He stated that, although an explanation is relevant, of primary concern is "whether the case put forward is an appropriate case for the plaintiff to apply for an order". It was found that the plaintiff's claim was neither very large nor meritorious, which was why she had delayed making an application. Leave was therefore refused despite his finding that the "hardship" consideration was in the plaintiff's favour.

6.42 In a Victorian case, an application was brought by the de facto wife for leave to bring an application under Part IX of the *Property Law Act* (Vic) (and under trust laws) four years after the parties ceased living in a de facto relationship. The parties had lived together for at least 14 years, had had two children together and at the end of the relationship, by a separation agreement, the de facto wife agreed to accept $40,000 in full and final settlement of any claim against the de facto husband. At the time of the application, she was 48, had custody of the children, lived in rented premises, had assets of about $17,000 and her $100 per week part-time salary was supplemented by social security. He, on the other hand, was 55, retired and lived on the rental income of his

85. *Meyer v Melocco* [1991] DFC 95-111.
86. *Trelore v Romeo* (1991) DFC 95-108 (Young J).
87. *Beavan v Fallshaw* (1992) 15 Fam LR 686.

investment properties. His total assets were in the order of $1 million and he paid about $2 per week in child support.[88]

6.43 Taking into account all the relevant matters, Gillard J was satisfied that greater hardship would be caused to the de facto wife than to the defendant de facto husband and granted leave. Among the relevant matters, Gillard J considered the question of delay and the requirement by some judges for an adequate explanation to be given in order to exercise the discretion in the applicant's favour.[89] He held that the primary concern when exercising this discretion is to do justice between the parties. In particular, the concern was to see where the greater hardship would fall. His Honour said:

> I can not see how an explanation for a delay, an inadequate explanation or no explanation for delay could in justice ever preclude the granting of an order where the greater hardship falls on the plaintiff if leave were not granted.
>
> I think the time has arrived for court to consign this outdated requirement to adequately explain a delay to the judicial dustbin … The failure to adequately explain delay, in my opinion, could never be a basis for refusing leave where there were factors which justified leave.[90]

6.44 There are similar provisions to s 18 in other jurisdictions. In Queensland, applications must also be brought within two years of the end of the relationship and leave must be sought if an application is to be brought out of time.[91] But under the Queensland Act, the court need only consider whether hardship would be caused to the applicant if leave were not granted.[92]

88. *Harris v Harris* (1997) DFC 95-192.
89. See for example, *Danny Kidron and Andrew Spaile Architects Pty Ltd v Garrett* (1994) 35 NSWLR 572 (Meagher JA). Cf the judgment of Priestley JA in the same case who noted that "delay is small and appeal is not hopeless and no relevant prejudice will be caused by an extension of time it seems to me that a due exercise of discretion requires the granting of an extension of time" at 578.
90. *Harris v Harris* (1997) DFC 95-192 at 77,675.
91. *Property Law Act* 1974 (Qld) s 288(1).
92. *Property Law Act* 1974 (Qld) s 288(2).

It need not consider any prejudice to the defendant nor is there a statutory requirement for the delay to be explained, as is the case under the FLA s 44(3).[93]

6.45 The Commission's tentative view is that the Queensland model should be followed. The sole requirement when considering applications for claims to be brought outside the limitation period should be hardship. Whether there is an adequate explanation or whether the claim is meritorious are subsidiary factors, and perhaps should not be relevant at all.

**ISSUE 22**

**Should an adequate explanation be required before a court will allow an applicant to bring a claim out of time?**

**Should hardship be the only relevant factor?**

## CONTRIBUTIONS MADE BEFORE OR AFTER THE RELATIONSHIP

6.46 The duration of a domestic relationship also affects the contributions upon which an applicant can rely in her or his claim.

### Can contributions that pre-date the PRA be taken into account?

6.47 Section 16 of the PRA says that in determining whether to make or refuse an order the court may consider facts and circumstances that took place before the commencement of the PRA. This indicates that for relationships which existed before the PRA came into operation, the court can consider property and

93. *Whitford v Whitford* (1979) 24 ALR 424.

contributions towards the acquisition or maintenance of that property which pre-date the PRA.[94]

## Can contributions that were made prior to the domestic relationship be taken into account?

6.48 There are two lines of judicial authority on this issue. One holds that contributions made before the commencement of the de facto relationship cannot be taken into account; the other holds that they can.

6.49 Justice Powell is one of the proponents of the first view. In *Roy v Sturgeon,*[95] he held that pre-relationship contributions could not be considered in a property adjustment claim under s 20. He declined to follow the Family Court approach, which does allow contributions made before marriage to be taken into account.[96] He held that the different wording of the PRA and the policy considerations which underpin it indicate that "the relationship between de facto partners was not to be elevated to one equivalent in status to that of parties to a marriage."[97] Justice Powell has

94. See also *D v McA* (1986) 11 Fam LR 214 and *Roy v Sturgeon* (1986) 11 NSWLR 454. Although it is not explicitly stated that matters prior to the Act are able to be considered, in both cases the court begins assessing contributions and property from April 1983 and November 1981 respectively, both of which pre-date the original *De Facto Relationships Act 1984* (NSW).
95. *Roy v Sturgeon* (1986) 11 NSWLR 454.
96. *In the Marriage of Olliver* (1978) 32 FLR 129. See also the more recent case of *G and G* (2000) 26 Fam LR 592 at para 14 where Justice Nicholson held that the court was not confined to looking at contributions only during the period of marriage but could consider those made before and after. The case of *W v W* (1997) 136 FLR 430 extended the FLA's application even further, holding that contributions to the welfare of the family by caring for a child of the parties could be considered even though the parties were not even cohabiting at the time: see D Sandor, "Accounting for Care Contributions before Cohabitation in Property Settlements" (1997) 11 *Australian Journal of Family Law* 223.
97. *Roy v Sturgeon* (1986) 11 NSWLR 454 at 464.

maintained this view in recent cases.[98] Master Macready also felt bound to accept this view when deciding the case of *Del Gallo v Frederikson*.[99] Although his decision was upheld,[100] the Court of Appeal actually left the issue of pre-relationship contributions undecided. Had the issue been resolved, there is reason to believe that the opposite view may have been taken, with Justice Rolfe speculating that:

> … it is arguable that, upon a proper construction of the *De Facto Relationships Act 1984*, pre-relationship contributions made in contemplation of and for the purpose of the relationship which, ex hypothesi, came into existence, should be taken into account in making the adjustment which the Act permits.[101]

6.50 The alternative view, that contributions made prior to the relationship are relevant, was adopted in *Griffiths v Brodigan*.[102] In this case, heard by the Family Court under cross-vesting legislation, Justice Chisholm held that the PRA did not expressly prohibit this expanded view. Furthermore, he said that it was impossible to make a "just and equitable" order in this case without regard to the prior and subsequent contributions of the parties. This approach was followed by Justice Bergin in *Stelzer v McDonald*[103] where she concluded that it would be inappropriate to ignore prior contributions when regard was had to the nature of the relationship. Her Honour's decision was upheld on appeal, although Justice Priestley cautioned that the pre-relationship contributions must be closely connected with those made during the actual de facto relationship and that the court can give them

98. *Fotheringham v Fotheringham* (NSW, Supreme Court, No 4161/94, 19 November 1996, unreported). See also *Jones v Grech* (2001) 27 Fam LR 711.
99. *Del Gallo v Frederiksen* [1999] NSWSC 737.
100. *Del Gallo v Frederiksen* (2000) 27 Fam LR 162.
101. *Del Gallo v Frederiksen* (2000) 27 Fam LR 162 at para 71. See also Justice Heydon at para 67.
102. *Griffiths v Brodigan* (1995) 129 FLR 102, heard in the Family Court under the now defunct cross-vesting scheme.
103. *Stelzer v McDonald* [1999] NSWSC 602.

"some weight, but not fundamental weight".[104] A similar finding was made in *Campbell v Campbell,*[105] where it was held that the limited view could lead to injustice in certain cases, for example, where one party alone buys a house which both parties are going to move into. In the recent appeal decision in *Jones v Grech,* the majority held that the court may have regard to contributions made both before the relationship commenced and after it has ended.[106]

6.51 The Family Court has taken the broader approach with respect to contributions made prior to marriage. In the recent case of *G and G*,[107] Justice Nicholson held that there was a long line of authority supporting the proposition that contributions to the welfare of the family made prior to the marriage can be taken into account.[108] The judge at first instance stated that:

> … the Full Court has not limited the phase the "welfare of the family" to when the family is an intact family. By analogy therefore, it follows that contributions made by one party to the welfare of the other party including contributions in the capacity of homemaker should not be limited to cohabitation or an "intact" family situation. However the rendering of such contributions, the circumstances of the parties, and the weight to be accorded to those contributions must be a factual matter to be determined in each case.[109]

6.52 Justice Nicholson cited these comments with approval, holding that it is part of the trial judge's discretion as to how much weight is given to pre-marriage contributions and in this case, her

104. *McDonald v Stelzer* (2000) 27 Fam LR 304 at para 39, approved in *Jones v Grech* (2001) 27 Fam LR 711 at para 25 (Davies J).
105. *Campbell v Campbell* (NSW, Court of Appeal, No 40123/95, 16 April 1997, unreported).
106. *Jones v Grech* (2001) 27 Fam LR 711 at para 82 (Ipp JA). See also Davies JA at para 24.
107. *G and G* (2000) 26 Fam LR 592.
108. The cases he cited as authority were *Kowalski v Kowalski* (1992) 109 FLR 193; *W v W* (1997) 136 FLR 430 and *Nemeth and Nemeth* (1987) FLC 91-844.
109. *G and G* (2000) 26 Fam LR 592 at para 13.

discretion had not miscarried. He also agreed that a child of the relationship need not exist prior to the marriage in order for the parties to be able to make contributions to the "family". He stated:

> It seems to me to be quite clear that the trigger to the Court's jurisdiction is the fact of the marriage and the Court is then not confined to the actual period of the marriage in taking account of contributions. It can look to the situation both before and after the marriage.[110]

**ISSUE 23**

**Should the court be able to consider contributions made prior to the domestic relationship when making orders for property adjustment?**

## Can contributions that were made in earlier periods of cohabitation be taken into account?

6.53 Related to the issue of whether the court can take into account contributions made before the relationship began is the issue of how to deal with a break, or series of breaks, in the relationship. First, what sort of a break in the relationship will or should constitute the end of that relationship?[111] Second, should the court be able to consider only those contributions made during the most recent period of cohabitation, or can it look to contributions made during the entire "on-again, off-again" relationship? As with the issue of pre-relationship contributions, there are two strands of judicial thought.

6.54 The narrower view is that a separation period between the parties will constitute the end of that de facto relationship and any eventual reconciliation between them will be treated as the commencement of a new discrete de facto relationship. This has significant ramifications on any claim for property division under

110. *G and G* (2000) 26 Fam LR 592 at para 14.
111. See para 6.28-6.31.

the PRA. By treating the relationship as a series of discrete de facto relationships, parties may have difficulty first, in establishing that they cohabited for the relevant minimum time for each of the relevant periods, and secondly, in meeting the limitation period for bringing the claim for each relevant period.[112] It is highly probable that, unless the court allows the applicant to bring a claim out of time, only the latest period of cohabitation will be considered relevant. Significantly, this means that only contributions made during that period will be taken into account. Contributions made earlier may be completely disregarded.

6.55 The broader view is that despite any breaks in the relationship, the court should consider the aggregate of the time that the parties were together in order to reach a "just and equitable" order.[113] A very recent case which cast the community spotlight on the rights of de facto partners on separation was the highly publicised case of *Grech v Jones.*[114] The parties had been in a relationship spanning some 32 years, although they had not always cohabited during that time. They had separated for various periods and then reconciled, leading to some confusion about the exact periods in which they were living together. At first instance, the court awarded Ms Jones a mere 16 percent of the house the parties shared because Mr Grech's financial contributions towards the acquisition of the house were held to be much greater than her homemaker contributions. Notoriously, the Master did not even

112. See, for example, Justice Powell in *Lipman v Lipman* (1989) 13 Fam LR 1 and *Fotheringham v Fotheringham* (NSW, Supreme Court, No 4161/94, 19 November 1996, unreported): O Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation", paper prepared for NSW Law Reform Commission seminar (Sydney, 7 July 2000) at para 2.7.
113. See, for example, *Griffiths v Brodigan* (1995) 129 FLR 102, *Campbell v Campbell* (NSW, Court of Appeal, No 40123/95, 16 April 1997, unreported) and *Stelzer v McDonald* [1999] NSWSC 602: O Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation", paper prepared for NSW Law Reform Commission seminar (Sydney, 7 July 2000) at para 2.7.
114. *Grech v Jones* [2000] NSWSC 61 (McLaughlin). Decision overturned on appeal: *Jones v Grech* (2001) 27 Fam LR 711.

begin his adjustment process from the starting point of the parties' legal title. The property was in both of their names as joint tenants and the Master was criticised on appeal for not commencing the adjustment from the standpoint that Ms Jones was entitled to a half-share.[115]

6.56 On appeal, the decision was overturned. The majority adopted the broader view and considered the aggregate of the time that the parties cohabited.[116] Justice Davies treated the issue as part of the wider one of pre-relationship contributions, concluding that:

> … the application of s 20 of the PRA, including examination of the factors specified in s 20(1)(a) and (b), required the Master to look at events which occurred prior to the commencement of the last period of the de facto relationship. The actions of the parties must be placed in context and given weight and relevance according to the incidents of their relationship over time, including during any prior time when a relationship existed between them.[117]

6.57 Justice Ipp emphasised the remedial purpose of the PRA. He said that it was intended to remedy injustice and to do this the court needs to assess the contributions made by both parties throughout the whole period of the relationship, whether interrupted or continuous.[118]

**ISSUE 24**

**Should contributions made during the earlier periods of the relationship be considered when making a property adjustment order upon cessation of the last period of cohabitation?**

115. *Jones v Grech* (2001) 27 Fam LR 711 at para 30 (Davies JA) and at para 91 (Ipp JA).
116. Ipp JA and Davies JA; Justice Powell dissented.
117. *Jones v Grech* (2001) 27 Fam LR 711 at para 24.
118. *Jones v Grech* (2001) 27 Fam LR 711 at para 76.

## WHAT PROPERTY IS TAKEN INTO ACCOUNT UNDER SECTION 20?

6.58 Generally, property settlements or orders under the PRA will consider what is often described as "basic" or "domestic" property, namely the house, car, furniture and bank accounts.[119] There are, however, also non-domestic assets to consider, such as businesses and farms.

6.59 Section 3 of the PRA contains a definition of property which includes real and personal property, including any present, future or contingent estate or interest in the property, and also any cause of action for damages (including damages for personal injury), and any other chose in action.[120] Only what is defined as property can be made part of an order under the PRA.[121] Financial resources may also be considered, but only in the context of whether one or both parties has contributed to a particular financial resource.[122] Section 3 of the PRA defines "financial resources" as superannuation entitlements, interests in trusts, property over which one party has control and any other valuable benefit. As they are not property they cannot be divided. However, the court can take them into account when adjusting the parties' interests in available property.[123]

### Windfalls

6.60 A major issue that arises in this area is how windfalls, such as lottery wins and inheritances, gained by one party either during or after the relationship are to be treated.

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119. These definitions are used in G Sheehan and J Hughes, "What is a fair settlement? The division of matrimonial property in Australia" (2000) 55 *Family Matters* 28 at 31.
120. Other choses in action include any claims a party may have to recover a sum of money, for example insurance claims.
121. PRA s 20(1).
122. PRA s 20(1)(a).
123. See Chapter 7.

### *Lottery wins*

6.61 In *Fowler v Zoka,*[124] the court held that the ordinary rule is to assess the assets of both parties at the date of the hearing rather than the date of separation. One exception they gave was that found in *Mackie v Mackie*,[125] where the court used the separation date due to the "extraordinary factor" of one party winning the lottery after separation. The lottery win was considered as the property of that party only and not available for the adjustment. A similar principle was accepted in *Wallace v Stanford* where a hypothetical example of a lottery win was given:

> Assume that a woman has, by a lottery win, acquired $1 million the day before or the day after separation from a de facto relationship: what, if any, account is to be taken of that fact? There is, in such a case, no contribution to that sum by the other party to the relationship. (I put aside special cases, eg, joint ownership of the money used to buy the lottery ticket or joint ownership of the ticket). In my opinion, the fact that she has such moneys is not as such, a ground for making an order which otherwise the Court would not have made. The winnings are a windfall which has no relationship to the exercise of the Court's discretion.[126]

6.62 However, in *Theodoropoulos v Theodosiou,*[127] Justice Priestley said that how a lottery win is treated will depend on the facts of the case. He gave an example of a long de facto relationship where feelings of mutual interdependence develop and each party makes sizeable contributions but they end up with a small property pool upon separation. He seems to suggest that if one party was to win the lottery after separation the other party could have a claim upon it to compensate for their contributions. In these cases the court must be able to look at the property facts as they exist at the time the court is considering making the order and not at separation. Further, as lottery wins are seen as the property of the winning partner only, wins that are received during the

124. *Fowler v Zoka* [2000] NSWSC 1117. See also *Parker v Parker* (1993) DFC 95-139.
125. *Mackie v Mackie* (1981) FLC 91-069.
126. *Wallace v Stanford* (1995) 37 NSWLR 1 at 15.
127. *Theodoropoulos v Theodosiou* (1995) 38 NSWLR 424.

relationship and put towards the parties' property and financial resources will most likely be treated as a contribution by the winning partner only.

6.63 These cases can be compared with how the Family Court has dealt with lottery wins in the context of marriage and divorce. The leading case here is *In the Marriage of Zyk*,[128] where the court held that, unless it was an unusual case, the court will assume that the ticket was purchased from joint funds, whether both parties were working outside the home or only one was earning money. In other words, a lottery win will usually be treated as a contribution to the relationship by both parties. An unusual case would be "where the parties have so conducted their affairs and/or expressed their intentions that this would not be the appropriate conclusion".[129] An example of an unusual case was found in the case of *Brease and Brease*.[130] In that case the ticket was brought prior to the marriage and although at that stage the parties were already in a "quasi-de facto relationship", there was yet to be a pooling of their funds.

6.64 The Family Court's rationale in *Zyk* stands in direct contrast with Justice Mahoney's statements in *Wallace v Stanford,* quoted above. He states that the general rule under the PRA is that lottery windfalls are not to be included in the property adjustment. An exception is the "special case" of a ticket that is jointly owned or was purchased by joint funds. Unlike the case with married couples where joint ownership is assumed, it seems de facto couples must prove a direct financial link to the ticket.

6.65 Another area where the treatment of lottery wins in marriage cases differs is with respect to the s 75(2) factors under the FLA, for which there is presently no equivalent in the PRA.[131] In *Farmer and Bramley*,[132] 15% of the husband's post-separation lottery win

128. *In the Marriage of Zyk* (1995) 128 FLR 28.
129. *In the Marriage of Zyk* (1995) 128 FLR 28 (Nicholson CJ) and at 40 (Fogarty and Baker JJ).
130. *Brease and Brease* (1997) 138 FLR 404.
131. Similar provisions are recommended for the PRA, see Chapter 5.
132. *Farmer and Bramley* (2000) 27 Fam LR 316.

was transferred to the wife, due in part to factors under s 75(2). The small asset pool at separation was also a consideration. It was held that the property available was not large enough to compensate the wife for her contributions considering, as the trial judge stated, life "was not a bed of roses" for Mrs Bramley. A similar adjustment was made in *Bradley v Weber* where 20% of the husband's lottery win was transferred to the wife largely due to the fact that she was caring for young children.[133]

## Inheritances

6.66 Another common windfall is an inheritance received by one party. A leading case on this issue is *Wallace v Stanford*, where the majority held that although the inheritance was a windfall, the parties did have a relationship to the inherited land. For several years preceding the inheritance the parties had lived on the land and made contributions to its development and maintenance. However, the majority held that the contributions made by the party who had inherited the land outweighed those made by the other.[134] It was found he had built the house and worked the land, which were considered substantial contributions. Whereas, although she tended the poddy calves and did other work around the farm as well as all of the housework, her contributions were considered to have been compensated by being able to live on the land rent-free. In their decision, the majority read s 20 narrowly, holding that the only relevant considerations in a claim for property adjustment are contributions.[135] They held that if the adjustment cannot be justified by evidence of the parties' contributions, the court cannot otherwise make the adjustment under the broad justification that it was "just and equitable" to do so. Justice Handley, in dissent, disagreed and took the broader approach. He held that the inherited land should be made part of the property adjustment, otherwise the order would not be "just and equitable".

133. *Bradley v Weber* [1998] FamCA 90, where the application of s 75(2)(c) was considered.
134. Mahoney and Sheller JJA. Handley JA dissenting.
135. See Chapter 5 at para 5.14-5.39 for discussion about various approaches to s 20.

6.67 In most cases regarding inheritances, the court has classified the windfall as a contribution by the party who inherited it only.[136] Usually the inheritance, especially if it is received towards the end or after the relationship has ceased, is classified as having no connection to the parties' relationship and hence the other party is considered not to have contributed to the property or money inherited. The majority view in *Wallace v Stanford* is adopted, namely that there must be a link between the contributions of the other party and the inheritance for it to be included in the adjustment. However, it may be possible to apply Justice Priestley's statements in *Theodoropoulos v Theodosiou* with respect to lottery wins to inheritances also.[137] When the rest of the property pool is relatively small and the other party's contributions will not be adequately compensated unless the inheritance is included in the adjustment, then an argument could be made that it should be included.

6.68 In comparison, the Family Court case of *In the Marriage of Bonnici* held that whether inheritances will be dealt with as part of the property adjustment will depend on the circumstances of each case. It will depend, for example, on the funds available and whether a just and equitable settlement can be achieved without recourse to the inheritance. If a just result can otherwise be arrived at, a recently acquired inheritance will usually be treated as the entitlement of the receiving party only. When an inheritance is received late in the relationship, the other party will generally not be considered to have contributed to it except in unusual circumstances where, for example, they helped to care for the deceased.[138] This was the case *In the Marriage of Heath*[139] where Justice Nygh had regard to the wife's care for her husband's parents which was seen as a contribution towards the bequest he received from them.

136. *Keene v Harkness* (1997) DFC 95-179; *Webber v Webber* [1999] NSWSC 1178.
137. See para 6.62.
138. *In the Marriage of Bonnici* (1991) 105 FLR 102 (Nicholson CJ).
139. *In the Marriage of Heath; Westpac Banking Corporation Intervener* (1983) FLC 91-362 at 78,430 (Nygh J).

## Gambling wins

6.69 A recent case which dealt with windfalls in a de facto relationship was *McGrath v Ter Hedde*.[140] The first issue was the defendant's claim that through gambling on horses he had won $277,742, of which he kept records. Conversely, he had kept no records of his losses, which he "merely estimated" at $100,000. Due to the vague and incomplete nature of his records the court did not accept these as contributions by the defendant. The court did, however, regard evidence of trifecta winnings totalling $31,550 (which the plaintiff corroborated) as a contribution by the defendant to the relationship. In the case of *Rigg v Kersh*[141] the court found that the proceeds from a winning trifecta ticket was a contribution by both parties. Although it was purchased in the plaintiff's name alone, the ticket was purchased from joint funds and hence it was held that the parties were jointly entitled to the win. Conversely, gambling losses that result in a dissipation of the parties' assets have been taken into account as "negative" contributions.[142]

## Loans

6.70 *McGrath v Ter Hedde* also dealt with the issue of loans from the defendant's parents which were put towards property acquired by the parties that was later sold for profit. It was held that the loans were "thus a substantial contribution on the part of the defendant".[143]

## Gifts

6.71 Gifts are treated (in a similar way to loans) as a contribution by the party who received the gift.[144] In *Fowler v Zoka* the

140. *McGrath v Ter Hedde* [1999] NSWSC 1192.
141. *Rigg v Kersh* (1992) DFC 95-116.
142. See, for example, *Stroud v Simpson-Phillips* [1999] NSWSC 994.
143. *McGrath v Ter Hedde* [1999] NSWSC 1192 at para 30 (Macready M).
144. See, for example, *Trahana v Foley* [2000] NSWSC 1086 at para 21 and 28 where contributions to the purchase price of a property, funded by the defendant's mother, were credited to the defendant alone.

defendant's parents' company funded a substantial part of the purchase price of the parties' property. It was found that the gift "clearly was intended on the evidence to be a benefit for the defendant and not for the parties jointly",[145] hence she alone was credited with the contribution. By analogy, it could be argued that if a donor intends that both parties should benefit from the gift, then it should be seen as a contribution by both of them.

6.72 The leading Family Court decision on this issue is *In the Marriage of Gosper*. In that case it was held that the intention of the donor is "the critical issue", but that evidence of this intention is often conflicting, and hence the strongest indicator of whether both or only one party was the intended recipient is whether the title of the property was transferred to the name of both or only one party.[146] For smaller gifts, the court approved of the "rule of thumb", which although cannot replace actual evidence, presumes that if the gift was from one party's family or friends it was intended for that party alone.[147] The law in this area has been extended to non-financial gifts, such as free babysitting by one party's parent.[148] It has also been applied to gifts of property received by one party before the marriage. In these cases, the property is seen as a contribution by the recipient party only, especially if that party works on the property or otherwise increases its value before it is brought into the relationship.[149] However, as the marriage progresses, the weight of that contribution diminishes through it being offset by contributions of the other party.[150]

145. *Fowler v Zoka* [2000] NSWSC 1117 at para 18.
146. *In the Marriage of Gosper* (1987) 90 FLR 1.
147. *In the Marriage of Gosper* (1987) 90 FLR 1 citing with approval *Samson v Samson* (1960) 1 All ER 653 at 656.
148. *Aleksovski v Aleksovski* (1996) 135 FLR 131.
149. *Lee Steere v Lee Steere* (1985) FLC 91-626 at 80,078.
150. *Lee Steere v Lee Steere* (1985) FLC 91-626 at 80,078.

## Shares in businesses

6.73 As stated above, the court can only make orders adjusting the interests of the parties in available property, not their interests in any financial resources. Shares in family businesses are financial resources. In the case of *King v Kemp*,[151] the Family Court stated that, in order to decide what order was just and equitable, the court should consider the contributions of the parties not only to their property but also to their financial resources. They upheld the trial judge's finding that a partner's one-quarter share in the family business, as well as his expectancy to inherit the other three-quarters, was considered a valuable financial resource. However, they also stated that the court is only to have regard to it as a financial resource and to ensure that the orders adequately reflect whatever contribution the applicant made to it.

6.74 In the ACT case of *Ferris v Winslade*, it was held that part of the plaintiff's financial resources which ought to be taken into account by the court included her expected inheritance from her deceased father's estate. However, it was also held that the worth of this resource had to be discounted due to the possibility of other claims on the estate and delays in its administration.[152] It should be noted that, as it currently stands, the PRA does not allow the court to consider the financial resources of the parties unless it is in the context of assessing contributions towards them. Unlike in the two cases above, the court cannot make an adjustment because of a disparity in the parties' future financial positions, hence financial resources cannot be considered in this context under the PRA.

## How is property defined in other jurisdictions?

6.75 Section 20 of the *De Facto Relationships Act 1996* (SA) defines property as:

- a prospective entitlement or benefit under a superannuation scheme;

151. *King v Kemp* (1996) DFC 95-171.
152. *Ferris v Winslade* (1998) 22 Fam LR 725.

- property held under a discretionary trust that could, under the terms of the trust, be vested in the person or applied for the person's benefit;
- property over which the person has a direct or indirect power of disposition and which may be used or applied for the person's benefit;
- any other valuable benefit.

6.76 The most notable feature of this definition is the inclusion of superannuation as a form of property, as opposed to a financial resource like in NSW.[153] The FLA was also recently amended to make superannuation property for the purpose of property adjustment proceedings.[154] With the exception of superannuation, the statutory definition of property is similar across all jurisdictions.

## DISCLOSURE REQUIREMENTS

6.77 Neither the PRA nor the Regulations contain a provision that requires parties to make a full and frank disclosure of their assets and liabilities. However, a reading of the case law suggests that it is required.

6.78 In *Dowrick v Sissons*,[155] the major issue for the court was valuing the shares held by the defendant in a consultancy company. The defendant's valuation of the 100 shares he held came in at $1 per share. The plaintiff's experts valued them, the first time, at over $400,000. After certain documents had been subpoenaed, it was revealed that accountants for the defendant had not entered any of the work in progress on the company's balance sheets even though they had entered expenses relating to that work in progress. It was further revealed, after documents were subpoenaed from the defendant's bank, that the defendant

153. PRA s 3.
154. See Chapter 7.
155. *Dowrick v Sissons* (1996) 20 Fam LR 466.

had not disclosed management accounts. Master Macready quoted a passage from the English case of *Livesey v Jenkins*:

> … unless a court is provided with correct, complete and up-to-date information on the matters to which, under s 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection…It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice.[156]

6.79 In the case at hand, he found that the defendant had failed to provide the requisite disclosure in his submission that the shares were only worth $100. Instead, with the aid of evidence lead by the plaintiff, the Master applied a conservative estimate of $300,000.

6.80 *Dowrick v Sissons* has been cited with approval in *Parks v Thompson*, where Master McLaughlin commented:

> It cannot be emphasised too strongly that in proceedings under the *De Facto Relationships Act*, each party bears a responsibility to place before the Court full and complete information concerning the financial and material circumstances, including the assets and liabilities, of that party at the commencement of the relationship, at the termination of the relationship and at the time of the trial. In the instant case the defendant appears deliberately to have chosen not to fulfil his obligations in this regard … He cannot be heard to complain, therefore, if any order made in favour of the plaintiff is more generous than might have been the case if the defendant had chosen to place before the Court accurate and complete information concerning his financial and

156. *Livesey v Jenkins* [1985] 1 AC 424 at 437.

> material circumstances, his assets and liabilities, at each of the times to which I have referred.[157]

6.81 Order 17 rule 3 of the *Family Law Rules* (Cth) requires that each party to the proceedings provide full and frank disclosure of their assets and liabilities via a financial statement. There is a long line of authority that confirms this duty of disclosure for proceedings under the FLA.[158] As in the cases under the PRA, if the court finds that a party is concealing assets, it can estimate the actual amount the party has and accordingly make an order that goes beyond the identified property.[159] The Family Court also requires full and frank disclosure with respect to consent orders. In *Suiker v Suiker*[160] the court found that the husband should have disclosed to the wife that he was contemplating retirement, specifically what benefits he would be entitled to if he did retire. Otherwise, there could not be *informed* consent to the order.

6.82 Similarly, there is also an obligation to make full and frank disclosure under the FPA:

> It cannot be emphasised too strongly that an applicant seeking an order for provision under the *Family Provision Act* has an obligation to place before the court information as full and as frank as possible concerning the applicant's financial and material circumstances (which include the financial and material circumstances of the applicant's spouse or de facto partner).[161]

6.83 As stated above, a party's failure to make full and frank disclosure can result in the court making an estimate of the extent of his or her assets and making an order on this basis. However,

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157. *Parks v Thompson* (NSW, Supreme Court, No 4298/94, McLaughlin M, 6 March 1997, unreported).
158. See, for example, *Weir and Weir* (1992) 110 FLR 403; *Stein and Stein* (1986) FLC 91-779; *Giunti and Giunti* (1986) FLC 91-759.
159. *Weir and Weir* (1992) 110 FLR 403.
160. *Suiker v Suiker* (1993) 117 FLR 254.
161. *Fraser v Venables* (NSW, Supreme Court, No 1847/95, 30 September 1998, unreported), cited by Berecry AM in *Foster v Foster* (1999) NSWSC 1016. See also the similar statements in *Killiner v Freeman* [2000] NSWSC 263 at para 13.

the non-disclosure of assets may not be discovered until after an order has been made according to the incomplete property pool. One of the grounds for varying or setting aside an order under the FLA is where "there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance".[162] Although a similar provision exists in the PRA it does not expressly include "failure to disclose relevant information" as an instance of suppression of evidence. Although there are Family Court cases which suggest non-disclosure of assets already constitutes a miscarriage of justice as "any other circumstance",[163] it is proposed that non-disclosure be expressly added to protect a party who has obtained an adjustment that is less than it would have been had the court had the full range of material before it. This ground would also apply to consent orders to provide relief for parties whose consent was not fully informed.

**ISSUE 25**

**Should the duty of full and frank disclosure be expressly included in the PRA?**

**Should parties be required to submit a financial statement stating their assets and liabilities?**

**Should non-disclosure of assets be expressly included as a ground for setting aside or varying an order?**

## CONSENT ORDERS

6.84 Consent orders made under the FLA must be approved by the Family Court to ensure that they are just and equitable under

162. FLA s 79A(1)(a).
163. *Pelerman and Pelerman* (2000) 26 Fam LR 505; *In the Marriage of Morrison* (1994) 18 Fam LR 519; *Suiker v Suiker* (1993) 117 FLR 254.

s 79.[164] However, the court is not required to investigate them as fully as contested orders, especially when both parties are represented.[165] In fact, it has been held that

> "[p]rovided that a court, or a registrar, is adequately informed, where the parties are at arms length and are properly represented little more than consent may be needed to establish that the requirements of the section have been met".[166]

6.85 Conversely, there is currently no requirement of court approval for consent orders made under the PRA. Master Macready in *Bradshaw v Walder* stated:

> … a comparison of the differences between s 20 and s 27 of the *De Facto Relationships Act* and the difference between s 20 of the *De Facto Relationships Act* and s 79 of the *Family Law Act*, to which I have already referred, indicates that there is no duty on the court to consider whether a consent order under s 20 is just and equitable. Power to make a consent order is expressly given in s 38(1)(J). In the case of a consent order made under circumstances where there is no legislative prescriptions for conditions precedent to the making of the order, there are well established principles under which such an order may be set aside.[167]

6.86 It was held that the principles under which a consent order can be set aside are those which would suffice in setting aside a simple contract; that is, duress, undue influence, mistake, illegality, misrepresentation and non-disclosure of a material fact, if disclosure was required.[168] These grounds for setting aside consent orders appear to be in addition to those grounds expressly

164. *Harris v Caladine* (1991) 172 CLR 84.
165. See *Harris v Caladine* (1991) 172 CLR 84 and the cases which followed, *Prowse and Prowse* (1995) FLC 92-557 and *Hueston and Hueston* (1993) 112 FLR 316.
166. *Harris v Caladine* (1991) 172 CLR 84 at para 25 (Dawson J), citing as authority *Livesey v Jenkins* [1985] 1 AC 424 at 437 and 444.
167. *Bradshaw v Walder* (1998) DFC 95-195.
168. *Harvey v Phillips* (1956) 95 CLR 235, cited in *Bradshaw v Walder* (1998) DFC 95-195.

listed in the PRA for setting aside consent and contested orders. The contract law grounds attack the validity of the agreement underlying the consent order rather than the order itself.[169]

**ISSUE 26**

**Should consent orders be subject to the court's approval that they are "just and equitable"?**

## Power to vary or set aside orders

6.87 Section 41 of the PRA contains the grounds upon which an order can be set aside or varied.[170] Currently, these grounds relate to the behaviour of the parties themselves and the effect that the order would have on one or both of them if it was enforced. However, an order which transfers property from one party to the other could possibly defeat the interests of a bona fide purchaser of the property or some other third party. Whilst the court is required to recognise and protect the interests of third parties when making a property order,[171] a couple could mislead the court into making a sham order, most likely a consent order, for the purpose of avoiding the claim of a third party. If the court makes these orders, unaware of the competing interests, it could incur the undesirable consequence of being seen as a party to the sham. There is currently no specific provision in the PRA for setting aside or varying orders on the ground that the interests of a third party were not sufficiently recognised and protected. The FLA also does not specifically contain this ground. It does have a provision which states that, when setting aside or varying orders on one of the grounds listed in s 79A, the court shall have regard to and protect the rights of bona fide purchasers or other interested persons. However, this is not a ground in itself for setting aside or varying

169. *Harvey v Phillips* (1956) 95 CLR 235.
170. See para 4.111-4.113.
171. PRA s 43.

agreements, but rather a factor for the court to consider in exercising its discretion.

**ISSUE 27**

**Should interference with the rights of a third party be a specific ground for setting aside or varying orders?**

**Should any other grounds for varying or setting aside orders be added?**

# 7. Superannuation

- Introduction
- The treatment of superannuation under the Act
- Contributions to superannuation interests
- The approach under the Family Law Act
- Why is superannuation important?
- Family Law Legislation Amendment (Superannuation) Act 2001 (Cth)
- Options for reform

## INTRODUCTION

7.1 The expansion of superannuation savings has had an enormous impact on family finances. Savings accumulated in superannuation represent an increasingly significant proportion of family wealth, often second only to the family home. In some cases, it is the only notable asset at the end of a relationship. Yet, despite its increasing importance in household finances, superannuation rarely figures in property proceedings under the *Property (Relationships) Act 1984* (NSW) ("the PRA"). Where it is taken into account, the NSW Supreme Court seldom considers that the non-member partner is entitled to an interest in the member partner's prospective entitlements. In any case, the courts have very limited powers under the Act to deal with superannuation in a just and equitable way.

7.2 Currently, superannuation is considered a financial resource under the Act and cannot therefore be made the subject of any order itself. In those rare cases where the court considers that the non-member partner should have a share of the value of the superannuation entitlements that have accrued over the course of the relationship, the court has only two options, neither of which is satisfactory.

7.3 The first option is to adjourn the property proceedings to a later time when the superannuation vests in possession and can therefore be treated as property. However, this could be several years away from the hearing and leaves both parties in financial limbo, contrary to the clean break principle to which the courts should adhere.

7.4 Alternatively, the court could give the non-member partner a larger share of available property by taking into account the value of the superannuation entitlement at the time of hearing. This requires the court to ascribe a nominal value to the superannuation entitlement, which is a complex and difficult task in some cases, particularly in defined benefit schemes.[1]

1. There are two types of superannuation schemes. The first is a defined benefit scheme, which usually provides members with a

This strategy usually means that one of the parties ends up with all or most of the family property but no financial security for their retirement, whilst the other is left with a very generous superannuation entitlement, inaccessible until retirement, but is cash-strapped at the present time.

7.5 The treatment of superannuation on relationship breakdown, particularly on divorce, has been on the reform agenda for many years. In this chapter, the Commission examines how superannuation has been dealt with under the PRA and compares its treatment under the *Family Law Act 1975* (Cth) ("the FLA"). Integral to this examination is an analysis of recent amendments to the FLA which empower the Family Court to divide superannuation entitlements between married persons on divorce.

## THE TREATMENT OF SUPERANNUATION UNDER THE ACT

### Is superannuation "property" under the PRA?

7.6 Superannuation is not property, but is a "financial resource." The definition of financial resource in subsection 3(1) of the Act includes prospective claims or entitlements in respect of a scheme under which superannuation benefits are provided.

7.7 Furthermore, the Act provides that, when adjusting property interests under s 20, the court must have regard to the financial and non-financial contributions of the parties towards their superannuation entitlements. According to the then President of the Court of Appeal, Justice Kirby, in the authoritative case of

final benefit (either in the form of a lump sum or pension or combination of both) dependent on a range of factors including years of service, salary on retirement, contributions and earnings. The other type of fund is an accumulation fund where the benefit is related directly to contributions to the fund plus earnings. See Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at 21.

*Green v Robinson*,[2] the Act makes it very clear that first, superannuation is a financial resource and second, that there is an obligation on the court to take such entitlements into account under s 20.[3] Subsequent cases have confirmed that the court must consider each party's superannuation entitlement when assessing their relative financial positions in adjustment proceedings under the Act.[4]

## Family Law Act jurisprudence

7.8 New South Wales de facto relationships legislation was modelled on jurisprudence that developed under the FLA. Although this will shortly be superseded by amendments expected to become operative by the end of 2002,[5] existing jurisprudence still represents current law and unless similar reform occurs in NSW, continues to inform debate on current de facto relationships law in this State.

7.9 Numerous Family Court decisions have held that superannuation is not property under the FLA because it is only a contingent asset.[6] This is because most superannuation funds are set up as discretionary trusts and any benefits that are subsequently paid are at the discretion of the fund trustee. A fund

2. *Green v Robinson* (1995) 36 NSWLR 96.
3. The failure of the Master at first instance to give any consideration to the parties' superannuation entitlements was a clear error of law and justified allowing the appeal: see decision of Kirby P in *Green v Robinson* (1995) 36 NSWLR 96.
4. *Chapman v Chapman* (NSW, Court of Appeal, No 40637/89, 9 September 1991, unreported); *Green v Robinson*; *Molina v Fajwal* (1994) 17 Fam LR 512 (Cohen JA); *Keene v Harkness* (1997) DFC 95-179 (Cohen JA).
5. The *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) will commence in December 2002. The amendments are discussed at para 7.71-7.96.
6. *Crapp v Crapp* (1978) 21 ALR 245 (Fogarty J). But see also *Evans and Public Trustee for the State of Western Australia* (1991) FLC 92-223 and J Dewar, G Sheehan and J Hughes, *Superannuation and Divorce in Australia* (AIFS, Melbourne, 1999) at 4.

member does not become entitled to receive any payment from the trust until a condition of release is met, that is, until the member retires, resigns or dies. The Family Court has therefore consistently held that superannuation is a financial resource under the FLA. So while it can be considered as part of the assets of the parties in property proceedings (when considering the needs and means of the parties under the s 75(2) factors),[7] it cannot itself be divided.[8]

7.10 However, the Family Court does consider superannuation to be property in some instances, depending on what the deed that creates the fund says and on all the relevant facts and circumstances relating to the fund and to the parties.[9] For example, superannuation will be treated as property and as such be available for distribution where the parties or one of them is the trustee of a private superannuation fund and can easily access their entitlements without suffering any detriment.[10] This general principle has been adopted in NSW.[11]

7.11 As mentioned above, the way superannuation is treated on divorce is set to change radically once the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) becomes operative ("the Family Law Superannuation Act"). By virtue of these amendments, the Family Court will be directed to treat superannuation as property for the purposes of making an order under s 79, and will have power to make orders to split a party's superannuation entitlements.[12]

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7. Under the current regime, the Family Court has a discretion under s 75(2)(b) to take into account the parties' income, property and financial resources and, under s 75(2)(f), either party's eligibility for a pension, allowance or benefit under any Australian or foreign law or under any superannuation scheme. Alternatively, it could take superannuation into account under the catch-all provision in s 75(2)(o).
8. *Crapp v Crapp* (1978) 21 ALR 245 (Fogarty J). *Coulter and Coulter* (1989) 96 FLR 375 (Full Court).
9. *Harris v Harris* (1991) FLC 92-254 at 78,709 (Full Court).
10. *Wunderwald v Wunderwald* (1992) 106 FLR 138; *Stay v Stay* (1997) 138 FLR 43.
11. *McGrath v Ter Hedde* [1999] NSWSC 1192 discussed at para 7.25.
12. See para 7.77-7.83 for a detailed examination of the amendments.

### South Australian experience

7.12 Interestingly, only South Australia's de facto relationships legislation defines property to include prospective entitlements to superannuation.[13] In theory, this means that the parties' interests in superannuation can be subject to an adjustment order, though the Commission is unaware of any instances where superannuation has been so divided. No other State de facto relationship legislation goes this far although there is now increasing pressure on all the States and Territories to adopt the new federal model so that de facto couples whose relationships break down are treated the same as married couples under the law as regards superannuation.[14]

## CONTRIBUTIONS TO SUPERANNUATION INTERESTS

7.13 As detailed in the previous chapter, the court has power under the PRA to adjust the parties' interests in property, in a just and equitable way. In doing so it should have regard to both the financial and non-financial contributions of the parties, not just to the acquisition, conservation and maintenance of property, but also to the accumulation of the parties' financial resources.[15] The court must, under s 20, take into account each party's contributions, both financial and non-financial, to the other's superannuation entitlements.[16] This is quite distinct from the position under s 79(4) of the FLA, which does not require the Family Court to consider the contributions of the parties towards the parties' financial resources. The Family Court considers these as part of the overall assets of the parties to which both have contributed during the marriage.[17]

13. *De Facto Relationships Act 1996* (SA) s 3.
14. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at 79. See also Commonwealth Attorney General, "Commonwealth Calls For States To Refer Power To Legislate on Property for De Facto Couples" (News Release, 25 July 2001).
15. PRA s 20(1).
16. See para 7.7.
17. See para 7.42.

## Requirement of proof of contributions under the PRA

7.14 A distinguishing feature between the treatment of superannuation under the PRA and under the FLA is that, in NSW, the Supreme Court requires proof that one partner has contributed to the other's superannuation interest before it will consider the non-member partner entitled to a share of the member-partner's superannuation interest.

### *Green v Robinson*

7.15 In *Green v Robinson,* the majority of the Court of Appeal held that in order to justify an adjustment of the available property in the appellant's favour, the appellant was required to show proof that she had made some contribution to the respondent's superannuation interest. Powell JA held that once such proof of contributions was established, it was then "just and equitable" that some order based upon, or derived from, those entitlements should be made.[18] But he did not consider that the appellant met this requirement. Nor did Cole JA, who found that because superannuation was a direct deduction from the respondent's salary, she had made no direct or indirect contribution to it, nor he to her entitlement.[19]

7.16 The President of the Court of Appeal, Kirby P, as he then was, delivered a strong dissenting judgment. He said:

> … But, with respect, the error in his Honour's approach, is to require, in effect, proof by evidence of the direct or indirect contributions made by Ms Green to Mr Robinson's accumulating superannuation entitlements during the relationship. Such proof is not required in cases under the *Family Law Act*. In my view, the express mention of superannuation entitlements in section 3(1) of the *De Facto Relationships Act*, makes it plain that Parliament accepted that ordinarily, partners to such relationships would be making at least indirect, if not direct, contribution to the accumulation of the form of savings which superannuation

18. *Green v Robinson* (1995) 36 NSWLR 96 at 106-112.
19. *Green v Robinson* (1995) 36 NSWLR 96 at 112-121. This approach was followed in *Campbell v Campbell* (1995) DFC 95-162.

> constitutes. That, in my view, gave Ms Green, for the period of the relationship at least, such a stake in that aspect of the "financial resources" of Mr Robinson, as must be reflected in a "just and equitable order", designed to adjust the interests of the partners, as section 20(1) of the Act requires.

This, however, remains the minority view.

### *An analysis of cases since Green v Robinson*

7.17 An analysis of reported and unreported cases since the prevailing majority view in *Green v Robinson* shows that few if any applicants who have made a claim against their partner's superannuation entitlements, has ever been successful.[20] Nor have decisions been particularly consistent.

7.18 One of the reasons for this is that it is not clear what will constitute sufficient proof to satisfy the court that contributions to the other partner's superannuation entitlements have been made. As one Master has commented:

> … it is not easy to reconcile the different views but it would appear from the comments of Powell JA and Cole JA that there must be some factual matter which enables one to form the view that there had been a contribution to a spouse's superannuation entitlements. A common example of this would be a partner who stays at home to look after children thus enabling the other partner to go to work and earn a superannuation entitlement.[21]

7.19 These comments imply that the court may more readily assume that the partner who has stayed at home to take care of the children of the relationship has made some indirect

20. See for example, *Fowler v Zoka* [2000] NSWSC 1117. Superannuation was not taken into account in the adjustment process, despite the fact that the plaintiff's superannuation entitlements grew from some $800 to $8,000 during the period of the relationship because the Master found that there was no clear evidence that the defendant contributed to the increase.
21. *Fotheringham v Fotheringham* (NSW, Supreme Court, No 4161/94, 19 November 1996, unreported).

contribution to the other partner's superannuation entitlements.[22] But where both parties are in paid employment, as was the case in *Fotheringham v Fotheringham*:

> … that option is not available. Here, we are concerned with a situation where both parties were effectively working and there is very little evidence of where the money came from. In fact, there is none. It seems to be an assumption that the defendant paid it but I do not know whether or not this is in fact right or whether there might have even been employer contributions.[23]

7.20 It appears that where both parties are in paid employment and both accumulate superannuation entitlements (principally from compulsory employer contributions, albeit quite disparate entitlements), there is little possibility of proving that one has contributed, directly or indirectly, to the other's superannuation entitlements.[24] This is so even when the non-member partner has clearly contributed more to the household chores[25] or has helped out with the other partner's business[26] or has, by putting the balance of his or her salary into the kitty for food and expenses,

22. *De Jong v Walter* (NSW, Supreme Court, No 3444/94, Macready M, 19 September 1996, unreported). However, the plaintiff's claim was not based solely on homemaker contributions. Although she was not working, the plaintiff was in receipt of an invalid pension, some $26,000 of which was put towards the mortgage of the house that they lived in together. She also received an inheritance, almost $20,000 of which was spent during the relationship on furniture, personal expenses and joint household purposes.
23. In this case the amount of the defendant's superannuation still in a policy totalled approximately $10,000. However, $10,500 had been released from one fund shortly before separation, and a further $12,000 shortly after. No mention was made of the plaintiff's superannuation, which makes it doubtful that she had any at all.
24. See for example, *Anderson v Charlton* (NSW, Supreme Court, No 1719/96, Macready M, 6 August 1998, unreported); *Jackson v Jackson* [1999] NSWSC 229 (Macready M); *Williamson v Birch* [2001] NSWSC 36.
25. *Anderson v Charlton* (NSW, Supreme Court, No 1719/96, Macready M, 6 August 1998, unreported).
26. *Jones v Martin* [2000] NSWSC 1112 (Macready M).

enabled the other partner to put more of his or her salary towards superannuation.[27]

Kim and Josie have been in a de facto relationship for seven years. Both work full time: Josie is an accountant and Kim is a travel agent. Josie has accumulated $60,000 in superannuation, and Kim $25,000 over the course of their relationship. Josie works long hours and is working hard to become a partner in her accountancy firm. She places the money earned in overtime into her superannuation fund. Kim undertakes the majority of the household chores: cooking, washing, and paying bills to allow Josie put in extra hours at work. When they separate, Kim must show sufficient proof that she contributed to Josie's super before the court will order that Kim is entitled to a share in Josie's superannuation interest.

***Pooling of resources***

7.21 The only cases in which both parties were working and where superannuation interests were included in the adjustment process were those cases where it was demonstrated to the court that the parties pooled their resources and made joint use of funds. In *Blonk v Welch*, for example, the plaintiff declined an opportunity to sacrifice a portion of her salary by increasing her superannuation entitlements (and thus reduce income tax liability). Instead, on the advice of her partner, she took a higher salary in order to put money towards their joint purposes, namely renovations to their home. The defendant had also told the plaintiff that they would rely on his superannuation for their retirement. So when the relationship ended, she had only a small sum invested in her superannuation account whereas he had almost $105,000, of which approximately $27,000 had been accumulated during the relationship and a separate preserved portion (of $10,500) had been accumulated over the course of his employment. The Master

27. *Simpson v Barker* [1999] NSWSC 165 (McLaughlin M). The male partner's superannuation entitlement had grown from $18,500 to almost $141,000 during the relationship. Although the Master rejected her submission that she had contributed indirectly to his superannuation he did concede that it was appropriate to deduct the defendant's personal contributions to his superannuation from his general financial contributions to the parties' joint endeavours.

distinguished this case from *Green v Robinson,* referring to her expectation interest that the relationship would continue and that she would be able to rely on his superannuation in retirement.[28] She was awarded half of his superannuation entitlements that had accumulated over the course of their 10-year relationship.[29]

7.22 In the later case of *Gazzard v Winders*, however, where again both parties had worked throughout the relationship, the Master took the majority view in *Green v Robinson* and concluded that there was no evidence to prove that the applicant had contributed to the defendant's superannuation entitlement. On appeal, the Court of Appeal took a different view. Beazley JA[30] held that the court should not disturb how the parties had voluntarily organised their affairs, which was to contribute their whole incomes to the joint needs and purposes of the relationship. They always considered themselves equally entitled to any property which they had acquired, which was held in equal joint names. But because their one significant asset had been bought using his redundancy and superannuation payout, Beazley JA said that the court should examine this more closely:

> Superannuation and pension entitlements, are of course, financial resources for the purposes of s 20(1)(a): see s 3(1). As such the court is required to take account of any direct or indirect contribution made by the parties to that resource. In the present case, there was no evidence that the appellant had made any contribution of either nature to either the respondent's pension or entitlements: see *Green v Robinson* per Powell JA at 108-109 and Cole JA at 118. There is perhaps one qualification to that. The superannuation scheme was contributory and to that extent the parties did not have available to them on a weekly basis the amount of the superannuation contribution. This was not, however, a large amount. However, the matter is relevant because of the

28. The decision in *Dwyer v Kaljo* (1987) 11 Fam LR 785 was the precedent at the time. See Chapter 5 at para 5.23-5.26 for a discussion of this case.
29. *Blonk v Welch* (NSW, Supreme Court, No S2488/94, Macready M, 7 November 1995, unreported).
30. With whom Stein JA agreed; Powell JA dissenting.

> invariable practice of the parties to use their incomes jointly. A proportion of the entitlements accumulated prior to the parties' cohabitation. It is not possible to ascertain to what extent the pre-cohabitation accumulation is reflected in the fund payout figures. It may be, and is likely, that the entitlements increased with the respondent's increase in salary. Be that as it may, there can be no doubt that a significant amount of the entitlements accumulated prior to the parties' relationship.
>
> Notwithstanding that if there was any contribution by the appellant to the respondent's contributory scheme it was only small, it is still relevant to consider the respondent's pension and superannuation entitlements against the background of the way in which the parties dealt with their several incomes and assets, namely as available for their joint use.[31]

7.23 Beazley JA considered that because the superannuation scheme was a contributory one, any contributions made towards superannuation, however small, was nonetheless money that was not available to the parties on a weekly basis.

7.24 In a similar case in Victoria, the applicant was found to be entitled to an order adjusting the interest of the defendant in the amount he contributed to the superannuation fund by salary sacrifice because it was their practice to pool their resources for the purposes of the acquisition, conservation and improvement of their properties, their business and household living expenses. The court said:

> By putting aside $19 per week from his salary during the period of the de facto relationship the defendant put out of reach of the plaintiff a small portion of his income which she was entitled to share as a partner. Now it is just and equitable that it be brought into account.[32]

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31. *Gazzard v Winders* (1998) 23 Fam LR 716. The Court of Appeal overturned the decision at first instance where the Master had held that the fact that the parties used their income for the joint purposes of the relationship did not satisfy the requirements of the majority decision in *Green v Robinson* (1995) 36 NSWLR 96.
32. *Bennett v Parker* (2000) 27 Fam LR 8.

### *Private superannuation funds*

7.25 Superannuation has also been included in the adjustment process where contributions are made to a private superannuation fund from a jointly operated business. In the NSW case of *McGrath v Ter Hedde*, the de facto couple set up their own private superannuation fund. Contributions were made to each of their accounts in the superannuation fund from the newsagency business, which they owned. His contributions were greater than hers because he was older and therefore due to retire sooner. In these circumstances, the Master found that the total of the contributions should be equally shared in the adjustment process.[33]

7.26 Private superannuation funds are often tax effective ways of saving and, therefore, both the Family Court and the Supreme Court have concluded that they should be regarded as property.[34] Private superannuation funds held by couples are more likely to be treated as assets if:

(a) it is clear to the court who the beneficiaries are;

(b) if there is no evidence to suggest that either party would suffer unfair disadvantage if the fund or part of the fund were realised; and

(c) if the superannuation fund was clearly set up for both parties or for one of them.

### *Where the entitlement has vested*

7.27 Superannuation, which has vested in the possession of the contributor, is property.[35] But even in such cases, the courts have applied the same strict approach when assessing contributions to the parties' superannuation interests.[36]

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33. *McGrath v Ter Hedde* [1999] NSWSC 1192 at para 36 (Macready M).
34. See para 7.10. *Stay v Stay* (1997) 138 FLR 343; *Wunderwald v Wunderwald* (1992) 106 FLR 138; *McGrath v Ter Hedde* [1999] NSWSC 1192.
35. See para 7.10.
36. See for example, *Campbell v Campbell* (1995) DFC 95-162. In this case, the defendant received his superannuation entitlement

### *Contributions to superannuation made before the relationship*

7.28 Contributions made before the relationship began are not generally taken into account.[37] The relevant entitlement is the pro rata amount that has accumulated during the course of the relationship.[38]

## Other types of financial resources

7.29 The same principles have been held to apply to other types of financial resources to which the parties may be entitled. Mostly, these relate to redundancy payments and long service leave entitlements. Like superannuation, they are contingent on certain events occurring and as such fall within the category of financial resources rather than property. The Family Court has held that sums accruing, or paid, by way of redundancy payments or long service leave entitlements are financial resources which the court may consider when determining a property settlement under s 79 of the FLA.[39]

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shortly after the relationship (of 2 and a half years) ended. It constituted about $54,400 of a termination package from his employer of $290,000. The Master found that the applicant was not entitled to any interest in the defendant's superannuation entitlement because he had been contributing to it for some 24 years before they met. He found that the relationship in no way helped the defendant to continue to contribute to the superannuation fund. The majority of the entitlement (almost $38,000) had been accrued before they began their relationship: at 77,359 (McLaughlin).

37. *Green v Robinson* (1995) 36 NSWLR 96. See also *Lipman v Lipman* (1989) 13 Fam LR 1. Contrast *In the Marriage of Gill* (1984) 9 Fam LR 969 (both of these cases referred to in *Green v Robinson*). See also discussion at para 7.15-7.16.
38. *Green v Robinson* (1995) 36 NSWLR 96. An example of where the amount of superannuation included in the adjustment was proportional to the length of the relationship is *De Jong v Walter* (NSW, Supreme Court, No 3444/94, Macready M, 19 September 1996, unreported). But see the contrary opinion *In the Marriage of Gill* (1984) 9 Fam LR 969.
39. *Burke v Burke* (1992) 112 FLR 250 (Fogarty J).

7.30 This decision has been followed in matters under the PRA.[40] However, in NSW, the court has also extended the requirement of proof of contributions. Thus the court will only consider it appropriate to have regard to such entitlements when making a property order under s 20 if it is satisfied that the plaintiff made some contribution to the defendant's entitlement to receive redundancy payments and long service leave entitlements.[41]

## Orders available to the court

7.31 As superannuation is not property, unless it has vested in a party's possession or is accumulated in a private fund that can be easily accessed without detriment, the court cannot make an order to divide a party's superannuation interest itself. If the court determines that it is appropriate to recognise some contribution to the acquisition of superannuation entitlements, it can only adjourn proceedings until a later time when the superannuation interest will vest or make a further adjustment to presently available property.[42] Each of these options poses problems.

### *Power to adjourn proceedings*

7.32 Section 21 of the PRA gives the court power to adjourn property proceedings under the Act if there is a likelihood of a significant change in financial circumstances of one or both of the parties and where it is reasonable to do so. In cases where the court cannot make a just and equitable property order because there are insufficient assets presently available, an adjournment of the proceedings may be the only solution. However, if the parties are years away from retirement, an adjournment may not be desirable. Creating a situation whereby the parties' financial affairs remain unresolved for many years after separation not only exacerbates and prolongs what is often a very difficult experience for the parties, but is contrary to the clean break principle. Under s 19, the court is directed to make orders which will finalise

40. *Gazzard v Winders* (NSW, Supreme Court, No 3054/95, Macready M, 12 December 1996, unreported).
41. *Gazzard v Winders* (Macready M).
42. *Green v Robinson* (1995) 36 NSWLR 96 (Powell JA).

the parties' financial affairs once and for all, so that parties can move on with their lives.

7.33 Where proceedings are adjourned, there is also a risk of the non-contributing partner losing most, if not all, of their entitlements. This will occur if, for example, the member-partner dies before the superannuation vests. In this case only the preserved component of the superannuation fund is paid out. Decisions regarding the division of superannuation pursuant to a property claim under the PRA, years after the relationship ended, may become even more complicated if there are other potential beneficiaries including, quite possibly, new partners.

7.34 If the non-contributing spouse dies before the member satisfies a condition of release, the treatment of superannuation interests will depend on the type of the fund in question. For accumulation funds, death is a condition of release and the death benefit will be paid to a dependent or dependents or to the estate, depending on the wishes of the deceased.[43]

7.35 For an interest that is notionally divided or flagged in a defined benefit scheme, the interest would be statutorily transferred into the names of the dependents, if any, of the non-contributing spouse. If there are no dependents the interest will be transferred into the name of a person at the direction of the executor of the deceased's estate.[44]

7.36 Same-sex couples face further difficulties. Although fund members are entitled to nominate a beneficiary in case of death, in the case of a member nominating his or her same sex partner, such a nomination will only be binding on the trustee if the nominee is a legal personal representative or a dependent of the member.[45] The current definition of dependent does not include a same-sex

43. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at para 8.3.
44. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at para 8.3.
45. *Superannuation Industry (Supervision) Amendment Regulations 1999 (No 3)* (Cth) reg 6.17A(3).

spouse. So a form nominating the member's same-sex partner as the beneficiary will not be binding unless a court orders otherwise.

### *Offsetting claims to superannuation against other property*

7.37 In most negotiations for settlement of a couple's financial affairs, parties are likely to trade off their share in the value of superannuation interests for a larger proportion of the family home. For women who are responsible for the care of children, securing the house is frequently a more important and pressing consideration than setting aside income for their retirement.

7.38 While there is no dispute that where there are children involved, their interest in terms of safe and secure housing is a priority, there are concerns that many people who trade off their interest in their partner's superannuation may be selling themselves short. This is because they may not appreciate the true value of superannuation interests; bearing in mind the favourable taxation treatment that putting aside income in superannuation funds attracts. These concerns apply mostly to women because they tend to have major caring responsibility for the children[46] and because they also tend to have less knowledge and less access to information about financial matters.[47] Of course, this option is also only feasible where there is other adequate available property against which superannuation entitlements can be offset. In cases where there are few or low assets, superannuation is of even greater relative importance.[48] This may be the case, for example, where there is little equity in the family home and the major asset of the parties is the earning capacity of one of them. However, in these cases, the only course open to the court is to adjourn proceedings until the superannuation vests, which might not occur for some years.

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46. K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, Melbourne, 1993) at 69.
47. See para 7.61.
48. Dewar, Sheehan and Hughes at 19 (see Table 4.4). Median superannuation constituted about 20% of the total median assets of low asset marriages (ie those with assets below the DSS assets test threshold of $268,500), in comparison to 14% of medium asset marriages and only 8% of high asset marriages.

Joan and Peter have been in a de facto relationship for 12 years. They have 2 children, aged 10 and 8. Peter, 47, is an executive earning $90,000 pa and Joan, 44, was a secretary before the children were born. Their main asset is a house with a value of $500,000 but they still owe $250,000 on it. Their other major asset is his superannuation of $100,000. If they were to split up, Joan would not be able to keep the house, as she couldn't afford the repayments on the mortgage. Her share of the equity would not be enough for her to buy another house for her and the children in the same area. To overcome these difficulties, the court can take the super into account as a financial resource when splitting the other assets of the parties. Assuming that the court is satisfied by evidence that she contributed to his superannuation, she may be entitled to a further property adjustment based on what the court considers to be her fair share of the superannuation entitlement. However, while this may allow Joan to relocate to a smaller home in the same suburb, she is left with little prospect of being financially secure in her retirement.

## THE APPROACH UNDER THE FAMILY LAW ACT

7.39 The current approach to superannuation in property proceedings under the FLA is set to change significantly. The Family Law Superannuation Act, which has recently been enacted by the Commonwealth Parliament, radically changes the options available to parties and the Family Court in respect of superannuation on marriage breakdown.[49] These amendments, which are due to take effect by late 2002, are examined in detail below. It is useful before doing so, however, to examine the current approach to superannuation under the FLA and identify the inadequacies of the current approach that the amendments were designed to remedy. It is useful because the same problems beset de facto couples when their relationships end. This gives rise to the question whether the same amendments should be adopted in NSW.

49. The Act was assented to on 28/6/2001. Commonwealth, *Government Gazette* No 31 of 8 August 2001 at 2203.

## Provisions of the Family Law Act

7.40 The FLA directs the Family Court to take the existence of superannuation into account when dealing with property alteration and spousal maintenance claims. In particular, s 75(2)(f) requires the court to take into account the eligibility of either party for a pension, allowance or benefit under "any superannuation fund or scheme where the fund was established or operates within or outside Australia". Section 75(2)(b) is also relevant in property proceedings where an entitlement to superannuation is at issue. This provision directs the court to take into account the income, property and financial resources of each of the parties.

7.41 Numerous Family Court decisions have made it clear that in most cases an entitlement under a superannuation scheme is to be regarded as a financial resource.[50] But this is not a hard and fast rule. Private superannuation funds, for example, are often merely tax effective savings schemes, and may therefore be regarded as property.[51]

## Current policy approach under the Family Law Act

7.42 The Family Court tends to proceed on the basis that superannuation is a nest egg for the retirement of *both* parties and not just for the contributor.[52] It considers superannuation to be a

50. *Crapp and Crapp* (1979) 24 ALR 671; *Coulter and Coulter* (1989) 96 FLR 375.
51. In *Wunderwald v Wunderwald* (1992) 106 FLR 138, the Family Court said that whether or not superannuation is property depends on a consideration of the relevant statute or private instrument under which the fund was created. In that case, the husband and wife had a private superannuation fund which the court considered an asset because it was clearly a creature of both or one of them and it was relatively easy to work out the parties' respective entitlements. Furthermore, there was no evidence to suggest that either party would suffer disadvantage if one or both parties realised their entitlements. This was followed by the Full Court in *Stay v Stay* (1997) 138 FLR 343.
52. *Hauff and Hauff* (1986) FLC 91-747 at 75,441.

form of savings by the parties, to which both have made direct or indirect contributions,[53] and a source of funds on which both reasonably expect to rely on retirement. In an early case under the FLA, the Full Court of the Family Court found that:

> In most cases, the right to superannuation is not immediately realisable and therefore seldom able to be dealt with directly under s 79. It is however, always a very important factor to be taken into account when the adjustment of property rights between spouses is sought, although quantification of such a factor can be very difficult. Contribution by one spouse to superannuation usually means the loss of moneys available for the current support of the family in order to provide security for both spouses on the retirement of the contributing spouse. Loss of the right to share in the superannuation by a divorced non-superannuated spouse is an important financial consequence of the dissolution of the marriage.[54]

7.43 The Family Court has also held that superannuation is relevant in property adjustment proceedings because it is money that is invested in a party's superannuation account, which could have alternatively been put towards the acquisition of other assets to provide financial security to the parties in retirement.[55]

## How the Family Court deals with superannuation

### *Contributions to superannuation*

7.44 As discussed previously, an adjustment based on the parties' superannuation entitlements will only be made under the PRA if there is actual proof that one has contributed to the other's superannuation. This is an almost insurmountable evidentiary

53. *Hauff and Hauff* (1986) FLC 91-747 at 75,441.
54. *In the Marriage of Bailey* (1978) 20 ALR 199 at 206 (Evatt CJ and Murray J).
55. *Hauff and Hauff* (1986) FLC 91-747 at 75,441. This latter concept seems to have been adopted in a recent decision under the NSW Act where the Supreme Court conceded that voluntary contributions towards a party's superannuation fund reduced that person's financial contribution to the other relationship property: see *Simpson v Barker* at para 7.20.

burden and it is not surprising, therefore, that few property orders under the PRA have been made with an adjustment for superannuation.

7.45 The Family Court, by contrast, generally considers and assesses non-financial contributions to superannuation entitlements along with contributions to assets generally.[56] This means that if a wife's contributions to the assets, other than the family home, are assessed at 30% then that contribution also flows to the superannuation entitlements.

### *Options to deal with superannuation*

7.46 While it is clear that the Family Court *can* take superannuation into account when making decisions adjusting the property of the parties, *how* the court will do this is much less straightforward. Throughout the 1980s, the Family Court adopted various methods of dealing with superannuation when making property adjustment orders under s 79 of the FLA, none of which are particularly clear or consistent.

7.47 *In the Marriage of West and Green*, Justice Kay identified the three broad approaches that are generally open to a trial judge:[57]

- take the superannuation entitlement into account as a financial resource of the member spouse under s 75(2)(b) and offset the non-member's share of the superannuation against other property;[58] or

56. See *Wunderwald v Wunderwald* (1992) 106 FLR 138. This case appears to have disproved the theory that a husband's substantial superannuation entitlements accumulated during the marriage could be left untouched where the wife's future needs for long term financial security were met from other sources. As one commentator has noted, that case "demonstrates that the wife's entitlement in such cases is contribution driven and not simply a question of needs": M Watt, "Apportionment of Super Entitlements" (1993) 28(3) *Australian Lawyer* 52 at 53.
57. *In the Marriage of West and Green* (1991) 114 FLR 74 (Kay J).
58. For this purpose, the court has developed different ways of valuing superannuation interests: see for example, *In the Marriage of West and Green*; *In the Marriage of Harrison* (1996) 129 FLR 74.

- adjourn the proceedings pursuant to s 79(5) until the superannuation vests; or
- fix the non-member spouse's entitlement to the superannuation when it becomes available to the parties by using a mathematical formula.

7.48 The approach used depends on the facts and circumstances of each case. Although each approach is valid, none is considered particularly adequate. In cases where superannuation represents a large proportion of the assets, and there are not enough presently available assets to offset the superannuation, the court will generally adjourn the hearing until the member spouse retires or try to reach some other satisfactory arrangement. Where there are other adequate available assets, the judge may decide to give all or a larger proportion of those assets to the non-member spouse and leave the member spouse's superannuation entitlement untouched. Although this may often mean that the wife receives an unencumbered home, she is left with no financial security in retirement. He on the other hand, may be able to look forward to a generous superannuation payout but may have to wait a number of years before it vests.

## Problems with the Family Court's approach

7.49 The provisions dealing with superannuation under the FLA have been criticised extensively over many years from many quarters, including from the Family Court itself[59] and various other bodies.[60] In particular, it is argued the myriad approaches developed by the Family Court have created inconsistency and

59. *In the Marriage of Mitchell* (1995) 120 FLR 292.
60. ALRC, *Equality Before the Law; Justice for Women Part 1* and *Women's Equality Part 2* (Report 69, 1994); ALRC, *Matrimonial Property* (Report 39, 1987); ALRC, *Collective Investments: Other Peoples Money* (Report 65, 1993). See also Australia, Parliament, Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* (AGPS, Canberra, 1992).

uncertainty, particularly for those people trying to negotiate a settlement rather than seek a court order. Key problems with the current approach of the Family Court were summarised by the Commonwealth Government in its position paper on superannuation and family law.[61] Briefly, those problems include:

- the difficulties in determining the value of superannuation interests, not so much in accumulation schemes where valuation is relatively straightforward but in defined benefit schemes where valuation of the final benefit depends on a range of factors (including retirement age, salary at retirement, vesting rules etc) that are unknown at the time of settlement of the parties' financial affairs;
- the inability of the Family Court to make orders against third parties such as to the trustee of a superannuation scheme to divide a superannuation interest;
- the fact that the legislation does not allow superannuation interests to be divided;
- the incapacity, in some cases, to offset the value of a superannuation interest against other property because of the lack of significant other assets;
- the lack of access to information about a former spouse's superannuation entitlement and the concern that, as a result, some people are trading away their interest in superannuation without knowing the full value of that interest;
- the impracticality of adjourning proceedings unless the superannuation is due to be paid out in the short term; and
- the difficulty the Family Court has experienced in determining what weight it should give to the superannuation entitlement when making a property order, given the problems with valuation.[62]

61. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998).
62. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998).

## WHY IS SUPERANNUATION IMPORTANT?

7.50 As superannuation coverage increases and as superannuation entitlements constitute a more significant proportion of household wealth, how superannuation is treated on relationship breakdown becomes more significant and finding more equitable ways of dealing with superannuation becomes more important. The limited options to deal with superannuation, in both current federal and State legislation, have a detrimental impact on those with less access to superannuation.

### Increasing coverage of superannuation

7.51 The number of superannuation fund members and the value of superannuation savings have increased exponentially in the last two decades, largely as a result of the Commonwealth government's retirement incomes policy. According to the Association of Superannuation Funds of Australia (ASFA), more than 8 million people currently save through superannuation. As at March 2001, there was $497 billion saved and invested in 22.76 million superannuation accounts.[63] This is projected to increase to $1.7 trillion by 2020.[64]

7.52 The first major catalyst for growth came with the implementation of compulsory superannuation. This began with the Hawke Labor Government's decision in 1986 to give workers a pay rise in the form of a 3% superannuation contribution by employers. This "award super", as it became known, brought many more people into the superannuation net than ever before. Previously, superannuation was a benefit of employment reserved mainly for public sector employees and managers and other

63. Australian Prudential Regulation Authority, *Superannuation Trends* (March Quarter 2001) available at «www.apra.gov.au».

64. Australia, Department of Treasury, Retirement Income Modeling Unit, J Tinnion and G Rothman, "Retirement Income Adequacy and the Emerging Superannuation System" paper presented to the *Seventh Colloquium of Superannuation Researchers* (University of Melbourne, 8-9 July 1999).

professionals in large companies. Award super greatly extended the coverage of superannuation. The introduction of the Superannuation Guarantee in 1992, which imposes an obligation on employers to make contributions to employees' superannuation accounts, has ensured even greater coverage.[65]

7.53 Superannuation coverage has more than doubled since 1984, rising to around 94% for employees with leave entitlements not working on a fixed-term contract and to 58% for self-identified casual employees. Superannuation coverage for all workers, including the self-employed, is now around 87%.[66] However, for those who have never been in paid work, superannuation coverage remains negligible because, until recently, contributions to funds were only permitted for those in paid work. Since 1997, a working spouse can now make contributions on behalf of a non-earning spouse in a superannuation fund or a retirement savings account, which should result in an increase in coverage for those outside the paid workforce.[67] However, this is likely only to benefit those couples with sufficient disposable income to make extra superannuation contributions.

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65. Employers must, in 2001, contribute at least 8% of an employee's gross salary to a complying superannuation fund for the benefit of that employee. This will increase to the current maximum agreed percentage of 9% in July 2002. Employers who do not make the compulsory minimum contributions are required to pay a tax, called the Superannuation Guarantee Charge (SGC), which is equal to the contributions which have not been paid plus interest and a component for administration costs. Any SGC collected by the Tax Office (less the administration component) is paid to a superannuation fund nominated by the employee.
66. Coverage outside the compulsory regime is lower. For example, 37% of owner managers of unincorporated enterprises (self-employed) have no superannuation, despite the tax breaks available for contributions. See Australian Bureau of Statistics, *Employment Arrangements and Superannuation* (Cat No 6361, March 2001).
67. ASFA, "What are retirement savings accounts (RSAs)" (Fact Sheet 15) available online at «http://www.superannuation.asn.au/super/rpm.cfm?page=wis15». "Spouse" is defined as a married couple or a de facto couple, but it is unclear whether this includes same sex couples.

## Superannuation as a proportion of household wealth

7.54 According to recent economic modelling, superannuation constitutes an increasingly large proportion of the average Australian household's financial wealth. While superannuation assets formed only 10% of household financial wealth in 1985, this figure had increased to over 20% by 1997.[68] Research shows consistently that superannuation is the most important asset and savings vehicle for most people, second only to the family home.[69]

7.55 Recent research by the Australian Institute of Family Studies (AIFS) paints a similar picture. The Australian Divorce Transition Project, in which 650 divorced men and women were randomly surveyed, found that on average, superannuation accounts for 25% of the parties' total asset wealth compared to just 14% in 1980.[70] For one quarter of respondents, superannuation was said to represent at least 40% of the parties' total assets. The study also found that, in 82% of couples, at least one of the spouses had superannuation compared to just 55% in the 1980s.[71]

## Disparate entitlements to superannuation

7.56 Although superannuation coverage of workers has increased substantially in the last two decades, the entitlements of those who have superannuation accounts vary considerably. While some highly paid professionals in generous superannuation schemes are likely to have amassed a substantial nest egg for their retirement, many others will be forced to supplement their meagre superannuation savings with the aged pension. The situation is

68. Australia, Department of Treasury, Retirement Income Modelling Unit, B Bacon, *Household Wealth and the Aged: An Income Distribution Survey Analysis* (AGPS, Canberra, 1998) at 4.
69. S Bordow and M Harrison, "Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases" (1994) 8 *Australian Journal of Family Law* 264.
70. Dewar, Sheehan and Hughes at 17.
71. Dewar, Sheehan and Hughes at 11, comparing the earlier AIFS findings in the 1980s: see P McDonald, *Settling Up* (AIFS, Melbourne, 1986) at 176.

particularly dire for women who tend to live longer than men but generally have much lower superannuation savings to see them through old age. Women are less likely to plan for retirement than men, even when they work full time.[72] In 1997, 72% of women aged 61 years and over relied on the aged pension as their main source of income in retirement.[73] Many of those currently retired would not, of course, have had the benefit of compulsory superannuation contributions. These factors are compounded by the fact that women work a full-time equivalent of 20 years, while men work the equivalent of 38 years.[74] The 9% compulsory contribution is clearly inadequate to provide an adequate retirement income for women with a broken work history and whose average earnings are lower than those of men.[75]

### *Disparate entitlements between men and women*

7.57 Numerous reports have documented the disadvantage faced by women in relation to their access to superannuation.[76] For example, a 1992 report of the Senate Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal,* found that women were significantly disadvantaged by the design of superannuation schemes which were predominantly geared towards unbroken full-time workforce patterns.[77] A recent study

72. J Onyx and A Watkins, "Why women do not plan their retirement" (ASFA, Research Paper 2, 1996) at 4.
73. ABS, *Australian Social Trends* (Cat No 4102.0) at 108.
74. ASFA, "Women Doubly Handicapped on Super" (Media Release, 10 July 2001).
75. ASFA Research Centre, Ross Clare, *Women and Superannuation* (July 2001) at 8.
76. See, for example, Australia, Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Superannuation and the Sex Discrimination Act: Current Status and Future Directions* (AGPS, Canberra, 1994).
77. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992) at 97. Similar examples are found in ASFA Research Centre, Ross Clare, *Women and Superannuation* (July 2001) at 4.

states that a woman's nest egg will be 70% of the average man's; this is largely due to interrupted work history and lower wages.[78]

7.58 Superannuation is, by and large, a benefit of employment. It is primarily tailored to a pattern of employment that better reflects men's, as opposed to women's, paid work experience. In other words, those who work for long and continuous periods in full time paid work gain maximum benefit. This presents problems for women, many of whom take substantial breaks from the paid workforce for the birth of children and often return to work on a part time basis as a result of their greater care giving role and the lack of access to, and cost of, quality child care. Statistics show that women, far more than men, tend to take longer periods out of paid employment mostly for family reasons.[79] While they are not in paid work, women generally are not entitled to contribute to superannuation although there are provisions for contributions to be made on their behalf.[80]

7.59 While it is true that the participation rate of women in paid work has increased, large numbers continue to work on a casual or part time basis.[81] Some of these women earn less than $450 per month, which is the income threshold below which employers are not bound to make contributions to a superannuation fund. Also, because women generally earn less than men, even when their work involves a similar level of skills,[82] it follows that compulsory contributions set at a percentage of a person's salary tends to be lower for women than for men. Recent AIFS research has found that women have five times less superannuation than men.[83]

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78. A Horin, "Women left behind in super stakes" *Sydney Morning Herald* (5 July 2001) at 6.
79. See, for example, ABS, *NSW men and women: balancing work and care* (Cat No 4903.1, Media Release, 2000).
80. See para 7.19-7.20.
81. ABS, *Australian Social Trends* (Cat No 4102.0) at 108.
82. ABS, *Australian Social Trends* (Cat No 4102.0) at 151. Table entitled "Average hourly earnings in main job of employees, August 1999" shows that the female to male earnings ratio is 0.89. See also Seventeenth Select Committee Report on Superannuation, *Super and Broken Work Patterns* (November 1995) at 13-15.
83. Women's superannuation entitlements were found to have a median value of $5,590 compared to men's $26,152: see Dewar, Sheehan

7.60 Other research also shows that women do not plan for their retirement because of differences in attitudes and in levels of information. Many women consider retirement planning to be the responsibility of their partner, particularly those who work part time or on a casual basis.[84] Even those who work full time expect to rely on their partner's superannuation in retirement. In general women are less likely to receive information about retirement. Again this is particularly true for those who work on a part time or casual basis. Even those who do contribute to superannuation are less likely to know what their contributions are, how much they need to contribute or what their current entitlements are.[85]

### *Access to information about superannuation*

7.61 Research by the AIFS has found that both men and women generally knew very little about the other's superannuation entitlement.[86] This was found to be more true for the women in the study than for the men,[87] which suggests that men and women do not have equal access to information about their spouse's entitlement or have different levels of awareness of the potential importance of superannuation.[88] This has greater implications for those couples whose superannuation represents a significant

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and Hughes at 13. On the other hand, Treasury estimates suggest that in 1994 the average superannuation entitlement was $17,000 for women compared to $42,000 for men. Treasury projections for 2004 are $40,000 for women and $74,000 for men: Department of the Treasury, Retirement Income Modeling Task Force, G Rothman, "Aggregate and Distributional Analysis of Australian Superannuation using the RIMGROUP Model" paper presented to the *Colloquium of Superannuation Researchers* (University of Melbourne, July 1996).

84. J Onyx and A Watkins, "Why women do not plan their retirement" (ASFA, Research Paper 2, 1996) at 12.
85. Onyx and Watkins at 12. See also A Horin, "Divorced women face lean old age" *Sydney Morning Herald* (Weekend Edition 30 June/ 1 July 2001) at 1 and 10.
86. Dewar, Sheehan and Hughes at 13.
87. Dewar, Sheehan and Hughes at 13 (Table 2.2). Similar findings were reported in ALRC, J Swartzkoff and C Rizzo, *A Survey of Family Court Property Cases in Australia* (1985). See also Onyx and Watkins at 7 and ARLC, *Matrimonial Property* (Report 39, 1987).
88. Dewar, Sheehan and Hughes at 13.

proportion of their assets.[89] Consequently, there is a need for improved access to information for both spouses,[90] but more so for women. They are more likely to lack knowledge of their spouse's entitlement and have a smaller entitlement themselves, making access to their spouse's superannuation more important for an equitable settlement.

### *Disparate entitlements due to non-gendered factors*

7.62 Although gender is an important factor influencing superannuation entitlements, it is by no means the only factor. There are numerous other factors which affect people's entitlements to superannuation and which may explain differences in entitlements among persons of the same sex. These include income level, occupation and type of employment, age, date of separation, time spent out of the paid workforce and number of children. The primary factor is income level. The higher one's salary, the greater the contribution is under compulsory superannuation laws and the greater propensity one has to make one's own personal contributions to the account. The type of occupation and place of employment will also be relevant.[91] Some employers or industries offer more lucrative schemes than others. Age affects a person's entitlement to superannuation. Older people will usually have been in the paid workforce longer and thus will have been able to accrue more money in superannuation accounts. The introduction of compulsory employer superannuation contributions in the early 1990s began at the low level of 3% of the employee's salary. However, the percentage that employers must contribute is now 8% and is to reach 9% in July 2002. So those separating later are likely to have accumulated more funds in superannuation than those who separate sooner.[92]

7.63 Time spent out of the paid workforce, for further study for example, also affects the accumulation of superannuation entitlements. However, while it may shorten the time in the paid workforce, further study may also improve the person's ability to

89. Dewar, Sheehan and Hughes at 13.
90. Dewar, Sheehan and Hughes at 13.
91. Dewar, Sheehan and Hughes at 14.
92. Dewar, Sheehan and Hughes at 14.

get a better paying job and, consequently, to contribute more towards superannuation.

7.64 The number of children a person has negatively impacts on the superannuation entitlements of women only. The more children women have, the lower the value of their superannuation entitlements, and the higher the value of men's. As Dewar, Sheehan and Hughes state, this "reflects the opportunity costs incurred by women in caring for children and perhaps the need for men to earn higher incomes to support larger families".[93] New research published by the AIFS shows that women with one child lose about $162,000 or 37% of total lifetime earnings because of their decision to have a child.[94] While this is an improvement on the findings of previous research (which found that women with children could expect to earn lifetime incomes of $435,000 less than those without children),[95] the lost earnings still have a commensurate negative impact on accumulation of superannuation.

### *Should the court take into account the parties' differential entitlements?*

7.65 According to Kirby P, as he then was, in *Green v Robinson,* differential entitlements to superannuation, generally a result of the parties' disparate income levels, must be taken into account. He considered that not taking these differences into account is as flawed as to disregard superannuation altogether. This is because:

> Despite equal pay legislation, and industrial decisions to the same end, it is well known that in Australia, female earnings are typically lower than male earnings. Inherent in the notion that each "owns" the superannuation entitlements accumulated from his or her income, is an inescapable bias against vulnerable (usually female) members of a marriage or marriage-like relationship. This is a bias which the Act, far from condoning, forbids. By section 3(1), the Act requires, in relation to "de facto partners or either of them", that the financial resources, which must be taken into account under

93. Dewar, Sheehan and Hughes at 15.
94. M Gray and B Chapman, "Foregone earnings from child-rearing: changes between 1986 and 1997" (2001) 58 *Family Matters* 4 at 8.
95. Gray and Chapman at 9.

> section 20(1) of the Act, are to include entitlements under a superannuation scheme. This is therefore something which, in the exercise of the section 20(1) discretion, the Court must view as belonging not to Mr Robinson separately however he actually banks or notionally receives the contingent benefit, but to the financial resources of the parties which need to be adjusted, having regard to the contributions "made directly or indirectly" by them. Conformably with the language of the Act and applicable jurisprudence which has developed in the Family Court on analogous problems, it is my view that Ms Green made an indirect contribution to Mr Robinson's superannuation entitlements. Just as he did to hers. The only difference is that his entitlement was more substantial. This was because of its longer duration and because of his higher base income.[96]

7.66 In this particular case, Ms Green's own superannuation entitlement grew from $7,000 to $17,000 during the course of their relationship, whilst Mr Robinson's increased from $24,000 to $62,000. This reflected the disparity in their incomes. The President found that she had contributed indirectly to his superannuation interest and made a further adjustment of $10,000 in her favour. However, the President was in the minority. The majority view was that there was no proof that she had contributed to his superannuation entitlement, nor he to hers, and therefore no adjustment was justified. In subsequent cases under the PRA, the fact that the parties had disparate entitlements to superannuation was held not in itself sufficient to justify an adjustment in favour of the party with fewer entitlements.[97]

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96. *Green v Robinson* (1995) 36 NSWLR 96 at 103.
97. See for example, *Anderson v Charlton* (NSW, Supreme Court, No 1719/96, Macready M, 6 August 1998, unreported). In this case, the parties had been in a de facto relationship for almost four years. There was a very marked disparity in their earning capacity: he earning an annual salary of over $100,000 as an accounts executive with McDonalds while she earned about $30,000 per annum as a secretary. In relation to superannuation, the Master found that because the parties were both working there was no evidence that one party contributed to the other's superannuation and therefore it was inappropriate to make any adjustment having

## Empirical research

7.67 Extensive research has been conducted by the AIFS over the past decade into the economic consequences of divorce for married couples. A part of this research has focused on the incidence, and treatment of, superannuation in financial settlements under the FLA. Unfortunately, there has been no similar empirical research into how superannuation has been treated in cases, both settled and litigated, under the PRA. However, it is highly likely that de facto couples equally face the problems experienced by divorced couples in relation to superannuation. In fact, de facto couples may be more adversely affected because of the narrower approach taken by the Supreme Court and the absence of s 75(2) factors in property orders under the PRA.

7.68 The major criticisms of the treatment of superannuation on divorce, highlighted by the AIFS studies, are that superannuation is still largely ignored in property settlements under the FLA and that this has a deleterious impact on the share of property awarded to the non-contributor. Even when superannuation is taken into account, the court has failed to develop principles to deal with superannuation consistently and equitably.[98]

### *Superannuation still largely ignored*

7.69 Despite the increasingly significant part superannuation plays in the total asset wealth of the parties, research suggests that superannuation is still largely ignored in property proceedings under the FLA.[99] The recent research by the AIFS found that superannuation was taken into account in less than half (46%) of property settlements under the FLA despite the fact that over 80%

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regard to their superannuation entitlements. This was despite the fact that because of the difference in their salaries, her entitlement (at the date of hearing) was about $13,000 and his was $58,000.

98. Dewar, Sheehan and Hughes; Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at 10.

99. Dewar, Sheehan and Hughes; ALRC, *Matrimonial Property* (Report 39, 1987) at para 126, 131, 137; P McDonald, *Settling Up* (AIFS, Melbourne, 1986) at 198-200.

of respondents reported that one or both of them had superannuation entitlements. This indicates little improvement since the *Settling Up* study, which was conducted by the AIFS in the mid 1980s. The *Settling Up* study found that superannuation was taken into account in only 32% of cases involving younger divorcees, and 46% of cases involving older couples,[100] largely because parties had not even been advised by their lawyers of its relevance.[101]

#### *Reduces non-contributor's share of family assets*

7.70 The *Settling Up* study also found that the parties' share of the family assets was greatly affected by whether superannuation was included in the general pool of assets. Where it was included, the survey found that women received a lower share of the total assets (between 45% to 55% lower).[102] In general, the study found that women received a greater share of the basic assets – namely, bank accounts, house, car and furniture – while men received a greater share of the non-basic assets defined as businesses, farms and superannuation. These findings have been replicated in the more recent AIFS research. While women receive two-thirds of the basic assets such as the home and car, they received only one-fifth of the non-basic assets, which include superannuation, businesses and farms.[103]

## FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) ACT 2001 (CTH)

7.71 The Commonwealth is set to implement a radical new approach to the way in which superannuation is treated on divorce. The proposals have garnered a lot of interest and support from a range of interest groups.[104] The Family Law Superannuation Act

100. McDonald at 199.
101. McDonald at 199.
102. According to women's valuation of the shares: see McDonald at 182.
103. G Sheehan and J Hughes, *Division of Matrimonial Property in Australia* (AIFS, Research Paper 25, 2001) fig 2.3 at 16.
104. Support found in submissions by the Institute of Actuaries of Australia, Association of Superannuation Funds of Australia, National Network of Women's Legal Services and Lone Fathers

which was introduced in the Commonwealth Parliament in April 2000, was passed in June 2001.[105] When it becomes operative, it will redefine superannuation as property for the purposes of property claims under the Act. This will allow separating couples to divide their entitlements to superannuation in the same way as they can divide their other assets. That is, superannuation interests will be treated as a form of property capable of division under s 79 of the FLA, and not just as a financial resource.[106]

7.72 The Family Law Superannuation Act provides for parties to make agreements relating to their superannuation interests. These superannuation agreements can be incorporated into financial agreements which have now become operative pursuant to the recently enacted *Family Law Amendment Act 2000* (Cth).[107] Where people are unable to agree, the court will be given power to split the value of superannuation as part of a property settlement. The Act will also provide more precise methods for the valuation of superannuation interests by regulation.

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Association to the Senate Select Committee on Superannuation and Financial Services*, Interim Report on the provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000* (November 2000).

105. Following its introduction on 13 April 2000, the Bill was subsequently referred to the Senate Select Committee on Superannuation and Financial Services. This Committee reported on 6 March 2001. See Australia, Parliament, Senate Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000* (AGPS, Canberra, 2001).
106. This proposal has been recommended on many previous occasions. In 1992, the Joint Select Committee on *Certain Aspects of the Operation and Interpretation of the Family Law Act* recommended, inter alia, that superannuation entitlements be legislatively included as property and that the Family Court be empowered to order that a superannuation entitlement be split and shared between the contributing and non-contributing spouse. A "split benefit" approach was also endorsed by the Australian Law Reform Commission, *Collective Investment Schemes: Superannuation* (Discussion Paper 40, 1992).
107. See Chapter 4.

## Objectives of amendments

7.73 One of the Act's major objectives is to overcome the uncertainty that the current approach has produced. It gives separating couples and the court more choice in dealing with superannuation interests. By providing legislative guidelines for the valuation of superannuation interests, it also gives parties (and courts) a tool with which they can assess their interests with more certainty. The various actuarial tables that will be used by the parties and the court in relation to defined benefit interests will be included in the Family Law Regulations although there is also provision for the trustee of funds to have their own specific calculations approved by the Australian Government Actuary in appropriate cases.

7.74 The Act also promotes several of the Commonwealth Government's other objectives. First, it is part of the Government's broader push to encourage parties to take responsibility for their own affairs. This is to be achieved by enabling separating couples to make binding agreements on how their superannuation interests are to be divided. Superannuation agreements will be binding on the parties in the same circumstances as financial agreements under the *Family Law Amendment Act 2000* (Cth) and are accordingly subject to the same procedural requirements.[108]

7.75 Secondly, the Act is intended to be consistent with the Government's broader retirement incomes policy goals. These include making sure that all employees are able to provide a financially secure retirement for themselves and for their dependants. The Explanatory Memorandum accompanying the Bill explicitly recognises that the Government's Age Pension outlays will be lower in the long term if parties are permitted to split superannuation interests upon marriage breakdown.

7.76 The stated objectives of the Act are that:

- superannuation should be clearly recognised in the division of marital property;

108. See Chapter 4 at para 4.45-4.46.

- there should be clear rules for valuing superannuation interests;
- parties should be encouraged to settle their own affairs and have full information to do so;
- it should be consistent with the government's broader retirement incomes policy; and
- arrangements need to minimise complexity and cost and take into account the features of the superannuation fund involved.[109]

## Splitting superannuation interests

7.77 The amendments are premised on two new concepts: "splitting" and "flagging". The Family Court will be able to order, and parties will be able to agree, that a member spouse's superannuation interest be split. This will only ever be possible if the superannuation interest is a "splittable payment". What is and what is not a splittable payment will be determined under the forthcoming amendments to the Family Law Regulations. Whenever the splittable payment becomes payable, the non-member spouse will become entitled to the amount calculated in accordance with the Regulations or as agreed by the parties in the superannuation agreement.

7.78 The Family Law Superannuation Act allows the parties to give the trustee an agreement (or the court to give an order) which requires the trustee to establish a "base amount" equal to the amount agreed to be paid to the non-member spouse. The non-contributing spouse's interest will be "carved out" of the contributing spouse's interest and attracts interest at a prescribed rate until the member's benefit is payable. The non-contributing spouse has the same rights to annual statements and other appropriate information while the base amount is growing with interest in the fund. Payment is made when the member spouse

109. Prime Minister of Australia, John Howard, *Assistance to Women* (Media Release, 8 March 1998).

meets a condition of release. The non-member spouse is not a member of the fund.

7.79 The Family Law Superannuation Act has also amended the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the SIS Act"). This amendment makes it possible for people with an accumulation interest (and the majority of people are in accumulation type funds) to achieve a clean break. The non-member spouse will not have to wait until the member satisfies a condition of release to have their share of the interest paid into their own account. In cases where the superannuation interest is in an accumulation interest, a split to a new account or fund for the non-member is possible and relatively simple. Once an agreement is reached or an order made, the trustee can transfer the agreed "base amount" and any interest from the member's account to a new account in the non-member spouse's name. There is also provision for trustees, in schemes such as employer-sponsored funds where it is not possible to create a separate account for a non-employee, to transfer the interest to a separate superannuation fund nominated by the non-contributor spouse or, if no nomination is made, to an eligible roll-over fund.

7.80 Splitting superannuation interests held in a defined benefit scheme is more complex. It is not possible to move the non-member's interest out of the fund until the member's benefit is payable. The value of the member's superannuation interest is calculated using factors in the Regulations developed by the Australian Government Actuary. The parties or the court then decide what part of that amount is to be given to the non-member spouse and this becomes the "base amount". As outlined above, this base amount remains in the defined benefit fund but is allotted to the non-member spouse. Interest is credited on it until the member satisfies a condition of release (that is, either retires, resigns or dies) at which time the non-member spouse is paid the base amount plus any interest and the member-spouse receives the remainder of the total benefit.

7.81 Central to the notion of splitting is the ability to value the total member's benefit to be split. The overall value of an accumulation fund is easy to determine, as it is the amount in the

member's account. Valuation of a defined benefit is calculated using factors in a table in the Regulations or scheme-specific factors approved by the Australian Government Actuary. There will be cases where the amount finally received by the member in a defined benefit scheme is less (or more) than the amount of the valuation (for example where the assumptions used in the valuation factors are not met). The amount paid out to the member and the non-member can never exceed the total amount that is payable to the member. The trustee will always pay the non-member's base amount plus interest first.

7.82 All superannuation interests that are split and allotted to the non-member spouse are preserved until retirement age. This is in keeping with the Government's retirement incomes policy. Also, where one of the parties dies before a payment split becomes payable, the splitting order or agreement will continue to operate in favour of, and be binding on, the legal personal representative of the deceased spouse.

7.83 There was a concern that the new amendments would remove the possibility of a party trading off their interest in the other party's superannuation in order to get a bigger share of other assets. This is particularly important for women concerned more with housing for themselves and their children than long-term financial security in retirement.[110] Under the new legislation the court is authorised to order that parties trade their interests in superannuation instead of splitting the fund, if splitting the fund would have the effect of having to sell the matrimonial home.[111]

110. Women's Legal Service, Brisbane, *Submission in Response to Superannuation and Family Law – A Position Paper of the Commonwealth Attorney's General's Department* (August 1998). See also K Dunn, "Splitting the Difference: Superannuation Equality and Family Law" (1998) 12(3) *Australian Journal of Family Law*.
111. Dunn at 233.

Ali, 38 and Jordan, 40 met at university and have been married for 15 years. They have 3 children, aged 11,8, and 6. Ali has her hands full raising the children and taking care of all the household chores. She also works part time in a bookstore. Jordan has been in full time employment in the public sector since leaving university and is now in middle management. Jordan has at least $98,000 in a defined benefit state superannuation scheme and Ali has about $5,000. They still owe $150,000 on their home, which was recently valued at $300,000.

The relationship ends and they cannot agree on how to divide their property. If Ali waits for the new amendments to come into effect, she could seek an order that Jordan's superannuation interests be split so that she would receive her share of his superannuation when it becomes payable. But this is not likely to happen for another 15 years. Ali prefers to trade off her interest in his superannuation in order to secure the matrimonial home, unencumbered, and also receive a lump sum payment from Jordan. She will continue to be able to do this even when the new arrangements come into effect.

## Flagging superannuation interests

7.84 The Act also allows for the "flagging" of superannuation interests. When a superannuation interest is flagged, either by agreement or by court order, the trustee is prevented from dealing with the interest until the flag is lifted. This effectively defers the division of the superannuation interest. It is expected that this may be a preferred method when the superannuation interest is likely to be paid out soon at which time the actual value of the interest will become known. The flag can be lifted either by a court order or by a flag-lifting agreement made by the parties. It is a penalty to fail to comply with payment flags and trustee who does so can be fined.

## Agreements

7.85 Parties will be able to make superannuation agreements that specify how superannuation is to be divided on marriage breakdown. This provision is linked to other recent amendments,

which now allow married couples to make binding financial agreements either before or during their marriage or after separation. Superannuation agreements will be enforceable in the same way that general financial agreements are enforceable. They will thus need to comply with the procedural requirements as set out in s 90B-s 90G of the FLA.[112]

7.86 Couples may, by agreement, split their superannuation interests in one of three ways. They can:

- use the actuarial method provided in the Regulations to determine the value of the interest and then identify a percentage for the purpose of the split; or
- identify a percentage; or
- identify an amount to be transferred rather than a percentage.

7.87 Alternatively, parties can agree to flag an interest in the other party's superannuation so that they can revisit the issue at a later date. The trustees must observe any flagging agreements or flag lifting agreements made by the parties. However, the parties will need to provide the trustee with proof of the fact that they have separated, since superannuation agreements can only operate to split payments after the marriage has broken down.

7.88 The Act requires that the parties present the trustee with a "separation declaration" that conforms with certain requirements. Parties whose superannuation interests are less than the prescribed amount (the eligible termination payment (ETP) tax-free threshold pursuant to s 159SG of the *Income Tax Assessment Act 1936* (Cth)) need only provide a written declaration that their marriage has broken down, signed by at least one of the spouses. On the other hand, parties with superannuation interests greater than the ETP tax-free threshold need to provide a more formal declaration.

112. See Chapter 4 at para 4.45-4.59 for a detailed discussion of the requirements under the FLA in relation to binding financial agreements.

7.89 The requirements for a separation declaration are consistent with the grounds for dissolving a marriage under s 48 of the FLA, that is, that the parties have separated and lived separately and apart for a continuous period of at least 12 months. Again, only one of the parties needs to have signed the declaration for it to be effective (s 90MP).

7.90 Importantly, the Act gives the court power to make orders to enforce a superannuation agreement.[113] The court will be able to use this power in cases where the trustee does not comply with the provisions of a superannuation agreement or where one of the parties attempts to sidestep the agreement.

## Court orders

7.91 Where the parties have not made a binding superannuation agreement, the Family Court will be able to make orders either splitting or flagging their superannuation interests. As these orders will be made in the context of property alteration proceedings under s 79, the court will only be able to make them if it is just and equitable in the circumstances of the case.

7.92 Under proposed s 90MT(1), the court may make an order which effectively entitles the non-member spouse to a certain amount when the splittable superannuation interest becomes payable. There will be a corresponding reduction in the member's entitlement to superannuation under that superannuation plan. Before making a splitting order, the court will be required to determine the overall value of the superannuation interest in accordance with the Regulations, and allocate a base amount to the non-member spouse.

7.93 It will also be open to the court to make flagging orders in relation to superannuation interests, directing the trustee not to deal with the superannuation without the leave of the court. Section 90MU(2) guides the court in determining when it will be appropriate to make a flagging order. It states that the court must

113. FLA s 90MR.

take into account whether the superannuation interest is likely to become payable in the near future. It may take into account any other matters it considers relevant. This gives the court a discretion similar to that currently in s 79(5) of the FLA which allows the court to adjourn the consideration of property interests to a later date. Flagging orders are envisaged to be most appropriate in circumstances where a condition of release (such as retirement) is imminent.

## Information to parties

7.94 One of the major problems facing separating couples is obtaining information about the other partner's superannuation entitlements. Under the FLA at the moment, if parties do not agree to give information about their superannuation entitlements to the other, they must apply for a subpoena to be issued requiring the information to be provided. There is a specific form available from the Family Court for this.[114]

7.95 In order to facilitate an informed decision in property settlements or orders, the Act will allow spouses to ask trustees for information about their partner's superannuation interest. Trustees, in turn, will be authorised and in fact, required to give full information about the member's account to the non-member spouse on specific request. Trustees who disclose information, which they are authorised to disclose, will not be in contravention of any privacy provision.[115]

## Other significant provisions

7.96 Section 90MB provides that the new Part VIIB of the FLA will override any other laws, trust deeds or the like, whether made before or after the commencement of the new regime, that prevent the division of superannuation. It provides that superannuation interests will be able to be divided on the separation of the parties

114. Available on its website «www.familycourt.gov.au».
115. FLA s 90 MZB.

to a marriage despite any contrary intentions expressed in other legislation, trust deed or any other law of the Commonwealth or State or Territory. This is a clear expression of the Commonwealth's intention to cover the field in respect of the division of superannuation interests between married couples on separation. Section 90MB(2) protects the trustee in that it provides that anything that the trustee does in compliance with s 90MB(1), which is contrary to the governing rules of the superannuation fund, will not be treated as a contravention.

## Overseas jurisdictions

### *United Kingdom*

7.97 Under legislation introduced in July of 1996, UK courts are empowered to split the pension plans of separated couples. Sections 25-26 of the *Matrimonial Causes Act 1973* (UK) allowed couples to seek an order that either the income or the tax free lump sum available on retirement be paid to other spouse. The provisions have not been popularly received because of the potentially extended delay before payment is made. The legal and administrative costs involved in securing such an order also have a prohibitive effect.

7.98 A new system of pension sharing began on 1 December 2000 under the *Welfare Reform and Pensions Act 1999* (UK). Under the new arrangements, the value of the pension entitlements can be divided on divorce or nullity of marriage for the benefit of the other spouse,[116] termed a pension sharing order.[117] In making such orders the court is to have regard to any benefits under a pension arrangement which a party to the marriage has or is likely to have (whether or not in the foreseeable future), and any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring. This has made it easier to pursue the clean break principle as pensions, the matrimonial home and other assets can be split on divorce.

116. *Matrimonial Causes Act 1973* (UK) s 21.
117. *Matrimonial Causes Act 1973* (UK) s 27.

### *Canada*

7.99 In Canada, provincial laws govern the division of property on relationship breakdown while federal laws govern the division of pension plans. The *Canada Pension Plan Act 1985* allows for the division of unadjustable pension earnings between spouses and common law partners on relationship breakdown.[118] Either party may apply for a division, however the parties must have lived together for 36 months during the marriage or relationship for the application to be approved.[119]

7.100 On separation or divorce, s 55 allows each of the partners to apply for an equal division of the pension entitlements that each accumulated during the relationship. Entitlements are calculated by adding together the unadjusted pensionable earnings for each party (only the earnings made during cohabitation are counted).[120] This figure is then divided equally and payed to each party.[121]

7.101 This provision effectively adopts the same view as the provincial schemes for the division of matrimonial property namely that marriage is an equal partnership in which partners contribute equally to the accumulation of wealth during the course of the relationship thus entitling them to equal shares of that wealth upon relationship breakdown.[122]

7.102 Division of pension entitlements is mandatory following the granting of a divorce, or a judgement of nullity of the marriage; on the application of either spouse if the spouses have been living

118. The *Canada Pension Plan Act* was extended to cover common law partners by Bill C-23. Common law partner is defined as "a person cohabiting with a contributor in a conjugal relationship at the relevant time having cohabited … for a continuous period of at least one year."
119. *Canada Pension Plan Act 1985* s 55(2)(a).
120. *Canada Pension Plan Act 1985* s 55(3).
121. *Canada Pension Plan Act 1985* s 55(4).
122. Law Commission of Canada, B Cossman and B Ryder, *Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation* (May 2000).

separately for a year or more; or if one of the parties has died and the parties had been living apart for more than a year.[123]

### *New Zealand*

7.103 The *Property (Relationships) Act 1976* enables the court to make orders to ensure that both spouses and de facto partners receive their appropriate share of a superannuation scheme entitlement on separation. Superannuation is included within the definition of relationship property under s 8(1)(i) of the Act. That proportion of the value of any superannuation scheme entitlements that is attributable to the marriage or de facto relationship[124] is relevant in property proceedings under the Act. If partners do not want this to apply, they may enter into an agreement to contract out of the provisions of the Act.

## OPTIONS FOR REFORM

7.104 The position paper on superannuation and family law, prepared by the Commonwealth Attorney General's Department, acknowledged the constitutional limitations on the Commonwealth to extend its proposed reforms to de facto couples. However, it also encouraged States and Territories to use the Commonwealth system as a model for adoption in relation to de facto couples.[125] Since then, however, it appears that the Commonwealth has increased pressure on the States and Territories to refer their powers over the resolution of financial matters between de facto couples post separation to the Commonwealth.

123. *Canada Pension Plan Act 1985* s 55(1).
124. *Property (Relationships) Act 1976* (NZ) s 8(f).
125. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at 79. See also recommendations of Australia, Parliament, Senate Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000* (AGPS, Canberra, 2001).

## Option 1: Reference of powers

7.105 At recent meetings of the Standing Committee of Attorneys General, the Attorneys General of all the States and Territories have discussed referring their powers over de facto relationships to the Commonwealth. Media reports noted that the Commonwealth Government sought only to take over legislative responsibility for heterosexual de facto couples. State and Territory Attorneys General are opposed to the non-inclusion of same sex de facto and other close personal relationships, seeing this as a retrograde step.[126] The Commission understands that discussions between the Commonwealth and State Attorneys General will continue.

7.106 The Commission considers that it is unfair for persons in de facto relationships to have inferior rights to their married counterparts. A referral of powers to the Commonwealth, in the light of the current discussions, would be beneficial for heterosexual de facto couples. However, the Commission considers that all couples regardless of sexual orientation should have equal rights. For this reason, the Commission would be wary of recommending that this State's powers over de facto relationships be referred to the Commonwealth unless there was a commitment to extend protection to the groups covered by the PRA.

## Option 2: Parallel laws

7.107 New South Wales also has the option of adopting parallel laws based on the FLA amendments.

### *Support for parallel laws*

7.108 There is broad support for the thrust of the Commonwealth reforms. The superannuation industry supports it. ASFA, which represents the superannuation industry, has consistently argued for the removal of discriminatory provisions between married and non-married couples, including the removal of discrimination against same sex couples.

126. See, for example, I Munro, "Gay couples left out of court shift", *The Age* (8 March 2002).

7.109 Women's groups are also generally supportive of the amendments. Their two major concerns are that women ought still be able to trade off their interest in their partner's superannuation in order to secure housing for themselves and their children. There is a particular emphasis on keeping the family home. According to the National Network of Women's Legal Services, the family home provides women with both economic and emotional security. It is important that any changes to the way that superannuation treated does not jeopardise the ability of women to trade off their entitlement to their partner's superannuation in order to secure the family home.[127] This is one of the reasons why there was not support for an automatic 50/50 split of superannuation interests.[128] The new provisions do not prevent trading off. Nor do they limit the amount to be considered for any split.

7.110 The National Network of Women's Legal Services suggested that trustees be prevented from disclosing the address of the member or non-member spouses to the other party, to ensure that women and children fleeing from violent situations were protected. This concern has been addressed in the legislation.[129]

### *Can NSW adopt the same laws relating to superannuation?*

7.111 Although NSW does not face the same constitutional difficulties that beset the Commonwealth in relation to binding

127. Women's Legal Service, Brisbane, *Submission in Response to Superannuation and Family Law – A Position Paper of the Commonwealth Attorney's General's Department* (August 1998) at 3.
128. The Position Paper proposed a system based on the premise that separating spouses are entitled to an equal share in each other's superannuation to the extent that they have cohabited during the period of membership of the superannuation scheme. Commonwealth Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998) at para 3.1. See also the criticisms of this approach by K Dunn, "Splitting the Difference: Superannuation Equality and Family Law" (1998) 12(3) *Australian Journal of Family Law* at 233. The equal sharing proposal has since been abandoned; superannuation is now to be treated in the same way that other property is treated.
129. FLA s 90 MZB(5).

third parties[130] or of not being able to acquire property other than on just terms,[131] there may be problems with s 109 of the Commonwealth Constitution. This states that when a law of a State is inconsistent with a law of the Commonwealth, the law of the Commonwealth prevails and the law of the State will become invalid to the extent of the inconsistency.[132] As any uniform law adopted by NSW will extend to same sex couples and persons living in close personal relationships, who come within the scope of the PRA, it is possible that inconsistencies may arise between those provisions and other Commonwealth laws (for example, taxation laws), which may invalidate the NSW provisions. The test is whether the Commonwealth intended to cover the field, that is, regulate an area completely and exhaustively. If the Commonwealth does intend to cover the field, any State law that attempts to regulate a part of that subject matter will be invalid. In the present context, the express mention of the Commonwealth's intention to cover the field of splitting superannuation interests on relationship breakdown applies only to married persons under the FLA.

## Option 3: Retain status quo

7.112 This is the third and least preferred option. It would perpetuate the unfairness of the current requirement of proof of contributions. In fact, in view of Commonwealth reforms to the FLA, doing nothing means increasing the extent to which people in de facto relationships have inferior rights as compared to married persons.

130. *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337. In the end, the Commonwealth claimed to draw its powers to bind superannuation trustees from its matrimonial causes power. Using the corporation's power was not feasible because a large number of superannuation funds are not incorporated.
131. *The Constitution* s 51(xxxi). This issue arose particularly in relation to splitting funds held in defined benefit schemes because they are so difficult to value.
132. *The Constitution* s 109.

**ISSUE 28**

**Which is the preferable option for dealing with superannuation entitlements on the breakdown of de facto or close personal relationships. Why?**

# 8. Partner maintenance

- Introduction
- Partner maintenance under the PRA
- Partner maintenance in other jurisdictions
- The purpose of partner maintenance
- Options for reform

# INTRODUCTION

8.1 The *Property (Relationships) Act 1984* (NSW) ("the PRA") creates a limited entitlement to partner or spousal maintenance. In this chapter, we review that part of the PRA and examine how the maintenance provisions have operated since 1984.[1] We also discuss the implications of the extension of the maintenance provisions to a broader category of relationships following the 1999 amendments to the PRA. After reviewing the rationale and objectives of partner maintenance, or "spousal" support, we consider options for reform.

# PARTNER MAINTENANCE UNDER THE PRA

8.2 The *Property (Relationships) Legislation Amendment Act 1999* (NSW) ("the 1999 amendments") did not alter the substantive content of the maintenance provisions that existed under the *De Facto Relationships Act 1984* (NSW).[2] However, the scope of the legislation was considerably broadened. Those in "domestic relationships", which includes same-sex and heterosexual de facto partners, and those in close personal relationships as defined in the PRA, are now covered.[3] As a consequence, the PRA applies to a more numerous and diverse range of relationships than was the case when the original legislation was enacted in 1984.

## No general right to maintenance under the PRA

8.3 The PRA provides expressly that a party to a domestic relationship is not generally liable to maintain the other, nor to claim maintenance from the other, except in accordance with the limited exceptions set out in Division 3 of the PRA.[4] The criteria for awards for maintenance under the PRA are set out later in this chapter. This narrow approach stems from a concern the

1. This chapter focuses only on "partner" maintenance. Maintenance for children is discussed briefly in Chapter 3.
2. See para 1.11-1.12, 1.23 and 2.7-2.9 for a discussion of the effect of the 1999 amendments.
3. PRA s 5(1).
4. PRA s 26. See para 8.4-8.8.

Commission expressed in its 1983 report that unmarried partners, unlike their married counterparts, should not have a general duty to support each other after their relationship ends.[5] Under the *Family Law Act 1975* (Cth) ("the FLA"), a spouse is liable to maintain the other to the extent that he or she is reasonably able to, if that party is unable to support him or herself adequately.[6] This provision is based on the twin criteria of one party's need and the capacity of the other to pay.

## Limited right to maintenance under section 27

8.4 Only parties to domestic relationships that have lasted for more than two years are eligible to make a claim for maintenance.[7] An application for maintenance must be made within two years of the domestic relationship ending.[8]

8.5 The PRA provides two limited bases for the award of partner maintenance.[9] An applicant for partner maintenance must demonstrate that he or she is unable to support himself or herself adequately because:

- he or she has the care and control of a child of the relationship, or a child of the respondent, provided the child is under 12 years (or 16 if the child has a disability);[10] and/or

5. NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) Ch 8, especially at 8.25-8.26. The Commission held the view in 1983 that de facto relationships should not be viewed on an equal footing with marriage: see para 1.14-1.15.
6. FLA s 72.
7. PRA s 17(1). There are some circumstances in which the court is permitted to consider an application for financial adjustment where the relationship has lasted less than 2 years, for example, where there is a child involved and/or failure to make an order for financial adjustment would cause serious injustice to the applicant): see s 17(2).
8. PRA s 18(1). A claim for maintenance does not survive the death of a party to the application: s 31.
9. See also *Domestic Relationships Act 1994* (ACT) s 19, and *De Facto Relationships Act 1991* (NT) s 26(1) for similar provisions.
10. PRA s 27(1)(a).

- his or her earning capacity has been adversely affected by the circumstances of the relationship and, in the court's opinion, maintenance would assist the applicant's earning capacity by allowing the person to undertake training or study and it is reasonable to make the order.[11]

8.6 These categories are sometimes described respectively as "custodial" maintenance and "rehabilitative" maintenance. While the Act specifically contemplates that a claim may be based on both of these grounds,[12] it has been held that such an action is a contradiction in terms. In *Todoric v Todoric*, Justice Powell concluded that such a claim contained an "air of incongruity" because "an assertion that one needs, and wishes to retrain in order to obtain full-time employment would seem to deny the validity of any assertion that the demands of caring for children render one incapable of seeking, or taking up, full-time employment."[13] However, this interpretation has been criticised as being inconsistent with the explicit statutory intention.[14]

8.7 The PRA provides that the court must have regard to a number of matters when determining an application for maintenance.[15] Specifically, decisions under the PRA have emphasised the importance of:

- the employment and financial situation of both parties;[16]

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11. PRA s 27(1)(b).
12. PRA s 30(3).
13. *Todoric v Todoric* (1990) DFC 95-096 at 76,241 (Powell J).
14. O Jessep, "Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation", paper prepared for NSW Law Reform Commission seminar (Sydney, 7 July 2000) at 6 ("Jessep seminar paper"); L Willmott, *De Facto Relationships Law* (LBC, 1996) at 197.
15. PRA s 27(2). The relevant factors include the income, property and financial resources of each de facto partner, including any pension allowance or benefit or capacity for gainful employment; the financial needs and obligations of each partner; the responsibilities of either partner to support any other person, and the terms of the property division and any child maintenance payments.
16. *D v McA* (1986) 11 Fam LR 214 (Powell J); *Todoric v Todoric* (1990) DFC 95-096 (Powell J).

- the financial position of the person being maintained, having regard to social security benefits or compensation payments;[17]
- whether maintenance would enable the recipient to acquire qualifications sought to assist financial independence;[18] and
- whether the inability to support oneself flows exclusively from the ground selected and is not affected by other circumstances as well.[19]

8.8 Generally, maintenance decisions under the PRA reflect the view that maintenance should be awarded only in exceptional circumstances. In *Todoric*, for example, the court refused to award maintenance because the training course nominated by the applicant would not necessarily lead to full-time employment, and could not be completed within the time period prescribed by the PRA during which the applicant is eligible for rehabilitative maintenance.[20] There is considerable empirical evidence showing that partner maintenance is rarely claimed or received.[21]

17. Including estimates of the income and welfare benefits, and in some cases the "ample margin" remaining from child maintenance: See *D v McA* (1986) 11 Fam LR 214 (Powell J). Note, however, that this decision predates the child support scheme and the consequent amendments to the *Social Security Act 1991* (Cth).
18. *Todoric v Todoric* (1990) DFC 95-096 at 76,234 (Powell J).
19. *Todoric v Todoric* (1990) DFC 95-096 at 76,241-76,242 (Powell J); *Parker v Parker* (1993) DFC 95-139 at 76,139 (Young J).
20. *Todoric v Todoric* (1990) DFC 95-096 at 76,241-76,242 (Powell J). Rehabilitative maintenance is available for up to 3 years after a court order is made, or 4 years after the end of the relationship, whichever is shorter: see PRA s 30(2).
21. There is considerable empirical research showing that spousal maintenance is rarely claimed or received: see K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, Melbourne, 1993); P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1986); and J Behrens and B Smyth, *Spousal Support in Australia: A study of incidence and attitudes* (AIFS, Working Paper 16, 1999).

## Duration of maintenance

8.9 The PRA places clear limits on the duration of any maintenance order. Where a person seeks maintenance on account of having responsibility for a child of the relationship, maintenance is available only until the child turns 12 years of age or, in the case of a child with a disability, 16.[22] For rehabilitative maintenance, support is available for up to 3 years after the court order is made, or 4 years after the end of the relationship, whichever is shorter.[23]

8.10 By contrast, other legislation that provides for maintenance does not specify any time limit on the duration of a maintenance award.[24] As yet, there is no case law from that jurisdiction, and it is unclear how such open-ended liability will be interpreted.

## The effect of repartnering on maintenance

8.11 The PRA provides that a person who has entered into a domestic relationship with another person, or has married or remarried, may not claim maintenance from his or her former partner.[25] This assumes that the purpose of maintenance is to address any financial disadvantage that flows from the breakdown of marriage or a similar relationship, and that this financial disadvantage disappears once a person repartners. Professor Owen Jessep has questioned the rationale for ceasing to make maintenance available once the recipient repartners, noting that "since the reason for seeking maintenance must flow from the

22. PRA s 30(1); *Domestic Relationships Act 1994* (ACT) s 22. Compare this with the *De Facto Relationships Act 1991* (NT) s 32(1) which allows periodic maintenance until the child turns 18 years of age.
23. PRA s 30(2). For equivalent provisions see: *Domestic Relationships Act 1994* (ACT) s 22; *De Facto Relationships Act 1991* (NT) s 32(2).
24. See, for example, *De Facto Relationship Act 1999* (Tas) s 23; FLA Pt 8.
25. PRA s 29. See also, *De Facto Relationship Act 1999* (Tas) s 25; and *De Facto Relationships Act 1991* (NT) s 28 and FLA s 82(4). Note also that one of the factors a court must take into account when considering an application for maintenance under the FLA is the financial circumstances of any person with whom one of the parties is cohabiting: s 75(2)(m).

previous relationship, it is not clear … why the claim should automatically be barred as soon as a new relationship is formed".[26]

8.12 Whether or not the repartnering provision is appropriate for de facto relationships under the PRA, it does not appear to be relevant to close personal relationships:[27]

> Take a situation where a woman separates from her de facto partner, is caring for their young children, and then brings her ailing mother home so that the mother can be cared for. As the woman now has a "close personal relationship" with her mother, she cannot seek maintenance for herself against her former partner. This does not make any sense at all.[28]

8.13 Of those States and Territories that have statutory provisions governing maintenance,[29] the ACT is the only jurisdiction that does not treat marriage or repartnering as an absolute bar to maintenance. Instead, marriage or repartnering is listed as a factor that might be considered relevant when assessing the financial resources or financial needs of the applicant,[30] or when determining an application to vary an order based on a change of circumstance.[31]

**ISSUE 29**

**What role, if any, should repartnering play in relation to the availability of maintenance under the PRA?**

26. Jessep seminar paper at 6.
27. PRA s 5(1)(b).
28. Jessep seminar paper at 6.
29. See para 8.22-8.25.
30. *Domestic Relationships Act 1994* (ACT) s 19(2).
31. *Domestic Relationships Act 1994* (ACT) s 23(2). Compare this with the PRA s 35.

## The type of maintenance: periodic or lump sum?

8.14 If an applicant for maintenance satisfies the criteria set out in the PRA, the court can award either periodic or lump sum maintenance. Under the PRA, the court is directed "so far as is practicable [to] make such orders as will finally determine the financial relationships between the parties to a domestic relationship and avoid further proceedings between them."[32] Since there have been few applications for maintenance under the PRA, it is difficult to discern any clear preference on the part of the court for either lump sum or periodic maintenance awards. In *Keene v Harkness*, Master McLaughlin rejected an application for periodic maintenance expressly on the ground that the PRA directed the court to avoid making an order that would not "finally determine the financial relationships between the parties and could possibly be a source of further proceedings between them."[33] However, the Court of Appeal disagreed, noting that if "s 19 [of the PRA] were to be applied in this fashion then courts would never be able to make orders for periodic maintenance."[34] In that same case, the Court of Appeal expressed reservations about ordering a person to make periodic payments where to do so may be "unduly restrictive", particularly where the payer is of limited means.[35]

8.15 Looking to the federal level, the Family Court addresses the same problem. It assesses whether an order for lump sum maintenance under the FLA would be impracticable in the circumstances; for example, where there are few assets but the payer has a high earning capacity.[36] The power to order lump sum maintenance has been described as:

> a power to be exercised cautiously. … In particular, uncertainty about future events explains this approach, and

32. PRA s 19(1). The FLA has an equivalent provision: s 81.
33. *Keene v Harkness* (1997) DFC 95-179.
34. *Keene v Harkness* (1997) DFC 95-179 at 77,555 (Cohen AJA).
35. *Keene v Harkness* (1997) DFC 95-179 at 77,557 (Cohen AJA).
36. See, for example, *In the Marriage of Walters* (1986) FLC 91-733; *In the Marriage of Best* (1993) 116 FLR 343; *In the Marriage of Clauson* (1995) 18 Fam LR 693; *DJM v JLM* (1998) FLC 92-816.

> capitalisation of maintenance would rarely be justified where there is no genuine concern about the capacity and preparedness of the payer to comply regularly with a periodic order.[37]

8.16 Lump sum awards of maintenance provide some clear advantages. Problems of enforcement, for example, are avoided. This may, in turn, also reduce litigation costs and antagonism between the parties. Lump sum orders may be particularly appropriate where the payer has significant assets that can be divided.[38] A lump sum payment, as opposed to periodic payments, might also permit the payee a greater degree of financial independence. For example, a lump sum payment might facilitate the purchase of a home for the payee (and perhaps thereby assist in rehousing the payee and any children for whom she or he might be responsible). It has also been suggested that lump sum payments may make it easier for the payee to qualify for social security benefits than would be the case with periodic payments.[39]

## Interim/urgent maintenance

8.17 The PRA currently makes provision for interim maintenance to be granted where "it appears to the court that the applicant is in immediate need of financial assistance"[40] pending the determination of the maintenance application. The economic costs of relationship breakdown are felt hardest immediately after separation, particularly for the partner who has no independent

37. *In the Marriage of Clauson* (1995) 18 Fam LR 693 at 706. For a discussion of the Family Court's approach to this issue, see A Sifris, "Lump Sum Spousal Maintenance: Crossing the Rubicon" (2000) 14 *Australian Journal of Family Law* 1.
38. In *Keene v Harkness* (1997) DFC 95-179*,* the court noted that the respondent had extensive demands on his income (including child support responsibilities for five children) and instead awarded the applicant a small lump sum payment which it noted could come from the proceeds of the sale of the house: at 77-557.
39. *Foster v Evans* (1997) DFC 95-193 at 77,685 (Bryson J).
40. PRA s 28.

income.[41] They are quite often unable even to meet short-term living expenses, let alone afford to bring proceedings for property division or maintenance. As Jessup points out, this type of maintenance is "clearly concerned with urgent as opposed to interim maintenance"[42] and would be one of the most compelling aspects of maintenance worth retaining.

## Power to discharge or vary an award

8.18 A court may vary or discharge a periodic maintenance order if it considers that either a change in the circumstances of one of the parties, or a change in the cost of living, justifies doing so.[43] The court also has the power to vary any order for financial adjustment where there has been a "miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance", where it is impracticable for an order or part of it to be carried out, or where a default by a party makes it just and equitable for a court to do so.[44]

## Incidence of partner maintenance

8.19 There have been very few maintenance orders sought under the PRA. Of those applications that have been made, few have been successful, either in establishing an award of maintenance at all or in securing the amount of maintenance requested.[45] Recently

41. M Neave, "Private Ordering in Family Law – Will Women Benefit?" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995).
42. 13 *Halsbury's Laws of Australia* [205-6442].
43. PRA s 35.
44. PRA s 41.
45. *D v McA* (1986) 11 Fam LR 214 (Powell J): claim for $200 per week reduced to $130 per week; *Todoric v Todoric* (1990) DFC 95-096 (Powell J): claim for maintenance denied on basis that the partner could not afford the amount and the plaintiff could not show that there was a causal relationship between the care and control of the children and an inability to support herself adequately, especially given the potential provision of Workers Compensation; *Parker v*

published data from the Australian Institute of Family Studies (AIFS) Australian Divorce Transitions Project suggests that over the past decade, periodic spousal support has been awarded in fewer than 7% of cases involving financial arrangements made on the breakdown of marriages.[46] While there is no equivalent research data on the incidence of maintenance on the breakdown of de facto relationships, a review of the (reported and unreported) case law in NSW suggests that the incidence of awards for maintenance is much lower than under the FLA.

8.20 In their research into the incidence of spousal maintenance under the FLA, Behrens and Smyth found that "periodic support continues to be rare, minimal and brief,"[47] noting that solicitors rarely advise their clients to seek maintenance. Such advice may well be informed by a pragmatic assessment that a claim will probably be unsuccessful, given the limited statutory basis coupled with restrictive interpretations that have been taken by courts.[48] Behrens and Smyth suggest that, at least under the FLA, solicitors are more likely to advise their clients to opt for a greater share of the property.[49]

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*Parker* (1993) DFC 95-139 (Young J): claim for maintenance disallowed (but a capital amount awarded under s 20 that appears to have been calculated by reference to maintenance criteria); *Foster v Evans* (1997) DFC 95-193 (Bryson J): lump sum maintenance award of $7000 lump sum; *Keene v Harkness* (1997) DFC 95-179 (NSWCA): lump sum maintenance of $20,500 awarded. This included retrospective periodic payments (of differing amounts) until the youngest child was 12 years of age.

46. J Behrens and B Smyth, *Spousal Support in Australia: a study of incidence and attitudes* (AIFS, Working Paper 16, 1999) at 7.
47. Behrens and Smyth at 8.
48. J Wade, "Forever Bargaining in the Shadow of the Law: Who sells solid shadows? (Who advises what, how and when)" (1998) 12 *Australian Journal of Family Law* 21 at 36. Consideration of how discretionary legislative provisions create uncertainty as to their application, particularly in a family law context.
49. See Behrens and Smyth at 21.

### Private maintenance agreements

8.21 As well as providing the court with the power to make orders for maintenance, the PRA provides that parties may make their own agreements with respect to their financial affairs.[50] This includes making provision for the maintenance of either or both of the parties.[51] So long as the agreement satisfies certain requirements under the PRA, the court cannot make an order inconsistent with the terms of the agreement.[52] The agreement must, for example, be in writing, signed by both parties and each party must have obtained a certificate of independent legal advice as attested to by a solicitor, which must be attached to the agreement.[53] Agreements may be varied or set aside according to statutory or common law contractual grounds.[54] Domestic relationship agreements (but not termination agreements)[55] may also be varied or set aside if the court believes that the circumstances of one or both of the parties have so changed since the agreement was made that enforcing the agreement would lead to serious injustice.[56]

## PARTNER MAINTENANCE IN OTHER JURISDICTIONS

### Australia

8.22 Until recently, the other States and Territories that have created statutory maintenance provisions for de facto partners tended to mirror the narrow approach found in the PRA.[57]

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50. PRA Pt 4 s 44(1).
51. PRA s 44(1).
52. PRA s 47(1); see also para 4.45. Note that parties cannot, by agreement, contract out of child support or child maintenance obligations: PRA s 45(2); see also para 4.62.
53. PRA s 47(1)(a)-(d).
54. PRA s 46.
55. See para 4.40-4.44 for definitions.
56. See para 4.63-4.118 for further discussion of the current and proposed grounds for setting aside financial agreements.
57. See *Domestic Relationships Act 1994* (ACT) s 18; *De Facto Relationships Act 1991* (NT) s 24; *De Facto Relationships Act 1999* (Tas) s 22.

8.23 In the ACT, the maintenance provisions under the *Domestic Relationships Act 1994* (ACT) apply to domestic partners. This includes those in heterosexual and same sex couple relationships,[58] as well as other interdependent relationships.[59] The Western Australian legislation has been introduced which applies to heterosexual and same sex de facto relationships, and mirrors the provisions of the FLA regarding partner maintenance.[60]

8.24 The Tasmanian and Northern Territory statutory schemes apply only to heterosexual de facto relationships.[61] The Tasmanian legislation does, however, provide the broadest scope for the award of maintenance.[62] Section 23(1)(b) enables the court to consider "any other reason arising in whole or in part from circumstances of the de facto relationship" when deciding whether the applicant is unable to support himself or herself adequately in the decision to grant partner maintenance.[63] This reflects more fully the approach taken in the FLA.[64]

8.25 By contrast, the *Property Law Amendment Act 1999* (Qld) does not provide for partner maintenance.[65] It creates a statutory

58. There is no record of any claims being made under the ACT legislation for same-sex partner.
59. *Domestic Relationships Act 1994* (ACT) s 19. A domestic relationship in the ACT is defined as a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other: s 3. Cohabitation is not a necessary criterion for the existence of a domestic relationship.
60. *Family Court Amendment Bill 2001* (WA) s 205ZE, s 205ZF.
61. South Australia, Victoria and Queensland do not provide for maintenance, though they have provisions dealing with property division.
62. *De Facto Relationship Act 1999* (Tas) s 23(1)(b).
63. In determining whether to make the order, or in fixing the amount to be paid, the court must have regard to nine enumerated matters that closely resemble s 75(2) matters contained in the FLA.
64. FLA s 75(2)(o), which states that the court may consider "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account."
65. The *Property Law Amendment Act 1999* (Qld) Div 4 s 279-s 285. Section 282 of the Act states that the purpose is to "ensure a just

regime for adjustment of property interests, and applies to both heterosexual and same sex relationships.

## Overseas jurisdictions

### *Canada*

8.26 In Report 36, the Commission considered laws in a number of Canadian provinces that enabled de facto partners to apply for maintenance on the breakdown of relationships.[66] Notable amongst these was Ontario, whose relevant partner support provisions were recently considered by the Supreme Court of Canada in *M v H*.[67] It was held that Ontario's *Family Law Act* violated section 15 of the *Canadian Charter of Rights and Freedoms* because the definition of spouse in the partner support provisions included unmarried heterosexual couples living in "conjugal relationships", but did not include those in same sex relationships. The Supreme Court directed the province to ensure that its legislation complied with the Charter, and in response to that decision, the province of Ontario passed an omnibus law reform statute that amends some 67 laws that refer to spouses or marital status, extending the application of those laws to cohabiting same sex partners.[68]

### *New Zealand*

8.27 The *Family Proceedings Act 1980* (NZ) was recently amended[69] to insert extensive new maintenance provisions for married and de facto partners. A de facto partner will be liable to maintain the other de facto partner to the extent that such maintenance is necessary to meet the other's reasonable needs in

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and equitable property distribution at the end of a de facto relationship." Some of the functions of maintenance might be seen as being served through these property adjustment provisions. South Australia also provides a property regime for de facto couples, not including maintenance or same sex couples: *De Facto Relationships Act 1996* (SA).

66. NSWLRC Report 36 at para 8.16-8.19.
67. *M v H* [1999] 2 SCR 3.
68. *Amendments Because of the Supreme Court of Canada Decision in M v H 1999* (Ontario), SO 1999, c 6.
69. By the *Family Proceedings Amendment Act 2001* (NZ), which came into force on 1 February 2002.

circumstances where he or she cannot practicably meet his or her own needs.[70] The New Zealand provisions allow for periodic or lump sum maintenance to be awarded,[71] and sets limits on the duration of periodic maintenance.[72] Under the new provisions, the liability to pay periodic maintenance ceases when the recipient partner marries or forms another de facto relationship.[73]

8.28 Section 65 sets out the matters that a court must consider when determining the amount of maintenance to be paid. These include the means of each party, the reasonable needs of each party, the financial and other responsibilities of each party, including any other order to pay maintenance and any other circumstance that makes one partner liable to maintain the other.[74]

## THE PURPOSE OF PARTNER MAINTENANCE

8.29 In determining the type of maintenance provisions that should apply to domestic relationships under the PRA, it is helpful to examine some of the past and current purposes of partner maintenance.

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70. In determining liability for maintenance, the court is to look at the ability of the de facto partners to become self-supporting; the responsibilities of each partner for the ongoing care of any dependent children of the relationship after the relationship has ended; the standard of living of the partners during the relationship; and the reasonable education needs of the partner seeking maintenance: *Family Proceedings Act 1980* (NZ) s 64(1) and s 64(2).
71. *Family Proceedings Act 1980* (NZ) s 70.
72. The Act states that each partner should assume responsibility for their own needs within a reasonable time after the relationship ends, following which time neither partner is liable to maintain the other: *Family Proceedings Act 1980* (NZ) s 64A(1). However, a de facto partner will still be liable to maintain the other if, given the duration of the relationship, the relative ages of the parties and the ability of the partner seeking maintenance to support him or herself, it is unreasonable for one party to do without maintenance and it is reasonable to require the other party to provide that maintenance: *Family Proceedings Act 1980* (NZ) s 64A(2) and s 64A(3).
73. *Family Proceedings Act 1980* (NZ) s 70A.
74. *Family Proceedings Act 1980* (NZ) s 65(2).

8.30 Prior to the enactment of the FLA, like most other aspects of family law, maintenance was fault-based. That is, a person could claim maintenance only if she or he was the "innocent" party.[75] Maintenance represented the continuing duty that a husband owed to a wife, as created by the marriage contract, and was a specifically female need. As a consequence, every wife was entitled to maintenance upon the dissolution of the marriage. In some cases, maintenance functioned as "punitive damages", where the amount payable was increased or decreased in accordance with the degree of matrimonial fault. In others, it functioned as "lifestyle maintenance" that acted to preserve the standard of living to which the wife had become accustomed during the relationship. Underlying both these approaches is the view that marriage is (in addition to any religious or spiritual element) a life-long contractual arrangement.

8.31 With the enactment of no-fault divorce, the grounds for awarding maintenance changed. The focus moved away from considerations of the rights and obligations emerging out of the marriage contract, or created by the conduct of the parties. The right to maintenance was transformed into a duty to support that flowed from a consideration of the financial circumstances of the parties, during marriage and after divorce, in order to ameliorate the dependency of one party. The FLA created a general entitlement to maintenance[76] based on the twin criteria of need on the one hand, and capacity to pay on the other.

8.32 The maintenance provisions of the FLA are closely intertwined with the provisions that deal with alteration of property interests.[77] In fact, when the court is making an order under section 79, it is required to take into account the "maintenance" factors listed in section 75(2). That section provides that, in making an order for spousal maintenance, the court shall take into account the:

75. For a history of spousal maintenance in Australia see H Finlay and R Bailey-Harris, *Family Law in Australia* (4th ed, Butterworths, Sydney, 1989) at para 704-711.
76. Unlike the PRA: see para 8.3-8.7.
77. See Chapter 5 for a discussion of property.

- age and state of health of the parties;
- income, property and financial resources of the parties and the mental and physical capacity of each of them for appropriate gainful employment;
- responsibility of either party to care for children or support any other person;
- extent to which maintenance would increase the earning capacity of the potential recipient;
- extent to which the potential recipient contributed to the income, earning capacity, property and financial resources of the other party;
- duration of the marriage and the extent to which it affected the earning capacity of the other party; and
- amount of any child support.[78]

## Main purposes of partner maintenance

### *Dependency/need*

8.33 The Commission in 1983 found that the primary function and purpose of maintenance was to provide a "means of easing the transition between the dependence which may exist during marriage and the responsibility for self-support assumed by each partner after the relationship breaks down".[79] The two limited forms of maintenance available under the PRA, rehabilitative and custodial maintenance, respond to the needs that flow from dependency created within the relationship.

8.34 The "need" rationale for the existence of partner maintenance has lost popularity in recent times, with the view that legislation should not encourage or reinforce such dependency. However, while the desire for formal equality between partners to a relationship is admirable, this is not necessarily borne out by statistics, particularly for women. For example, a disparity of real

78. See PRA s 75(2).
79. NSWLRC Report 36 at para 8.11.

wages between men and women persists, notwithstanding the notion of equal pay,[80] as does an unequal division of domestic labour and child care.[81] These circumstances affect opportunities for paid employment, both during and after the relationship, and hence earning capacity and financial security.[82] As a consequence, it has been argued that a desire for formal equality must be weighed carefully against the danger of overstating actual changes.[83]

### *Rehabilitative maintenance*

8.35 Rehabilitative maintenance refers to the provision of transitional short-term support provided for the specific purpose of enabling the recipient to retrain or gradually re-enter the workforce. This is one of the grounds upon which maintenance can

80. On average, women earn 10% less than men for equal tasks and are paid 10% less per hourly rate of pay: Australian Bureau of Statistics, *Australian Social Trends* (Cat No 4102.0, 2000) at 150. The AIFS, *Divorce Transitions Project* (2000) found that there was a gendered disparity in post-divorce household incomes, with older and younger women experiencing the lowest incomes and the most disadvantage: R Weston and B Smyth, "Financial Living Standards After Divorce" (2000) 55 *Family Matters* 10 at 13. See also K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, Melbourne, 1993).

81. Women have primary responsibility for the unpaid labour of caring for home or family during marriage, often in addition to their paid work commitments. Men have primary responsibility for the paid labour of financial support. Women continue to be primarily responsible for unpaid homemaker and childcare responsibilities, or are encouraged to make this their first priority: See ABS, *Time Use Survey* (Cat No 4153.0, 1997) for statistics on the unequal division of domestic work.

82. For example, 31.8% of all women are employed casually and 43.5% are employed part-time. By contrast, 22% of all men are employed casually, and 12.5% are employed part-time: ABS, *Australian Social Trends* (Cat No 4102.0, 2000) at 108.

83. See A Diduck and H Orton, "Equality and Support for Spouses" (1994) 57 *Modern Law Review* 681 at 683 for the dangers of a formal equality approach. See also K O'Donovan, "Should all Maintenance of Spouses be Abolished" (1982) 45 *Modern Law Review* 424 at 424-428.

be ordered under the PRA, which states that a partner can claim maintenance on the grounds that "his or her earning capacity has been adversely affected by the circumstances of the relationship and, in the court's opinion, maintenance would assist the applicant's earning capacity by allowing the person to undertake training or study and it is reasonable to make the order".[84] The PRA provides for a three stage process. The claimant must show first, that the relationship had an adverse effect on his or her earning capacity; second, that a maintenance order would assist the applicant's earning capacity; and third, that it is reasonable to make the order.[85]

8.36 Rehabilitative maintenance can be viewed in a broad or a narrow sense. A narrow interpretation requires the payment to address a specific condition created by the relationship within a specific period of time. A broader view could, for example, allow payments to "cushion the process of separation and of creating two households out of one" rather than address highly specific instances of disadvantage.[86]

Quentin has been in a de facto relationship with Brian for 8 years. She has had the primary care and control of 2 children, Alison 6 and Holly 4, and has worked part-time for the past 2 years as a child care worker which does not pay very well. After the relationship ends, Quentin applies for maintenance so that she can retrain as a computer data operator, which will improve her earning capacity. A narrow definition of rehabilitation would prevent any maintenance being awarded as Quentin already has an earning capacity and some skills. A broad interpretation of rehabilitative maintenance, on the other hand, could enable retraining in another field, to increase earning capacity.

84. Section 27(1)(b).
85. *Todoric v Todoric* (1990) DFC 95-096 at 76,241 (Powell J).
86 Family Law Council, *Spousal Maintenance* (Discussion Paper, AGPS, Canberra, 1989) at para 6.3.

8.37 Under the PRA, once a de facto partner is self-sufficient in an economic sense there is no entitlement to maintenance.[87] The Supreme Court has interpreted "self-sufficiency" narrowly to mean off-setting the economic disadvantages incurred as a direct result of the relationship.[88] However, there have been cases elsewhere where a form of rehabilitative maintenance has been provided for self-sufficient spouses who have nonetheless placed detrimental reliance on their partner, or whose partner has been unjustly enriched by decisions made during the relationship.[89] This form of maintenance may be more akin to general compensatory maintenance, which is discussed later.[90]

### *Custodial maintenance*

8.38 Custodial maintenance is the provision of support to the party with the primary care and control of a child or children of the relationship towards whom the parties have a joint responsibility. This is the only other circumstance in which maintenance may be awarded under the PRA.[91] Despite the distinct purpose of such claims, some judges have refused custodial maintenance on the grounds that the payment of child support (under child support legislation) is sufficient. This indicates a fundamental misunderstanding of the function of custodial maintenance, which is effectively a payment to the custodial parent for child-minding services, equivalent to that paid for professional child-minding. In order to clarify the purpose of custodial maintenance and thus enable it to operate effectively, some delineation between child support and custodial maintenance is required.

87. *Todoric v Todoric* (1990) DFC 95-096; *Parker v Parker* (1993) DFC 95-139.
88. *Todoric v Todoric* (1990) DFC 95-096 at 76,240-1 (Powell J); *Parker v Parker* (1993) DFC 95-139 at 76,139 (Young J).
89. See *In the Marriage of Best* (1993) 116 FLR 343 (Fogarty, Lindenmayer and McGovern JJ) and *In the Marriage of Mitchell* (1995) 120 FLR 292 (Nicholson CJ, Fogarty and Jordan JJ). For a Canadian decision with similar emphasis, see *Moge v Moge* [1992] 3 SCR 813 (Supreme Court of Canada).
90. See para 8.39-8.40.
91. Section 27(1)(a). See para 8.5.

### *Compensatory maintenance*

8.39 Compensatory maintenance requires an evaluation of the parties' needs, past contributions and capacity to pay in order to compensate one party's dependency on the other when the relationship ends. This is the approach adopted under the FLA, where there is a general obligation on parties to support each other after separation.[92]

8.40 This approach to maintenance is especially useful where one partner has, for example, taken responsibility for domestic tasks while the other partner has obtained professional qualifications, or where there is little in the way of property assets but one partner has a significant financial resource, such as a high earning capacity or a superannuation expectancy. Despite the difficulties inherent in valuing non-financial contributions, it has been estimated that the value of unpaid work in Australia was about $261 billion in 1997, equivalent to approximately 48% of the country's gross domestic product. Unpaid household work, such as cleaning, and childcare, comprised 91% of this work.[93]

### *Reduction of welfare expenditure*

8.41 In the absence of maintenance, a person unable to support him or herself after separation is more likely to seek state support. In the 1983 Report, maintenance was not linked to concerns about public expenditure as it was accepted that the public purse would not be substantially affected by moving maintenance recipients away from (or towards) government assistance. Instead, the Commission made clear that maintenance should not prejudicially affect a person's ability to receive social security.[94] Since that time, there has been a notable shift in public policy away from state support. Private relationships and the division of assets within these relationships are now essentially matters to be dealt with individually and in the private sphere.

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92. FLA s 72.
93. ABS, *Unpaid Work $261 Billion – ABS Finding* (Cat No 5240.0, Media Release, 10 October 2000); ABS, *Unpaid Work and the Australian Economy* (Occasional Paper, Cat No 5240.0, 1997).
94. Report 36 at para 8.37-8.39. This is also reflected in the FLA: see s 75.

8.42 The *Social Security Act 1991* (Cth) previously stated that a claim for maintenance was a pre-condition to receiving social security benefits. While this section no longer applies, the means-tested nature of social security and the increasing scrutiny of those receiving benefits mean that periodic maintenance could affect social security entitlements. Recent attempts to impose harsher eligibility requirements for social security benefits also need to be considered in any discussion of maintenance reform.[95]

### *Non-compensatory maintenance/wealth redistribution*

8.43 In contrast to the rights and dependency models of maintenance, non-compensatory maintenance aims to achieve quite a different objective. The approach was first adopted in Canada, where the Supreme Court of Canada held that a spouse had an obligation "over and above what is required to compensate the spouse for loss incurred as a result of the marriage."[96] The case involved a claim for maintenance by a wife who had sustained incapacitating physical injuries during the marriage that prevented her from working although these injuries were not causally connected to the marriage.

8.44 In the judgment, maintenance was used to rectify (and compensate for) broader structural inequities that prevented the applicant from realising financial self-sufficiency and independence. The court took into account broader social conditions such as the division of labour and pay inequity that may hamper gender equality. Accordingly, the order functioned as a means of redistributing the wealth of the parties on separation. This approach has been criticised in Australia.[97]

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95. See Reference Group on Welfare Reform, *Participation Support for a More Equitable Society* (Final Report, 2000).
96. *Bracklow v Bracklow* [1999] 1 SCR 420 (Supreme Court of Canada) at 430-431 (McLachlin J).
97. See K Abery, "Bracklow v Bracklow: a Canadian expansion of the bases for entitlement to spousal maintenance" (1999) 13 *Australian Journal of Family Law* 271; M Neave, "From Those Who Have Nothing, Even What They Have Will Be Taken Away – Is There Still a Case for Spousal Maintenance" (2000) *9th National Family Law Conference – Conference Handbook* 301-315.

## Should there be a distinction between married and de facto partners for the purposes of maintenance?

8.45 Compensatory payments as a justification for partner maintenance was explicitly rejected by the Commission in its 1983 Report on the basis that de facto partners differed from married partners and the law should reflect this difference.[98] The standard used to differentiate these relationships was the existence of explicit public commitment, and the concurrent creation of mutual obligation. As de facto relationships do not require such an explicit and public statement of commitment and obligation, it was argued that an expectation of mutual obligation could not be presumed.

8.46 One critique of that report notes that one of the problems confronting those involved in the process of law reform in this context is the "paucity of hard information about the nature of the problem".[99] Since that time, the majority of research and commentary concerning maintenance has continued to focus on developments to spousal maintenance and the experience of married partners, rather than de facto partners.[100] However, while precise data is generally unavailable, some conclusions can be drawn.

98. NSWLRC Report 36 at para 8.9.

99. H Astor and J Nothdurft, "Report of the New South Wales Law Reform Commission on De Facto Relationships" (1985) 48 *Modern Law Review* 61 at 63.

100. This focus on married persons is evident in an Australian and international context. For example, Australian research suggests that even in the event of a favourable property settlement women (both older and younger, in particular those who take on the primary domestic role during the relationship, and especially women with children) are worse off after divorce. P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1986) for a discussion on maintenance in the context of married persons and K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents after Divorce* (AIFS, Melbourne, 1993). Note also US, and UK, studies which show that men who do not repartner are better off some time after divorce, whereas women who do not repartner are worse off: L Weitzman, *The Divorce Revolution* (Free Press, New

8.47 First, de facto relationships are increasing in number and do not function in general as a prelude to marriage. In 1999, it was estimated that around 862,000 people were living in de facto marriages.[101] By comparison, 584,100 people were living in de facto marriages in 1991.[102] While the number of actual marriages has not decreased over the past 3 years, the number of people classed as currently never married has increased from 25.4% in 1976 to 30.6% in 1995.[103] The Australian Bureau of Statistics estimates that 28% of men and 23% of women will never marry in their lifetime.[104] De facto relationships, on the other hand, are likely to increase in number and duration and, in many respects, may be indistinguishable from marriage.

8.48 Secondly, the statistics indicate that, in many cases, the experience of those in de facto relationships does not differ from those who are married. Characteristics of marriage, such as long-term commitment, co-habitation and mutual support, may also be elements of a de facto relationship. This is not to challenge the status and religious significance of marriage, but to emphasise the need to consider the ways in which the experiences of people upon the breakdown of a relationship (married or not) may be similar. For example, in the case of a long-term de facto relationship between partners involving children, the custodial parent is very likely to encounter issues similar to those of a married woman or man in the same circumstances.

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York, 1987). For the methodological problems of these studies see A Sorenson, "Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale for the United States" in L Weitzman and M MacLean (eds) *Economic Consequences of Divorce: the International Perspective* (Clarendon Press, Oxford, 1992) at 263.

101. ABS, *Marriages – Couples choose civil celebrants* (Cat No 3310.0, Media Release, 21 September 2000); ABS, *Marriages and Divorces* (Cat No 3310.0, 1999).
102. ABS, *Marriages and Divorces* (Cat No 3310.0, 1997) at 86.
103. Australian Institute of Family Studies, *Australian Family Profiles: Social and Demographic Patterns* (1997) Table 2.1 at 13.
104. ABS, *Marriages – Couple choose civil celebrants* (Cat No 3310.0, Media Release, 21 September 2000).

8.49 In other jurisdictions, recent debate advocates a non-discriminatory approach that provides both legal recognition of de facto relationships and mechanisms to provide redress.[105]

## OPTIONS FOR REFORM

8.50 The Commission has identified four potential options for reforming the partner maintenance provisions in the PRA.

### Option 1: Retain the status quo

8.51 Under this option, the current provisions in section 26 and section 27 of the PRA would remain. One disadvantage of this approach is that the grounds on which maintenance may currently be claimed, combined with restrictive judicial interpretation of the provisions, are extremely limited. This results in people seeking maintenance orders under the PRA being disadvantaged in terms of the grounds upon which those orders may be sought in comparison with their married counterparts obtaining orders under the FLA where the grounds are broader. The existing provisions also perpetuate the distinction between orders for maintenance under section 27 and property orders made under section 20 of the PRA.[106] Experience under the FLA has shown that the line between property and asset division and maintenance can be unclear, and as such, these matters are best considered at the same time.[107]

105. See, for example, the discussion on the *Statute Law Amendment (Relationships) Act 2001* (Vic): Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 2000, the Hon R Hulls MP, Second Reading Speech at 1911-1913.
106. See Chapters 5 and 6 for a discussion of property issues.
107. See Chapter 5 for an explanation of the overlap between property division and maintenance awards.

## Option 2: Broaden the current provisions

8.52 The second option for reform is to retain the general presumption in the PRA against maintenance, but to make the grounds on which maintenance may be awarded more flexible. For example, the PRA could reflect a broader interpretation of rehabilitative maintenance, or clarify the distinction between custodial maintenance and child support.[108] This approach would have the advantage of providing greater scope for an award of maintenance where it is just and equitable in the circumstances. One disadvantages is that maintenance would continue to be considered separately from property orders. Further, the general presumption in the PRA against an award of maintenance would probably make it unlikely that the actual number of maintenance orders would increase.

## Option 3: FLA approach

8.53 Another option is to amend the PRA to reflect the same grounds for partner maintenance as provided for in section 75(2) of the FLA. This would have the advantage of providing broader grounds for awards of maintenance than are currently available under the PRA, and enabling maintenance and property orders to be determined at the same time, as is the case under the FLA. Family Court jurisprudence would also be of direct relevance in interpreting the provisions of the PRA, which would promote consistency between the two regimes. From a symbolic perspective, mirroring the provisions of the FLA would give those in domestic relationships the same rights and responsibilities, so far as maintenance is concerned, as married people.

8.54 The major disadvantage of this approach is that, according to research, partner maintenance is rarely awarded under the FLA.[109] Accordingly, the FLA provisions may not address the low incidence of awards under the PRA.

108. See para 8.35-8.40.
109. See para 8.8.

## Option 4: Integrative approach

8.55 The final proposal put forward by the Commission involves removing separate maintenance provisions altogether. Instead, the court looks at the factors that would ordinarily give rise to a claim for partner maintenance as matters to be considered at the time of property division. This is known as the integrative approach, and is used in Queensland and Victoria.

8.56 The benefit of this approach is its flexibility. It recognises that partner maintenance has changed over time, and rather than being a form of on-going dependency is now inextricably linked with property or monetary settlements. It is also more convenient dealing with maintenance and property in the one order. The drawback of this approach is that it is of little assistance to those with high incomes or earning capacity but few property assets.

**ISSUE 30**

**Which is the preferable option for reforming the partner maintenance provisions in the PRA? Why?**

# 9. Dispute resolution

- Introduction
- Current framework for resolving disputes under the PRA
- The Federal experience
- Other Australian jurisdictions
- Overseas experience
- General issues for discussion
- Evaluation of key features of the family court
- Options for incorporating key features

## INTRODUCTION

9.1 The aims of this chapter are to:

(a) identify any deficiencies in the current framework that impede the delivery of a "fair, accessible, timely and affordable process for dispute resolution"[1] under the *Property Relationships Act 1984* (NSW) ("the PRA"); and

(b) canvass options for reform that will stimulate further discussion. Since the issues canvassed and the options suggested are the result of a preliminary examination, the Commission would welcome the views of the community, practitioners and others with an interest in this area.[2]

9.2 In inquiring into "the process of decision making or determination of rights"[3] and assessing the need for reform, this chapter first considers the current framework for resolving disputes under the PRA and examines the processes that are in use in NSW in the relevant courts, ranging from the various types of primary dispute resolution methods to litigation. This is followed by a discussion of how similar family/relationship disputes are addressed in the federal sphere and in other Australian and overseas jurisdictions. The chapter then identifies the "issues for consideration" that have arisen out of the discussion of the current framework in NSW and suggests the need for a different approach. The perceived deficiencies of the current framework are considered in the context of a discussion of key features that characterise the Family Court of Australia and other courts dealing with similar issues. These key features (such as specialist jurisdiction, court annexed mediation), are then critically and objectively evaluated to ascertain their suitability for, and relevance in resolving PRA disputes. In conclusion, the chapter considers a range of options for reform.

1. See Chapter 2 at para 2.11 "Principles guiding the Commission".
2. See page x.
3. As required by the terms of reference: see Chapter 1 at para 1.1.

## Background

9.3 The adequacy and appropriateness of current dispute resolution methods in relation to de facto property matters has most recently been considered by Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee").[4]

9.4 In its inquiry into de facto Relationships legislation, the Social Issues Committee[5] considered some of the technical and procedural aspects of the PRA. The Social Issues Committee was particularly concerned about the jurisdiction of the District Court and the need to provide for alternatives to litigation.

9.5 The relevant recommendations[6] were:

> That the Attorney General examine the *District Court Act 1973* to ensure all powers necessary for the District Court to deal with matters brought under the *Property (Relationships) Act 1984* are available.
>
> …
>
> That the Attorney General fully explore the means by which adequate and appropriate alternatives to litigation could be made available under the *Property Relationships Act 1984*, with a view to making the necessary legislative amendments in due course.

In its concluding comments the Social Issues Committee suggested that the above matters (together with other specified issues) be examined by this Commission.[7]

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4. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform* (Report 20, Parliamentary Paper 127, 1999) ("Social Issues Committee Report").
5. See Chapter 1 at para 1.10 and 1.13.
6. Social Issues Committee Report Recommendation 16 at 70 and Recommendation 19 at 74.
7. Social Issues Committee Report Recommendation 26 at 93.

9.6 The Lesbian and Gay Legal Rights Service in its Discussion Paper, *The Bride Wore Pink* also discussed these issues.[8]

## CURRENT FRAMEWORK FOR RESOLVING DISPUTES UNDER THE PRA

9.7 A party to a domestic relationship may apply to a court for an order for the adjustment of property interests or for the granting of maintenance or both.[9] The current framework for initiating such proceedings is set out in section 9 of the PRA, which provides that a person may apply to the Supreme Court or a Local Court for an order for relief. Proceedings instituted in the Local Court may be transferred to the District Court or the Supreme Court.[10] The District Court also has jurisdiction under its own legislation to hear claims under the PRA.[11] The jurisdiction of each of these courts is set out below, followed by a list of issues for consideration.

8. Gay and Lesbian Rights Lobby, *The Bride Wore Pink: Legal Recognition of Our Relationships* (Discussion Paper, 2nd ed, Sydney, 1994). In the Discussion Paper, the Gay and Lesbian Rights Lobby recommended *inter alia* that the NSW State Government be called upon to allocate money and resources to the training of the judiciary and other decision makers who will be responsible for making determinations; allocate funds to an appropriate agency (such as the Law Reform Commission) to consider the question of relationships generally, including the need to ensure that all people with disputes which are based on rights and obligations arising from relationships have access to an inexpensive and accessible forum for the resolution of these disputes, and to that extent, extending cross-vesting arrangements to enable same-sex partners to access the Family Court in all circumstances.
9. PRA s 14; see also Chapters 6 and 8.
10. PRA s 12.
11. *District Court Act 1973* (Cth) s 134.

## Supreme Court

### *Jurisdiction*

9.8 As stated above, PRA matters may either be initiated in the Supreme Court or transferred from the lower courts to the Supreme Court.[12] Typically, the types of PRA matters dealt with by the Supreme Court are those that exceed the jurisdictional limit of the lower courts.[13] Matters that do not exceed the jurisdictional limit of the lower courts may be dealt with in the Supreme Court because of their public importance or complexity. Generally, no more than four new PRA matters are filed each month in the Supreme Court.[14] These low figures are consistent with the amendment to the *District Court Act 1973* (NSW) which gave the District Court jurisdiction in relation to PRA matters.[15]

### *Dispute resolution methods*

9.9 PRA matters can be dealt with by adjudication, or by other dispute resolution mechanisms such as arbitration, mediation or

12. PRA s 12. The court is also empowered to transfer proceedings to another court if it considers that it is in the interests of justice to do so: PRA s 11(2).
13. This is due to the rationale for the hierarchy of courts as defined by their respective jurisdictional limits. In 1997, the jurisdiction of the District Court was increased to $750,000 pursuant to the *District Court Amendment Act 1997* (NSW). This is the reason attributed for the decrease of 17% of cases commenced in the common law division of the Supreme Court in 1997. Following the enactment of the amendment, matters were listed for consideration for their suitability for transfer to the District Court and 64% were transferred to the District Court: NSW Supreme Court, *Annual Review 1997* at 9-10. A similar trend was evident in 1998: NSW Supreme Court, *Annual Review 1998* at 14, 17.
14. Refer telephone conversation with Registrar Berecry of the Equity division of the Supreme Court; this is consistent with the figure of 55 new substantive PRA matters initiated in 1999 as reported in the NSW Supreme Court, *Annual Review 1999* at 33.
15. The *District Court Act 1973* (NSW) was amended by the *District Court Amendment Act 1997* (NSW) and the *Courts Legislation Further Amendment Act 1997* (NSW). See note 13 above. See also para 9.26 to 9.36 for discussion of District Court jurisdiction.

early neutral evaluation. Each of these methods of dispute resolution is dealt with below.

9.10 ***Adjudication.*** Proceedings instituted in[16] or transferred to[17] the Supreme Court under the PRA are subject to the Supreme Court Rules, and are dealt with in the Equity Division of the Supreme Court.[18] The Registrar usually deals with preliminary matters such as adjournments and can transfer proceedings to the general list or the Master's list. Most applications to the Supreme Court under the PRA are decided by the Master.[19] The powers of the Master include all the powers of the court.[20]

9.11 The main advantage of bringing proceedings in the Supreme Court is that it has unlimited equitable jurisdiction. Also, there is no maximum limit on the amount that can be subject to a claim. On the other hand, a contested hearing "can take a long time, be confined to the issues raised in proceedings and be very expensive".[21]

9.12 An action under the PRA is commenced by statement of claim[22] and proceeds to a hearing on pleadings.[23] Any party may

16. PRA s 9.
17. PRA s 12(1).
18. *Supreme Court Rules 1970* (NSW) Pt 77 Div 19 r 74.
19. NSW Supreme Court, *Annual Review 1999* at 28.
20. Unless otherwise specified in the Schedule to the Rules. *Supreme Court Rules 1970* (NSW) Pt 60 r 1A and Sch D.
21. NSW Supreme Court, "Alternative Dispute Resolution in the Supreme Court" (as at 25 July 2001) «http://lawlink.nsw.gov.au/sc/sc.nsf/pages/mednevalguide». Also available at the Supreme Court Registry.
22. *Supreme Court Rules 1970* (NSW) Pt 77 Div 19 r 76A.
23. The pleadings in an action are:
    (a) the statement of claim which is the document in which the plaintiff sets out his or her claim for relief, the facts in which he or she relies in support of that claim and any necessary particulars of that claim. Costs need not be specifically claimed.
    (b) the defence, which is the document in which the defendant answers the plaintiff's statement of claim. The defendant may, in certain circumstances add to the defence a pleading by way of cross claim where he or she claims some relief against the plaintiff.
    (c) the reply, which is the document in which the plaintiff deals with matters raised by the defendant in his or her defence or cross claim.

require the other party to produce relevant documents for inspection.[24] The court may also make an order for discovery of documents that are relevant to facts in issue.[25] After the close of pleadings, the court can set a date for a hearing. An appeal lies directly to the Court of Appeal.[26]

9.13 It currently takes about three months for matters to be heard by a Master. For contested matters, it can take about six months.[27] In total, a matter is said to take anything between 12 to 18 months from filing to judgment.

9.14 ***Costs rules.*** The Supreme Court has a discretionary power to award costs.[28] The ordinary rule is that costs follow the event.[29] The court also has the power to impose cost penalties on parties in proceedings under the PRA.[30] If a plaintiff commences proceedings in the Supreme Court and the court makes an order for property adjustment or maintenance under $40,000, the plaintiff will not be entitled to costs unless the court otherwise orders. Furthermore, where the court does make an order for the payment of the plaintiff's costs on a party and party or indemnity basis, the cost of briefing more than one counsel for the plaintiff will not be allowed. There are some concerns about whether the court should have the power to make costs orders in PRA matters.[31]

9.15 ***Arbitration.*** Arbitration is a dispute resolution process somewhat similar to adjudication. It is an adversarial process, which relies on a third party decision maker, the arbitrator (rather than a judge). Although the rules of evidence are more relaxed and the process is less formal than in court, the arbitrator hears the evidence and makes a binding order based on the law, unless

24. Pt 23 r 2.
25. Pt 23 r 3.
26. Pt 60 r 10, r 17.
27. NSW Supreme Court, *Annual Review 1999* at 37.
28. *Supreme Court Act 1970* (NSW) s 76.
29. *Supreme Court Rules 1970* (NSW) Pt 52A r 11.
30. *Supreme Court Rules 1970* (NSW) Pt 52A r 34.
31. These concerns are discussed at para 9.140.

the parties have agreed otherwise. Arbitration can be court ordered or entered into by agreement between the parties.[32]

9.16 ***Court annexed arbitration.*** A system of court annexed arbitration in Supreme Court civil proceedings came into operation in NSW on 1 January 1990.[33] The scheme allowed the Supreme Court to make an order to refer proceedings relating to a claim for the recovery of damages or other moneys to arbitration. Arbitrators are appointed by the Chief Justice[34] and must attempt to bring the parties to an action to a settlement acceptable to all of them[35] according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms.[36]

9.17 ***Recent developments: arbitration in equity proceedings.*** More recently, the *Supreme Court Act 1970* (NSW) and Rules were amended to expand the range of matters that may be referred to arbitration.[37] The amendment now permits the court to refer proceedings in the Equity Division to arbitration where the

32. See H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992).
33. The *Courts Legislation (Procedure) Amendment Act 1989* (NSW) amended the *Arbitration (Civil Actions) Act 1983* (NSW) with respect to court annexed arbitration in the Supreme Court and inserted s 76B in the *Supreme Court Act 1970* (NSW). The scheme is akin to the one that has been in operation in civil proceedings in the District and Local Courts since 1983. In addition, with the introduction of the *Commercial Arbitration Act 1984* (NSW), the court has had a general discretion to a refer matters to referee under Pt 72 of the *Supreme Court Rules 1970* (NSW). However, funds made available for court annexed arbitration could not be used under these provisions.
34. *Arbitration (Civil Actions) Act 1983* (NSW) s 5. The Chief Justice makes the appointment based on nominations received from the Bar Association and the Law Society.
35. s 9.
36. s 10.
37. *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW) amended s 76B of the *Supreme Court Act 1970* (NSW); Rule 72B of the *Supreme Court Rules 1970* (NSW) amended by Gazette 152 of 24 November 2000 at 11931.

proceedings are ancillary to a claim for the recovery of damages or other moneys and the value of the relief sought is not likely to exceed $750,000.[38] Referrals can be made on the court's own motion or by application and are conducted pursuant to the *Arbitration (Civil Actions) Act 1983* (NSW).

9.18 ***Mediation and neutral evaluation.*** Since 1994, the Supreme Court has encouraged settlement of disputes by means other than the traditional adversarial court system by introducing "mediation and neutral evaluation".[39] These forms of alternative dispute resolution (known as ADR) are available for the majority of civil cases. According to the Supreme Court, the main benefits of using ADR include an early resolution of the dispute, less cost to the parties involved and greater flexibility in resolving the dispute. ADR is also considered beneficial to those disputes that eventually proceed to court as the process helps identify the relevant issues and thus reduces the court hearing time and consequent costs.[40]

9.19 "Mediation" is defined in the *Supreme Court Act 1970* (NSW) as:

> a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.[41]

The mediator does not impose a solution but assists the parties to arrive at their own solution by exploring options to resolve the dispute. The options are often broader than those that can be

38. *Supreme Court Act 1970* (NSW) s 76B(1) and s 76B(3)(d) read with r 72B(1), *Supreme Court Rules 1970* (NSW).
39. Pt 7B which deals with "Mediation and Neutral Evaluation" was inserted by the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW).
40. NSW Supreme Court, "Alternative Dispute Resolution in the Supreme Court" (as at 25 July 2001) «http://lawlink.nsw.gov.au/sc/sc.nsf/pages/mednevalguide». Also available at the Supreme Court Registry.
41. *Supreme Court Act 1970* (NSW) s 110I(1).

considered by the court.[42] If the parties resolve their dispute through mediation, they enter a written agreement, which is then formalised by court order.[43]

9.20 "Neutral Evaluation" is defined in the *Supreme Court Act 1970* (NSW) as:

> a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law that are in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings or the award of damages.[44]

9.21 ***Recent developments: court ordered mediations.*** The processes of mediation and neutral evaluation were initially entirely voluntary. On 1 August 2000, Part 7B of the *Supreme Court Act 1970* (NSW) was amended to permit the court at any stage of the proceedings to refer parties to mediation where, in the opinion of the court, mediation appears appropriate. Thus, the court can order parties to neutral evaluation or mediation without their consent.[45] It is not the intention of the court that mediation be ordered in all proceedings;[46] the court may refuse to order mediation depending on the circumstances.[47] Alternatively, the court may refer the matter to a Registrar who is on the Chief Justice's list of mediators, who can meet the parties and discuss the appropriateness of mediation.

9.22 There are no records of the number of court ordered mediations in the Supreme Court. However, it appears that even

42. NSW Supreme Court, "Alternative Dispute Resolution in the Supreme Court" (as at 25 July 2001) «http://lawlink.nsw.gov.au/sc/sc.nsf/pages/mednevalguide». Also available at the Supreme Court Registry.
43. *Supreme Court Act 1970* (NSW) s 110N.
44. s 110I(2).
45. s 110K (as amended by the *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW)).
46. NSW Supreme Court, *Practice Note* (No 118(2), 8 February 2001).
47. NSW Supreme Court, *Practice Note* (No 118(3), 8 February 2001).

before court ordered mediations were introduced, court annexed voluntary mediations were frequently used. In 1999, out of a total of 131 court annexed mediations conducted in the equity division, 110 matters were settled either at mediation or prior to the hearing which meant an overall settlement rate of 84%.[48] Although mediation is not confined to matters under the *Family Provision Act 1982* (NSW) and the PRA, they appear to be the most popular type of proceeding for mediation.[49]

9.23 The parties usually pay for costs of mediation and neutral evaluation in equal proportions, including the costs payable to the mediator or evaluator, unless the court makes an order as to the payment of costs.[50]

9.24 ***Appointment of mediators and neutral evaluators.*** There are currently six Registrars who are trained in mediation techniques.[51] The initial training is provided by the national organisation Lawyers Engaged in Alternative Dispute Resolution (LEADR).[52]

9.25 In addition, the Chief Justice has compiled a list of mediators and evaluators to be in effect until 31 December 2003.[53] When compiling the list the Chief Justice can obtain recommendations

48. NSW Supreme Court, *Annual Review 1999* at 36. The majority of these mediations were claims under the *Family Provision Act 1982* (NSW); the remainder included matters under the PRA but there are no records on exactly how many of the settled matters were PRA matters.
49. NSW Supreme Court, *Annual Review 1998* at 26. In comparison, neutral evaluation is very rarely used. According to Registrar Berecry there have been only 2 requests for neutral evaluation over the past 4 years. Information supplied by Registrar Berecry (13 June 2001).
50. *Supreme Court Act 1970* (NSW) s 110M.
51. According to registry sources, it is intended that all Registrars will progressively undertake training in mediation.
52. LEADR has a program designed to train accredit mediators at various levels of qualifications and experience.
53. *Supreme Court Act 1970* (NSW) s 110O – available at NSW Supreme Court Website «http://www.lawlink.nsw.gov.au/sc/», *Practice Note* (No 102, 31 August 1998). The list is subject to annual review: *Supreme Court Act 1970* (NSW) s 110O(6).

from a committee of judges and officers. Those wishing to apply may be members of the Bar Association, the Law Society or other professional associations or bodies, who can endorse their members' application.[54] Applicants must provide information regarding their mediation or evaluation experience, accreditation and training.

## District Court

### *Jurisdiction*

9.26 The District Court derives its power to hear claims under the PRA from the *District Court Act 1973* (NSW).[55] Section 134 of the *District Court Act* provides:

> 134(1) The Court shall have the same jurisdiction as the Supreme Court, and may exercise all of the powers and authority of the Supreme Court, in proceedings for:
>
> (g) any application under the *Property (Relationships) Act 1984*.

9.27 Proceedings can be transferred to and from the Supreme Court under section 143 and section 145 of the *District Court Act*. The court transfers proceedings from the Supreme Court on application of either party or if it is of the opinion that the proceedings could properly have been heard by the District Court. Proceedings are transferred to the Supreme Court upon application of the party or by order of the Supreme Court on various terms such as the payment of costs.[56]

9.28 Generally, the District Court handles civil cases where the amount claimed is $750,000 or less.[57] However, in relation to applications under the PRA, the court is limited to making orders

54. NSW Supreme Court, *Practice Note* (No 102, 31 August 1998).
55. The *District Court Act 1973* (NSW) was amended by the *District Court Amendment Act 1997* (NSW) and the *Courts Legislation Further Amendment Act 1997* (NSW).
56. The *District Court Act 1973* (NSW) s 145(1).
57. s 44 (1)(a)(ii).

for financial adjustment not exceeding $250,000.[58] This in effect limits the District Court's jurisdiction in relation to matters transferred from the Supreme Court.[59] There appears to be no good reason why the jurisdiction in relation to PRA matters should be significantly less than the general jurisdiction of the District Court.

9.29 Apart from the above limitation, the District Court's general jurisdiction in equity proceedings is similar to that of the Supreme Court.[60] The District Court also has the power to grant ancillary equitable relief by way of injunctions (interlocutory or otherwise), which the Supreme Court might have granted if the action was heard in the Supreme Court, in relation to matters under section 44.[61]

### *Dispute resolution methods*

9.30 As in the Supreme Court, the District Court can deal with disputes by adjudication, or by other alternative methods such as arbitration, mediation or neutral evaluation.

9.31 ***Adjudication.*** All matters in the District Court are listed for a directions hearing before a Judge approximately six weeks after the commencement of the proceedings. Lists are conducted on a fortnightly basis. Country matters are conducted using telephone

58. s 134(3) read with s 134(1)(g). See also NSW District Court, *Practice Note* (No 46, 30 January 1998), which states that "matters involving an amount not exceeding $250,000 may be commenced in the District Court." It is unclear whether this amount refers to the amount sought to be adjusted or the total value of the assets.
59. s 134(3) of the *District Court Act 1973* (NSW) does not allow the District Court unlimited jurisdiction in relation to matters transferred from the Supreme Court under s 44(1)(e) if they are applications under the PRA heard in the equity division. See J Boland, "De Facto Claims in the District Court" paper presented for the *Continuing Legal Education Centre* (Sydney, 27 August 1999) at 4.
60. s 134, s 137. However, the Butterworths commentary on District Court Procedure states at para 134.1, that s 134 is rarely used in practice, mainly because of the small monetary limits on the jurisdiction.
61. See s 46.

conferencing facilities.[62] There is a particular list judge assigned to issuing directions in matters under the PRA. The list judge makes directions as to matters such as the lodgement of affidavits and evidentiary material required. This process gives the parties a clearer understanding of the issues and the feasibility of proceeding to a hearing.[63] When the list judge is satisfied that the parties have complied with all directions, and the matter is ready for hearing, the matter is transferred to the civil list judge who then sets a date for hearing. Unlike at the directions hearing stage, there is no particular judge assigned to hearing PRA matters – hearings are allocated to Judges exercising civil jurisdiction. This system, which can, of course, be changed by the Chief Judge, gives no real opportunity for specialisation.

9.32 Proceedings before the District Court under the PRA are conducted according to rules of the Supreme Court.[64] The rules deal with various matters[65] including how proceedings shall be commenced.[66] The *District Court Act 1973* (NSW) further provides that all documents must be in the form specified in Schedule F of the *Supreme Court Rules* with the necessary modifications.[67] All other procedural matters are dealt with according to the provisions of the *District Court Rules*.[68]

62. *Practice Note* (No 46, 30 January 1998).
63. Prior to 1996 (ie before PRA matters were dealt with in the District Court), the District Court held pre-trial conferences that were supervised by court Registrars. The aim of the conference was to settle the claim or at least define and narrow the issues with the help of the Registrar who was considered the third party. Claims that did not settle were assigned to arbitration or trial.
64. *District Court Rules 1973* (NSW) Pt 51D r 1.
65. Rules re costs penalties for commencing in the wrong jurisdiction Pt 52 r 24A and orders for non-application of the rule relating to costs Pt 52A r 34.
66. Pt 77 Div 19 states that proceedings shall be commenced by statement of claim and includes information that should be included in the statement of claim.
67. *District Court Rules 1973* (NSW) Pt 51D r 4, r 5.
68. Pt 15 deals with Admissions, Pt 19A deals with Offers of Compromise, Pt 22 deals with Discovery, Pt 29 deals with Subpoenas.

9.33 In 2000 the Sydney District Court dealt with 23 PRA matters. The median delay from commencement of proceedings to finalisation was 11.6 months.[69]

9.34 ***Arbitration.*** The *Arbitration (Civil Actions) Act 1983* (NSW) introduced a scheme of court annexed arbitration into the District Court.[70] However, applications under the PRA cannot be referred to arbitration as all matters in the equity jurisdiction of the court are excluded from the operation of the *Arbitration (Civil Actions) Act 1983* (NSW).[71]

9.35 ***Mediation and neutral evaluation.*** Part 3A of the *District Court Act 1973* (NSW) empowers the court to refer matters to mediation and neutral evaluation[72] if the parties to the proceedings agree.[73] While the court does encourage the use of mediation and neutral evaluation, the court cannot compel parties to attend.[74] Additionally, the District Court does not have any court annexed mediation facilities. The current practice is to refer parties to outside mediators. It is unclear how many PRA matters were referred to either mediation or neutral evaluation.

9.36 The District Court has also conducted a Mediation Pilot Program for long or complex matters. The court required the parties and their legal representatives to complete a questionnaire on the mediation process to assist the court to refine and improve it.[75]

69. NSW Attorney General's Department, *Annual Report 2000-2001* at 165.
70. *District Court Act 1973* (NSW) s 63A.
71. s 63A(1).
72. See discussion of mediation and neutral evaluation at para 9.18-9.25 (in relation to the Supreme Court).
73. *District Court Act 1973* (NSW) s 162(1).
74. Unlike the Supreme Court which has recently been empowered to do so. See para 9.21.
75. NSW District Court, *Mediation Pilot Program* (10 April 2001) «http://lawlink.nsw.gov.au/practice_notes/nswdc_pc.nsf/WebAnnounce».

## Local Court

### *Jurisdiction*

9.37 As stated above, section 9 of the PRA provides that a person may apply to the Local Court for an order or relief under the Act. The jurisdictional limit in the general division of the Local Court is $40,000.[76] Matters are transferred to the District Court or the Supreme Court where the value exceeds the Local Court's jurisdictional limit, unless parties consent to the matter being heard in the Local Court.[77] The Local Court may also transfer matters to the superior courts of its own motion even if the parties are willing to have the matters heard in the Local Court.[78] In Sydney, PRA matters are dealt with in the St James Centre Local Court.[79] Since this court deals with family law matters, it has developed some degree of specialisation in the area.[80] Although there are no supporting statistics, the Registrar at the St James Centre Local Court is of the view that the vast majority of PRA matters dealt with in the Local Court are resolved by consent orders.[81]

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76. *Local Courts (Civil Claims) Act 1970* s 12.
77. PRA s 12(1).
78. PRA s 12(3).
79. This court is commonly referred to as the Local Court (Family Matters), but in April 2001, the court was renamed St James Children's Court. It now deals with care work arising out of the *Children and Young persons (Care and Protection) Act 1998* (NSW) as well as cases arising under the *Family Law Act 1975* (Cth), the *Child Support (Registration and Collection) Act,* the *Child Support (Assessment) Act*, and the PRA: Local Court of NSW, *Annual Review 2000* at 18.
80. The Magistrate and the Registrar of this court serve as a resource for other Magistrates who may consult them on matters concerning family law and child support: Local Court of NSW, *Annual Review 2000* at 19.
81. Information supplied by Registrar Jim Martin, St James Centre Local Court (1 July 2001). For the period January to June 2001, 32 new PRA matters were instituted in the St James Centre Local Court, of which 27 were dealt with by consent (mainly by consent orders, some by conciliation conference) and 5 finalised at a hearing.

### *Dispute resolution methods*

9.38 As in the other courts, the Local Court can deal with disputes by adjudication or other alternative methods.

9.39 ***Adjudication.*** The procedure for instituting PRA proceedings in the Local Court is set out in the *Property Relationships Regulation 2000* ("the PRR").[82] The PRR deals with the making of applications for financial adjustment under Part 3 of the PRA, service of applications, hearing of applications, privacy for the parties to such proceedings and payment of maintenance. It also deals with the enforcement of orders for periodic maintenance. Where it does not specify the practice and procedure to be followed, the Local Court may give directions as necessary.[83]

9.40 There are no specific provisions relating to costs orders in the PRA or the PRR. Generally, costs orders will only be made in particular circumstances, on the basis that PRA matters are more akin to family law matters than those that arise in the civil claims jurisdiction of the Local Court. However, given that there are no specific provisions in relation to costs orders, this area warrants further consideration.

9.41 ***Arbitration, mediation and neutral evaluation.*** PRA proceedings commenced in accordance with the provisions of the PRR, cannot be referred to arbitration, mediation or neutral evaluation as set out in the *Local Courts (Civil Claims) Act 1970* (NSW).[84] The Magistrate is empowered to give directions with respect to practice and procedure.[85] Using this power, the Magistrate at the St James Centre Local Court sometimes refers PRA matters to the Registrar to conduct a conciliation conference

82. The *Property Relationships Regulation 2000* (NSW) replaces the *De Facto Relationships Regulation 1994* without any changes in substance.
83. *Property Relationships Regulation 2000* (NSW) cl 15.
84. Although the Local Court is empowered to refer matters to arbitration, mediation and neutral evaluation, those provisions only apply to proceedings commenced under the *Local Courts (Civil Claims) Act 1970*.
85. *Property Relationships Regulation 2000* (NSW) cl 15.

akin to an Order 24 conference.[86] Generally, however, most PRA matters are referred to Community Justice Centres for mediation.[87]

# THE FEDERAL EXPERIENCE

## The Constitution and family law

9.42 The Constitution empowers the Commonwealth Parliament to legislate in relation to marriage, divorce and matrimonial causes[88] and incidental matters such as parental rights and property of parties to a marriage.[89] The *Family Law Act 1975* (Cth)

86. A conference held under Order 24 of the *Family Law Rules* (Cth) is called a conciliation conference and is conducted by a legally trained Registrar. The Registrar holds the conference with the parties and their legal representatives to resolve disputes in property matters.
87. Community Justice Centres are established under the *Community Justice Centres Act 1983* (NSW). They provide confidential, impartial, accessible and voluntary mediation services to the community. The CJC currently has 508 accredited mediators. The mediators are appointed by the Attorney General on the advice of the CJC Director and are selected from the community after a rigorous and competitive recruitment program. They undergo intensive training, ongoing supervision and update training. The CJCs do not keep a break down of mediated PRA settlements. However, family disputes accounted for 25%of the CJC's work. Of this, 25% are disputes between separating or separated spouses. 3139 of matters handled by the CJCs were referred by the Local Court: Community Justice Centres of NSW, *Annual Report 2000-2001* at 15, 16.
88. *Constitution* (Cth) s 51(xxi), s 51(xxii).
89. The restrictions imposed by s 51(xxi) and s 51(xxii) of the *Constitution* initially limited the original jurisdiction of the Family Court in children's matters to children of a marriage. However, in the late 1980's the Family Court's jurisdiction over children was considerably increased when all States (except Western Australia) referred their powers over ex-nuptial children to the Commonwealth. There is now no legal distinction between nuptial and ex-nuptial children in this regard which means that the Family Court can deal with parenting order disputes between unmarried parents. The references of power were effected by the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth).

("the FLA") deals with these matters.[90] Jurisdiction under the FLA is exercised by the Family Court of Australia ("the Family Court"), the Family Court of Western Australia, the Supreme Court of the Northern Territory, courts of summary jurisdiction and the Federal Magistrates Court ("the FMC").

***The impact of a constitutional challenge: end to cross-vesting power***

9.43 In addition to its jurisdiction under the FLA, the Family Court had, until 1999, jurisdiction to hear matters that were connected to proceedings in the Family Court, which would otherwise not come within its jurisdiction. The most notable example of this in the area of family law was the ability to hear disputes between de facto couples concerning both children and property concurrently, where they would otherwise be dealt with separately by the Family and State Courts. This was made possible by the enactment of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and similar complementary legislation that was enacted by all the states in 1987.[91] The legislation established a scheme which "cross-vested" the civil jurisdiction of superior courts. This meant that each court could transfer proceedings or exercise the jurisdiction of another when considered necessary or appropriate.

9.44 The Explanatory Memorandum to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) stated that:

> The reasons for the proposed scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of:
>
> (a) uncertainties as to the jurisdictional limits of Federal, State and Territory Courts, particularly in the areas of trade practices and Family Law, and

90. The FLA came into operation on 5 January 1976 and repealed the *Matrimonial Causes Act 1959* (Cth).

91. *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (ACT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT).

> (b) the lack of power in these Courts to ensure that proceedings which are instituted in different Courts, but which ought to be tried together, are tried in one Court.[92]

According to Chief Justice Nicholson of the Family Court, this did much to conserve the costs of litigation by bringing interconnected proceedings into one curial form.[93] It overcame limitations on the hearing of matters whose subject matter was interrelated, but straddled both State and federal jurisdictions.

9.45 However, the High Court in *Wakim, Re; Ex parte Mc Nally*[94] held the cross-vesting laws to be unconstitutional, and therefore invalid, as they purport to give the federal courts jurisdiction to exercise state jurisdiction. Consequently, the States can no longer vest State jurisdiction in federal courts nor can the Commonwealth consent to the vesting of State jurisdiction in federal courts.

9.46 The rejection of cross-vesting has had little impact on the workload of the Family Court, as there were few cross-vested matters.[95] The consequences are however quite serious for unmarried couples with combined disputes over children and property. Matters that were previously cross-vested must now be the subject of separate proceedings in a State and federal court, resulting in additional costs and delays.[96]

## The relevance of the Federal experience

9.47 Chief Justice Nicholson of the Family Court has commented that:

> The nature of family law sets it apart from other areas of law. It is a unique and critically important jurisdiction and the

92. Explanatory Memorandum to the *Jurisdiction of Courts (Cross-vesting) Bill 1986* (Cth) at 2, 3.
93. A Nicholson and M Harrison, "Family Law and the Family Court of Australia: experiences of the previous 25 years" (2000) 24(3) *Melbourne University Law Review* 756 at 766.
94. *Wakim, Re; Ex parte Mc Nally* (1999) 198 CLR 511.
95. Nicholson and Harrison at 767.
96. Matters relating to children are heard in the Family Court and property matters in the NSW courts.

> one which most directly impacts on what the *Family Law Act* describes as the natural and fundamental group unit of society – the family – and particularly on children who are often living in particularly vulnerable circumstances. … In contrast with most civil litigation, there is often a significant ongoing relationship between the parties to family law proceedings after the litigation has concluded, and there is considerable potential for further or extended litigation. … This means that the process and outcome of any litigation must be such as to permit them to have a sensible ongoing relationship. … It is also an area of law where people, who will have no other significant contact with the legal system, may become embroiled in a legal dispute and possibly litigation.[97]

Although these comments were made in relation to the FLA, they are relevant to the current consideration of the PRA because both deal with disputes arising out of close relationships that often involve vulnerable third parties. An examination of the Family Court and Federal Magistrates Court will provide a useful comparison with the NSW system of dealing with disputes under the PRA.

## The Family Court of Australia

### *Jurisdiction*

9.48 The Family Court was established under Part IV of the FLA as a "superior court of record".[98] It has jurisdiction to resolve or determine disputes under the FLA,[99] in conjunction with the *Marriage Act 1961* (Cth)[100] and the child support legislation.[101] The Family Court is funded to provide a range of services

97. Family Court of Australia, *Annual Report 1998-1999* at 22.
98. FLA s 21(2). Accordingly, it is equivalent in status to the Federal Court of Australia and the Supreme Courts of the States and Territories.
99. FLA *s* 31(1)(a).
100. FLA s 31(1)(b).
101. *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth). Both these Acts confer original and appellate jurisdiction on the Family Court.

including dispute resolution services and judicial determination of litigated matters.[102]

### *Procedural Issues*

9.49 Parties initiate proceedings in the Family Court by filing an application in accordance with forms[103] which simplify and standardise procedures.[104] The particular form that is needed depends on what kind of relief the applicant is seeking.[105] Some forms must be served with an affidavit.[106] The Registrar sets a date for the hearing of the application, which is generally 21-42 days after the application is filed.[107]

9.50 In some cases the respondent will be required to file a response to the application.[108] The respondent who opposes an application for divorce or a nullity of marriage must file a response to the application within 28 days[109] in accordance with a prescribed

102. Family Court of Australia, *Annual Report 1999-2000* at 14.
103. *Family Law Rules* (Cth) O 7 r 2, O 8 r 7. Forms are available on the Family Court's website at «www.familycourt.gov.au».
104. ALRC, *Managing Justice* (Report 89, 2000) at para 8.69.
105. Application for decree of nullity (Form 2), application for dissolution of marriage (Form 4), application for declaration of validity (Form 6), application for maintenance (Form 12), application for consent orders (Form 12A), application for interim or procedural orders O 8 r 3 (Form 8), application for rescission of a Decree Nisi O 7 r 12 (Form 8), approval of a s 87 FLA deed O 14 r 9 (Form 8), application for leave to intervene in proceedings O 15 r 3 (Form 8), application for leave to serve a subpoena in New Zealand O 28 r 14 (Form 8), application for the variation or revocation of a parenting plan, where the other parties do not consent O 26 Ar 17 (Form 8), if an order is sought and no other form of application is provided in the Rules O 8 r 4 (Form 8).
106. *Family Law Rules* (Cth) O 8 r 7.
107. O 7 r 7, O 8 r 9, O 8 r 10.
108. Response to initial application (Form 3), response to application for maintenance (Form 12B), response to application for divorce/nullity (Form 13), response objecting to jurisdiction (Form 14).
109. *Family Law Rules* (Cth) O 7 r 10.

form.[110] The response must be served on the applicant as soon as practicable after filing.[111]

9.51 When proceedings relate to financial matters, both applicant and respondent must file a financial statement with their application or response.[112] In addition, personal tax returns, tax assessments, superannuation fund account statements and financial statements of any company, trust or partnership must be served on each party.[113] The documents must be served within 14 days after the directions hearing.[114] The parties are expected to agree to mutual and informal discovery and inspection of documents that relate to any matter in question in the proceedings.[115] After the date of the hearing is set, the parties may seek discovery of relevant documents.[116] The Family Court's refusal to require disclosure from the outset of proceedings has been criticised on the grounds that it impedes and delays fair property settlement. Lack of disclosure also impacts on conciliation and mediation, where parties need to be fully apprised of the relevant information in order to negotiate effectively.

9.52 The Full Court of the Family Court hears appeals from the Family Court either by way of a re-hearing (which involves a review of the evidence only) or as a hearing *de novo* (which is a complete re-hearing).[117] An appeal to the High Court is only possible by special leave of the High Court or upon a certificate from the Full Court of the Family Court that it concerns an important question of law or public interest.[118]

9.53 Weaknesses identified in the current system of differential case management were addressed in the Family Court's *Future*

110. O 7 r 8.
111. O 7 r 8.
112. O 17 r 1.
113. O 17 r 4.
114. O 17 r 4(2).
115. O 20 r 1.
116. O 20 r 2.
117. FLA s 94.
118. FLA s 95.

*Directions* Report[119] and a new system was proposed. Parties currently pass through the following stages: filing, information session, directions hearing, conciliation and/or counselling, pre-hearing conference, a compliance check and finally the trial.

9.54 Under the new system, child and property proceedings are commenced with a Case Assessment conference, which takes longer than the current Directions Hearing. The case assessment is conducted by a Deputy Registrar or a counsellor, with the involvement of the parties and their legal representatives. The parties are encouraged to settle all or some of the issues in dispute by agreement. Orders for preparation for trial are made at the Conciliation Conference and parties are issued with a trial notice which sets out when evidence needs to be filed, the date of the Pre Trial Conference, the Case Summary, and the proposed date for trial. The parties prepare and file the evidence for trial, including affidavits and Family Reports before the Pre-Trial Conference. At the Pre-Trial Conference, at which the date of trial is set, trial plans are prepared, parties review all material including the case summary and are provided with a final chance for settlement. Trial dates will not be allocated until all evidence has been filed and served, all interlocutory steps have been completed and preparations are for trial are complete. The new system involves fewer and different activities and attempts to facilitate early resolution of disputes and streamline procedures for going to trial.

#### *Key features*

9.55 The most notable features of the Family Court in its approach to dispute resolution are its:

- specialist jurisdiction;
- court annexed primary dispute resolution facilities; and
- costs rule (whereby each party pays their own costs).

119. Family Court of Australia, *Future Directions Committee Report* (July 2000).

9.56 ***Specialist jurisdiction.*** Being a specialist jurisdiction, which deals exclusively with family law matters, the Family Court shapes itself to the characteristics and needs of its cases. Its establishment has been described as:

> … an attempt to create … a new kind of legal institution. It was a recognition that matrimonial disputes and their settlement required a different kind of approach: one which recognised the relevance of a range of services besides those customarily available to litigants in law cases. This involves attention to the special needs of children and to the possibilities of conciliation in helping those involved in marital agreements to reach agreements as to how their affairs should be ordered in the aftermath of divorce.[120]

9.57 Apart from dealing exclusively with a particular subject matter, the FLA provides that judges are appointed for their suitability "to deal with matters of family law by reason of training, experience and personality".[121]

9.58 Judges and court staff undertake training programs to ensure that methods and procedures in the court continue to be relevant. Thus, the judges are not only carefully chosen for their expertise, but their expertise is intended to increase by working in a specialist jurisdiction and participating in the court's judicial education programs. This is intended to help develop collegiate expertise within the judiciary and to establish an administration that has a relationship centred ethos.

9.59 ***Court annexed primary dispute resolution facilities.*** The Family Court's counselling and mediation method is known as "primary dispute resolution" (known as PDR).[122] PDR is a significant distinguishing feature of the Family Court, and gives the impression of the court being a "helping" court. Voluntary and court ordered counselling and conciliation conferences have been provided since 1975 and voluntary mediation services since 1992.

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120. Commonwealth, Report of Joint Select Committee, *Family Law in Australia* (Vol 1, 1980) at 121.
121. FLA s 22(2).
122. All court primary dispute resolution services have been called "mediation" services since 1 January 2000.

9.60 The term PDR was first introduced into the FLA in 1995[123] as an umbrella term to cover the processes of relationship and reconciliation counselling, mediation, conciliation counselling, conciliation and arbitration.[124] The Family Court has recently renamed its primary dispute resolution services with the generic term "mediation services", although the term PDR is retained in the legislation.[125] Mediation services will be used in this paper, except where reference is made to the legislation.

9.61 One of the principal tenets of the Family Court is that litigation should be a last resort and that the court has a duty to assist parties to resolve their own disputes wherever possible. To this end, the court's mediation methods are co-located with its adjudicative functions. According to the Chief Justice of the Family Court, the court's case management process is so closely integrated with its mediation facilities that matters do not simply proceed through mediation first and if that fails, proceed to litigation. Rather, there is frequent movement between the mediation and litigation pathways, at all stages of the process.[126] This enables the parties to use a range of services and methods to resolve disputes.

9.62 Part III of the FLA[127] deals with PDR and has been described as "one of the most comprehensive legislated alternative dispute resolution schemes in the world".[128] The object of Part III is:

123. *Family Law Reform Act 1995* (Cth).
124. Pt III of the FLA deals with PDR.
125. Family Court of Australia, *Future Directions Committee Report* (July 2000) at 16.
126. A Nicholson and M Harrison, "Family Law and the Family Court of Australia: experiences of the previous 25 years" (2000) 24(3) *Melbourne University Law Review* 756 and A Nicholson, "Keynote Address" presented at *National Association of Community Legal Centres Conference* (Sydney, 8 September 1999).
127. Part III of the FLA must be read together with the *Family Law Rules* and *Family Law Regulations*. Part V of the *Family Law Regulations* deals with PDR. Order 24 of the *Family Law Rules* describes conciliation conferences held with legally qualified Registrars who meet with the parties and their representatives to resolve disputes in property matters and O 25A r 10 describes how mediation conferences must be conducted.

(a) to encourage people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a Court order might otherwise be made under this Act, provided the mechanisms are appropriate in the circumstances and proper procedures are followed; and

(b) to ensure that people have access to counselling:

(i) to improve relationships covered by this Act; and

(ii) to help them adjust to Court orders under this Act.[129]

9.63 The Family Court defines mediation services as the range of services offered by the court to help settle dispute by agreement rather than a hearing. These services include mediation sessions, counselling, meetings with the Registrar, information sessions, and group programs for parents and children.[130]

9.64 Similarly, in the FLA, PDR methods are defined to mean, "procedures and services for the resolution of disputes out of court", including counselling, mediation and arbitration.[131] However, the processes themselves are not clearly defined in the Act. According to one view[132] the significant distinguishing features of conciliation and conciliation counselling that set them apart from mediation are respectively, their evaluative and directive nature and the fact that clients can be ordered to attend.[133] The Family Court may refer parties to mediation with their consent or make other orders

128. *Australian Family Law and Practice*, Vol 2 [58-100], CCH Australia Ltd.
129. FLA s 14.
130. Family Court of Australia, Family Court Website «www.familycourt.gov.au/html/terms.html» (as at 18 December 2001).
131. FLA s 14E.
132. Dr C Brown, *Diversity in primary dispute resolution services: What are the choices for clients* (Family Court of Australia, 1996-1997).
133. s 16A: the Family Court is empowered to direct parties to attend counselling if it is in the interests of the parties or their children to do so. Failure to do so does not however constitute contempt of court. In s 16B the Family Court may advise parties to attend counselling and can make the direction mandatory by adjourning the proceedings and declining to resume until the parties have complied.

to facilitate the effective conduct of the mediation.[134] It may also attempt to compel parties to attend mediation by adjourning the legal proceedings. Although conciliation is a consensual process, attendance at a conciliation conference is mandatory.[135] The same applies in relation to pre-hearing conferences.[136] In relation to arbitration, recent amendments now require that the parties consent to a referral to arbitration;[137] in the past referral to arbitration for proceedings under Part VIII was mandatory.[138]

9.65 Officers of the court and community organisations offer mediation services.[139] They are funded by the Commonwealth government.[140] The *Family Law Regulations* provide that an approved court mediator must be a person considered by the Chief Justice to be "suitable by reason of the person's training and experience".[141] The Regulations detail the qualifications, training and experience required for community and private mediators as well as the ongoing training required.[142]

9.66 In 1999/2000, the Family Court extended its mediation services by making further appointments and enhancing training processes. It used internal benchmarking to improve productivity and the quality of services provided.[143] The Family Court reported

134. FLA s 19BA(2).
135. *Family Law Rules* (Cth) O 24.
136. O 24A.
137. FLA s 19D(2).
138. Proceedings under Part VIII of the FLA covers property, spousal maintenance and maintenance agreements.
139. Counsellors and Mediators in the Family Court are appointed as officers of the court under s 38N of the FLA. As such, they are accountable to the Directors of Court and ultimately to the Chief Justice of the Family Court.
140. The Commonwealth currently provides funding for the Family Court's voluntary and court ordered mediation services and those community organisations that provide many of the same or related non-judicial family services to the community.
141. *Family Law Regulations 1984* (Cth) reg 59.
142. reg 60, reg 61.
143. Family Court of Australia, *Annual Report 1999/2000* at 20.

that about 80% of applications for final orders filed were resolved due to its provision of mediation services.[144]

9.67 The Commonwealth Attorney General's Department has examined the efficacy of access to mediation services.[145] The Discussion Paper suggested that a new administrative structure be established which would provide counselling and mediation services in the community setting rather than on court premises.

9.68 The issues raised by the paper were highlighted in *Next Steps*, in which the Government stated its aim to reduce the role of litigation in family disputes, and to expand the role of the community sector in primary dispute resolution.[146] Key issues identified were improving access,[147] building the capacity of

144. Family Court of Australia, *Annual Report 1999/2000* at 30.

145. Commonwealth, Attorney General's Department, *The Delivery of Primary Dispute Resolution Services in Family Law* (August 1997). The Discussion Paper sought views on how the Government can improve access to mediation services. Some of the issues raised in the context of assessing the effectiveness or otherwise of court annexed mediation included the following: whether more people may be encouraged to avoid litigation altogether if one of the largest sources of voluntary PDR was not situated within the court; how the expertise in court processes of the current court counsellors and mediators could be utilised in a new structure and developed in the community sector; whether geographic access to services could be improved by increasing the use of services that are not court connected; how the status of the court might impact upon the effectiveness of counselling and mediation processes and what challenges might be presented by increased private sector involvement in the future.

146. Commonwealth, Attorney General's Department, *The Delivery of Primary Dispute Resolution Services in Family Law: Next Steps* (July 1998).

147. Improving access requires an examination of the need for primary dispute resolution in a range of geographical locations and the current provision of services by the community, the Family Court and the private sector. Such inquiry is essential to ensure equitable resource allocation and the provision of services where they are most needed. Although access to dispute resolution services will be improved by use of services in community locations, courts still need to provide some services on their premises. For example,

community-based providers[148] and ensuring financial accountability and quality of service.[149]

9.69 ***Costs rule.*** In the Family Court, costs can be privately funded by the parties or publicly funded through legal aid. Costs are not tax deductible. The general rule is that each party to

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urgent counselling should be provided at the court. It is not necessary that in-house services be exclusively provided by the court; primary dispute resolution services may be contracted out, yet be conducted on court premises.

148. Building the capacity of community-based providers by recognising that for community providers to take an enhanced role in dispute resolution, it is essential that they acquire and sustain the type of expertise, skills and knowledge currently held by Family Court staff. It was noted that the focus of the community sector is on family relationship support services; emphasis needs to be switched to dispute resolution on either court premises or in community location. *Next Steps* envisages the establishment of a "new and separately identifiable service type" to be supported by case management models and training directed at family law dispute resolution services. While community providers need to be sensitive to the security needs of their staff and clients, it must be recognised that a high level of security may impact on the accessibility of community services. Community services need to be adequately funded so that they can provide appropriate training and security while facing rising administrative costs that are associated with tendering for contracts. Understanding within the community of the alternatives to court provided services needs to be developed via the adoption of a community awareness strategy, and the education of the profession.

149. Ensuring financial accountability by requesting the Family Court to introduce separate accounting of its budget used for primary dispute resolution services. Financial accountability for community-based organisations is already provided through their reporting obligations under the Family Relationship Services Program. As for ensuring the quality of services, the Family Relationships Services Program has a comprehensive quality strategy, FAMQIS, in place to ensure the quality of services provided. It is a mandatory framework covering services provided in the community, which is capable of expansion to include new services and service types, with the potential for application in the private sector.

the proceedings must bear their own costs.[150] This is unlike the costs rules in the Supreme Court and District Court where costs generally follow the event and costs orders are routinely made. Under the FLA, the Family Court may make an order as to costs only if there are justifying circumstances such as the financial circumstances of each party or the conduct of the parties.[151]

## The Federal Magistrate's Court

### *Jurisdiction*

9.70 The Federal Magistrates Court ("the FMC") was established by the *Federal Magistrates Act 1999* (Cth) ("the FMA") to provide people with "user friendly, affordable options for resolving their disputes".[152] It is a court of original jurisdiction, exercising concurrent jurisdiction with the Family Court and the Federal Court. However, contested property matters over the value of $300,000 are dealt with in the Family Court.[153] Introducing the Federal Magistrates Bill, the Attorney General noted that:

> Many of [the matters before Commonwealth Courts] are not complex and do not need to be dealt with by superior Court judges. Federal and Family Court judges are increasingly tied up dealing with matters that could be dealt with more efficiently at a lower level.[154]

9.71 The jurisdiction of the FMC in relation to family law matters is conferred by section 39 of the FLA.[155] More complex cases will be

150. FLA s 117(1).
151. FLA s 117(2A).
152. Australia, *Parliamentary Debates (Hansard)* House of Representatives, 24 June 1999, the Hon D Williams, Attorney General, Second Reading Speech at 7365.
153. FLA s 45A (1).
154. Australia, *Parliamentary Debates (Hansard)* House of Representatives, 24 June 1999, the Hon D Williams, Attorney General, Second Reading Speech at 7365.
155. The main areas of family law in which the Federal Magistrates Service exercises jurisdiction are summarised in the Commonwealth Attorney General's Department Fact Sheet: *Jurisdiction of the Federal Magistrates Service* (31 January 2000).

referred at the discretion of the FMC from the FMC to the Family Court or the Federal Court.[156] Conversely, simple cases will be referred to the FMC from the Family Court or the Federal Court.[157]

### *Procedural issues*

9.72 The FMA emphasises the provision of user-friendly procedures, which promote the use of primary dispute resolution processes that are likely to assist people to resolve disputes away from the courts.[158]

9.73 To achieve this, the FMC aims to operate without undue formality and to use streamlined procedures to ensure that proceedings are not protracted.[159] The FMA provides that interrogatories and discovery are not allowed unless the court declares them appropriate.[160] Proceedings are instituted by way of application without the need for pleadings.[161] The court may give directions about the length of documents to be filed[162] as well as limiting the time of oral argument in proceedings[163] and the length of written submissions.[164]

9.74 The court is constituted by a Federal Magistrate,[165] and is empowered to make orders, such as interlocutory orders, and issue writs, as it thinks appropriate.[166] The FMA can make binding declarations of right.[167] Appeals from the FMC lie to the Full Court of the Family Court.[168]

156. FMA s 39.
157. FLA s 33B(1).
158. FMA s 4.
159. s 42.
160. s 45.
161. s 50.
162. s 51.
163. s 55.
164. s 56.
165. s 11(1).
166. s 15.
167. s 16.
168. FLA Pt X.

### *PDR services*

9.75 Primary dispute resolution services in the FMC include counselling, mediation, arbitration, neutral evaluation, case appraisal and conciliation.[169] The FMC may advise the parties about the primary dispute resolution processes that can be used.[170] It can adjourn proceedings to enable the parties to undertake any of these processes.[171] The FMC may order proceedings to conciliation or mediation[172] without consent, and may also order a matter to arbitration, though only if the parties consent.[173] Notably, the court's powers with respect to mediation and arbitration under the FMA do not apply to family law and child support proceedings. Relevant powers in relation to these matters are dealt with in Part III of the FLA.[174] If a matter has been referred to a primary dispute resolution process, the court can still determine any question of law that arises from the proceedings; this determination will be binding on the parties.[175] If the parties reach agreement on a matter in dispute, they can apply for the FMC to make an order in the terms of the agreement.

### *Costs*

9.76 The FMC has jurisdiction to order costs in general litigation. However, costs in family law and child support matters are governed by the FLA, which provides that each party generally bears its own costs. The court may make orders as to costs if it considers it to be just.[176]

169. FMA s 21.
170. s 23(1).
171. s 23(2).
172. s 26, s 34.
173. s 35.
174. See para 9.62 for discussion.
175. FMA s 27(1), s 27(4).
176. FLA s 117.

# OTHER AUSTRALIAN JURISDICTIONS

## Australian Capital Territory

9.77 In the ACT, applications under the *Domestic Relationships Act 1994* (ACT) ("the DRA") can be made in the Supreme Court[177] or, if the amount in dispute is less than $50,000, in the Magistrate's Court.[178] Parties may agree to have the Magistrates Court hear a matter despite the limit.[179]

9.78 Recent research reveals that the Magistrates Court is the favoured forum even where the value exceeds the jurisdictional limit.[180] The majority of cases involving property divisions are resolved by consent. Between 1994 and 1999, only 1% of matters in the Magistrates Court and 9% in the Supreme Court were resolved in a contested manner. Of the matters resolved by consent, many files in the Magistrates Court represented an agreement that was not in dispute. There appeared to be no significant delays in the finalisation of matters, with the average time from filing to resolution being about 22 days in the Magistrates Court and 146 days in the Supreme Court. Although the DRA gives the court the power to refer a matter to mediation, this was not done in any of the 203 files examined in the Magistrates Court and only in 6 of the 34 files examined in the Supreme Court.[181]

9.79 Overall, the research indicates that there was a relatively low use of the DRA by same sex couples, non-cohabiting couples and

177. DRA s 10.
178. *Magistrates Court (Civil Jurisdiction) Act 1982* (ACT) s 5.
179. s 10(2).
180. J Millbank, "Domestic Rifts: Who is using the *Domestic Relationships Act 1994* (ACT)" (2000) 14 *Australian Family Law Journal* 163 at 183.The research identified and examined court files for cases filed in the Magistrates Court and Supreme Court of the ACT for the period November 1994 to May 1999. Of the files examined where a value was apparent in the property divided (116 files), 43% were over the jurisdictional limit: at 166.
181. Millbank at 168.

non-couples.[182] Some of the reasons suggested for this low usage include a lack of knowledge about the broad scope of the DRA and a reluctance by lesbians and gay men to use the formal legal system.

## Queensland

9.80 In 1999, Queensland enacted the *Property Law (Amendment) Act 1999* (Qld) which introduced a property division mechanism on the breakdown of a "de facto relationship". It covers same sex and opposite sex partners. As in NSW, the Queensland Supreme Court, District Court and Magistrates Courts have jurisdiction in relation to de facto relationships matters. The District Court's monetary limit is $250,000[183] and the Magistrates Court's limit is $50,000[184]. The legislation makes it clear that it is the value of the interest claimed, not the value of the property itself, which is relevant. Both the District Court and Magistrates Court may make an order or declaration concerning an interest in property where the value of the interest exceeds the court's monetary limit if an appropriate document has been filed under the court's consent jurisdiction.[185]

9.81 When maintenance is the only relief sought, an application must be made to the Magistrates Court even if the amount of maintenance sought is more than the monetary limit of the Magistrates Court.[186] The consent of the parties is not necessary for the Magistrates Court to make such an order.[187] Only the Supreme Court or District Courts have the power to make declarations about the existence or non-existence of a de facto

182. According to Millbank at 169-170, of the 237 files, there were five matters involving a same sex couple in the Magistrates Court and none in the Supreme Court, one matter in the Magistrates Court involved a non-cohabiting couple who were heterosexual and one matter in the Supreme Court involved a non-couple (ie a heterosexual couple and a friend who had purchased property together).
183. *District Court Act 1967* (Qld) s 68(2).
184. *Magistrate's Court Act 1921* (Qld) s 4(a).
185. *District Court Act 1967* (Qld) s 72 and *Magistrate's Court Act 1921* (Qld) s 4A.
186. *Property Law Act 1974* (Qld) s 307(2), s 307(3).
187. s 354(4).

relationship. However, the Magistrates Court may make a finding of fact on the evidence that a de facto relationship exists. In addition to the range of powers vested in each of the courts, the Supreme Court, District and Magistrates Courts are also given a number of powers similar to the Family Court by FLA.[188] Pending proceedings may be transferred to another court having jurisdiction in relation to de facto matters if it is considered more appropriate to be dealt with in the other court.[189]

## Northern Territory

9.82 In the NT, section 4 of the *De Facto Relationships Act 1991* (NT) confers jurisdiction on the Supreme Court and the Local Court to hear matters under its provisions. The jurisdictional limit in the Local Court is $40,000.[190] Proceedings that exceed this limit are transferred to the Supreme Court unless the parties consent to the matter being heard in the Local Court.[191] The Local Court may of its own motion transfer to the Supreme Court even if the parties are willing that the proceedings be determined by the Local Court.[192] There is also a general power to transfer proceedings between courts where it is in the interests of justice to do so.[193]

9.83 Both the Supreme Court and the Local Court may declare the existence of a de facto relationship, which has the effect of a judgment of a court.[194] Courts are empowered to make orders adjusting the interests in property between the parties[195] and orders for maintenance.[196]

188. For instance, third parties can intervene with leave of court (s 336(2)) and the parties bear their own costs subject to the court's discretion to make orders (s 341(1), s 341(2)) of the *Property Law Act 1974* (Qld).
189. *Property Law Act 1974* (Qld) s 331.
190. *De Facto Relationships Act 1991* (NT) s 5(1).
191. s 6(1).
192. s 6(2).
193. s 7.
194. s 10(3).
195. s 13.
196. s 26.

## South Australia

9.84 The *De Facto Relationships Act 1996* (SA) facilitates the resolution of property disputes arising on the termination of de facto relationships. Section 9 of the *De Facto Relationships Act* states that applications can be made to the District Court or the Supreme Court. If the value of the dispute is less than $60,000, it can be heard in the Magistrates Court. Under this Act, the court has power to make orders for the division of the property between de facto partners.[197] The court also has power to vary or set aside cohabitation agreements established under the Act at its own initiative or on the application of one of the de facto partners.[198]

## Victoria

9.85 The *Property Law Act 1958* (Vic) was recently amended by the *Statute Law Amendment (Relationships) Act 2001* (Vic) to recognise the rights and obligations of partners in domestic relationships irrespective of the gender of each partner.[199] Section 279 of the *Property Law Act 1958* grants jurisdiction to the Supreme Court and also the County Court if the value of the dispute is within its jurisdictional limit of $200,000. Under this Act the court is empowered to adjust the property interests as existing between the parties.[200] The court may declare the title or rights that a domestic partner has in respect of the property; it can make orders to give effect to the declaration, including orders about possession.[201] There is a provision for a person to be made a party to the proceedings on the application of the person or if it appears

197. s 10.
198. s 8.
199. The amendments have changed the appropriate terminology; de facto relationships are now termed domestic relationships. A domestic relationship is defined as the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender).
200. *Property Law Act 1958* (Vic) s 278.
201. s 278.

to the court that the person may be affected by an order under Division 2 (Orders for Adjustment of Property Interests).[202]

### Western Australia

9.86 Legislation is currently before the WA Parliament to cover heterosexual and same sex de facto relationships.[203] Given that WA has its own Family Court[204] exercising both federal and State jurisdiction, it is likely that matters under the proposed de facto relationships legislation will also be determined by that court.

## OVERSEAS EXPERIENCE

9.87 In the UK, there is no legislation regarding de facto relationships and partners must assert their property division rights through the general law. Division of property is governed by the principles of trust and property law rather than family law and is declaratory as opposed to adjustive.[205]

9.88 In Canada, property division comes within the jurisdiction of the Provinces, which means that legislation regarding de facto relationships varies according to jurisdiction. Under the *Family Maintenance Act* (Manitoba) cohabitants incur the same mutual obligation to contribute to each other's support as spouses.[206] However the law does not extend to making orders for property adjustment in de facto relationships; the division of

202. s 296(2).
203. The *Family Court Amendment Bill 2001* (WA) provides for the recognition of de facto spouses in opposite and same sex relationships and provides them with the same property rights as married couples.
204. The Family Court of WA is established under the *Family Court Act 1997* (WA) Pt 11 Div 1. It is invested with federal jurisdiction by virtue of s 41 and s 69 of the FLA.
205. England, Law Society of England Family Law Committee, *Cohabitation: Proposals for Reform of the Law* (London, 1999) at 1, 8.
206. *Family Maintenance Act* (Manitoba) s 4(3).

proceeds of sale is governed according to general law principles.[207] The province of Alberta[208] still maintains a clear distinction between marriage and a common-law relationship.[209] This distinction was challenged in *Rossu v Taylor.*[210] It was held that section 15 of the *Domestic Relations Act,* which limited the right to spousal support to married couples, infringed section 15(1) of the *Canadian Charter of Rights and Freedoms* which prohibits discrimination on the basis of "marital status". In Ontario, by contrast, there are few remaining distinctions between marriage and de facto relationships. The major differences between married spouses and opposite sex cohabitants is the exclusion of cohabitants from Parts I and II of the *Family Law Act*, which deal with the division of assets and the matrimonial home.[211] Under section 3 of the *Family Law Act* the court may appoint a mediator to facilitate agreement between the parties on any matter the court specifies. The parties pay the mediators fees and the court specifies the proportion each party pays.[212] Property is divided according to principles of unjust enrichment; seeking remedy based on unjust enrichment has been identified as being costly and time consuming.[213]

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207. England, Law Society of England Family Law Committee, *Cohabitation: Proposals for Reform of the Law* (London, 1999) at 18.
208. *Domestic Relations Act* (Alberta) s 1(2)(b) "common law relationship" means a relationship between 2 people of the opposite sex who although not legally married to each other (i) continuously cohabited in a marriage-like relationship for at least 3 years, or (ii) if there is a child of the relationship by birth or adoption, cohabited in a marriage-like relationship of some permanence.
209. Prof W Holland, "Intimate Relationships in the New Millennium: The Assumption of Marriage and Cohabitation", paper presented at the conference *Domestic Partnerships* (Kingston, Queen's University, 21-23 October 1999).
210. *Rossu v Taylor* (1998) 39 RFL (4th) 242 Alberta CA.
211. *Family Law Act 1986* (Ontario).
212. s 3(7).
213. Prof W Holland, "Intimate Relationships in the New Millennium: The Assumption of Marriage and Cohabitation", paper presented at the conference *Domestic Partnerships*, (Kingston, Queen's University, 21-23 October 1999).

9.89 In New Zealand, the *Matrimonial Property Act 1976* was recently amended to become the *Property (Relationships) Act 1976* by the *Property (Relationships) Amendment Act 2001*. This Act extended the property division regime in the principal Act so it now applies to the division of the property of couples who have lived in a de facto relationship.[214] The Family Court now has jurisdiction over de facto relationships including same sex couples.[215] Mediation is encouraged. Either party to a proceeding in the Family Court or a Family Court judge can ask the Registrar to arrange a mediation conference to be convened.[216] The parties are allowed to have a barrister or solicitor advise them during the mediation[217] which will be chaired by a Judge of the Family Court.[218] Mediation conferences are used to identify the matters in issue between the parties, with the aim of obtaining agreement between the parties on the resolution of those matters.[219] By consent the Chairman of the mediation conference may make orders regarding separation orders, the custody of any child of the parties, maintenance, and the possession or disposition of property.[220] If a person fails to attend a mediation conference, a District Court Judge may, on the request of a counsellor or Registrar, issue a summons requiring that person to attend mediation.[221]

## GENERAL ISSUES FOR DISCUSSION

9.90 The discussion thus far has focussed on the way disputes to do with marriage and de facto relationships are resolved in NSW, federally, in other jurisdictions around Australia and overseas. The extent of reform recommended would depend on whether the

214. *Property (Relationships) Amendment Act 2001* (NZ) s 3.
215. *Property (Relationships) Act 1976* s 2A, s 23; *Family Courts Act 1980* (NZ) s 11(1A).
216. *Family Proceedings Act 1980* (NZ) s 13.
217. s 14(1).
218. s 14(3).
219. s 14(2).
220. s 15.
221. s 17.

current dispute resolutions mechanisms are deficient in themselves and in comparison with approaches adopted in other jurisdictions.

9.91 The following analysis of the current framework raises a range of policy issues for discussion.

## Supreme Court

9.92 The Supreme Court has placed great emphasis on the benefits of using mediation and neutral evaluation methods as an alternative to litigation. The ability to order mediation where the judge deems it appropriate is an important first step. It is also necessary, however, that the value of mediation is recognised by the parties themselves and that there are adequate numbers of well trained mediators to meet the demand. There is also the issue of whether the training provided ought to be tailored to dealing with "relationship" disputes.

9.93 Where matters do proceed to court, the question to be resolved is whether the Supreme Court is the appropriate forum for dispute resolution of PRA matters.

### *Issues for consideration*

1. How effective are the mediation and neutral evaluation sessions in resolving PRA disputes?

2. Do the mediators require specialised training to deal with property disputes arising out of a "domestic relationship"?

3. What are the practical advantages and disadvantages of going to the Supreme Court in relation to PRA matters? Is it appropriate that the Supreme Court have jurisdiction in relation to PRA matters?

4. Should costs follow the event in PRA matters or should the Supreme Court mirror the Family Court approach where each party bears their own costs, unless there is an exceptional reason justifying the court to make a costs order?

## District Court

9.94 While the District Court does encourage the use of alternative methods of dispute resolution, there appears little evidence of its use. The result is that most matters proceed to trial.

***Issues for consideration***

1. Should the District Court have the power to compel mediation and neutral evaluation?

2. Should the District Court make provision for Court annexed mediation facilities?

3. Should the District Court have a specialist division that deals with PRA matters?

4. What is the rationale for limiting claims in relation to PRA matters to $250,000? Does the limitation refer to the amount sought to be re-adjusted or to the total value of the assets?

5. Should the District Court have unlimited jurisdiction in PRA matters as is the case with claims for damages arising out of motor vehicle accidents? If so, will there be a continued need for the Supreme Court to have jurisdiction in PRA matters?

6. Alternatively, should the District Court's jurisdictional limit be removed where matters have been transferred from the Supreme Court?

7. In PRA matters should the District Court mirror the Supreme Court's costs rules or should it mirror the Family Court's approach?

## Local Court

9.95 Since most cases are dealt with speedily and the process is uncomplicated, this jurisdiction would appear to attract the highest number of applications under the PRA. However, there is very limited scope for using primary dispute resolution mechanisms.

***Issues for consideration***

1. Should the Local Court be empowered through legislation to have access to arbitration and mediation facilities in relation to PRA matters?

2. Should such facilities be court annexed?

3. Should the Local Court have the power to compel mediation and neutral evaluation?

4. Should the PRA be amended to adopt the FLA approach to costs?

5. Should the jurisdictional limit be increased?

9.96 The above indicates that each court within the current framework has its own peculiar problems that may be addressed specifically. However, the broader policy question of whether or not the current framework ought to be substituted with a different approach will depend on whether PRA disputes by their very nature call for a different approach. In assessing the need for change, the best option will be one that delivers fair, accessible, timely and affordable justice.

## EVALUATION OF KEY FEATURES OF THE FAMILY COURT

9.97 Contrasted against the issues raised by the current framework are the main features of the Family Court: specialist jurisdiction; court annexed mediation services focus; simpler procedure; party-party costs rules. Given that the PRA deals with similar issues to those dealt with in the Family Court, it is worth critically and objectively evaluating these features by considering their relevance for resolving PRA matters and whether incorporating these features will ensure the delivery of more accessible, cost efficient, speedy justice.

## Specialist versus generalist jurisdiction

### *Advantages and disadvantages*

9.98 The prime advantages of specialisation lie in expertise and uniformity. Judges are assigned according to their specific education, training, and experience in that particular field. Judges who are trained and specialise in a particular area are better able to entertain, research and implement new ideas.[222] Specialisation will ideally produce a bench of judges better able to process cases efficiently and judiciously because of the expertise gained from dealing with the same issues.[223] This results in speedier decision-making and less cost.[224]

9.99 Conversely, courts with a general jurisdiction have a larger pool from which they can select judges. Generalist decision makers may be better able to incorporate insights gained in cases involving more diverse topics, especially in cases involving complex property or commercial issues.[225]

9.100 There is also concern about whether the impartial role of the decision maker is jeopardised by bringing too much specialised non-legal knowledge into the courtroom. The litigation process is founded on the parties bringing their evidence to court for neutral evaluation. Where an understanding of an individual's circumstances is necessary, the ordinary testimonial procedure is appropriate. Otherwise, the judge's neutrality is undermined.[226]

9.101 Specialisation may increase uniformity in decision making by reducing the number of courts and judges dealing with

222. Justice D M Steinberg, "Developing a Unified Family Court in Ontario" (1999) 37(4) *Family and Conciliation Courts Review* 454 at 455.
223. L Kondo, "Therapeutic Jurisprudence: Issues, Analysis and Applications" (2000) 24 *Seattle University Law Review* 373 at 404.
224. Justice D M Steinberg, "Developing a Unified Family Court in Ontario" (1999) 37(4) *Family and Conciliation Courts Review* 454 at 456.
225. E Chemerinsky, "Decision Makers: In Defence of Courts" (1997) 71 *American Bankruptcy Law Journal* 109 at 115.
226. E Barker Brandt, "The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases" (2000) 22 *University of Arkansas at Little Rock Law Review* 357 at 368.

particular issues, leaving less scope for errant decisions.[227] Although there is a danger that certain participants will receive consistently unfavourable outcomes, the public policy virtues of consistency of decision making outweigh fragmented inconsistency and any forum shopping that results.[228] Relatively consistent outcomes are also desirable because they encourage settlement.

9.102 Specialist courts, such as Drug Courts and Mental Health Courts, are often erected on the basis of a therapeutic approach to resolution. Therapeutic jurisprudence sees the law as a social and economic force, with the ability to produce both therapeutic and anti-therapeutic results for individuals.[229] Central to this is an acceptance of the importance of alternative models of dispute resolution.

9.103 Courts with a therapeutic jurisprudential basis are in a unique position to undertake a holistic approach to both the issues at hand and the needs of the person before the court, including any treatment that may be appropriate.[230] Specialist courts often provide legal and non-legal services to litigants,[231] as the issues to be determined are not purely legal or purely societal. In this way specialist courts can integrate the societal protections provided by the law and the remedial interventions provided by social services and mental health agencies.[232] Both mental health and drug courts operating in the US have made a positive impact on recidivism rates for offenders participating in treatment programs.[233]

9.104 Proceedings of Drug Courts and Mental Health Courts are very different from disputes over property. However, the

227. Chemerinsky at 115.
228. J Folberg, "Family Courts: Assessing the Trade-Offs" (1999) 37(4) *Family and Conciliation Courts Review* 448 at 451.
229. Kondo at 382.
230. Kondo at 430.
231. Family Courts provide counselling to participants. Mental health and drug courts offer medical treatments to offenders.
232. W J O' Neil and B C Schneider, "Recommendations of the Committee to Study Family Issues in the Arizona Superior Court" 37(2) *Family and Conciliation Courts Review* 179 at 187.
233. Kondo at 435.

experience of these specialist courts is still relevant because counselling and alternative dispute resolution play a much stronger role in relationship disputes than in purely commercial disputes. Specialist courts encourage the use of alternative mechanisms to resolve disputes prior to litigation. This emphasis minimises the adversarial nature of the proceedings, which is appropriate given the proceedings are often emotionally charged and are likely to involve complex social problems.[234] Mediation offers a model of cooperative decision-making that, where effective, better facilitates on-going family relations than the adversarial system, which may inflame family problems.[235]

9.105 The advantages put forward for specialist family courts are numerous. The complexity of relationships involved in family disputes demands judicial expertise. If each family is dealt with by a single judge, that judge will be in a better position to understand the context and dynamics of the family's behaviour.[236] The services of mental health professionals, which may be otherwise unavailable, can help emotionally impaired and dysfunctional families. Self-determination and alternative forms of dispute resolution are encouraged in a setting where the external decision maker is identified and reasonably predictable.

9.106 On the other hand, some see that family courts represent a trade off between individual-centred justice according to law and family-centred, judicially directed service interventions. The moral, cultural and religious biases of individual judges will have particular impact on judicial impartiality within family courts. Proceedings are likely to be less formal, with less emphasis on procedure, evidentiary rules, finite jurisdiction, case separation and appellate review. The checks on judicial discretion are fewer as individual judges may impose their particular biases on litigants. Specialist courts have been criticised on the grounds that specialist

234. Such as family law proceedings. W J O'Neil and B C Schneider, "Recommendations of the Committee to Study Family Issues in the Arizona Superior Court" 37(2) *Family and Conciliation Courts Review* 179 at 187.
235. Barker Brandt at 358, 367.
236. Folberg at 450.

knowledge compromises judicial neutrality and there is a greater potential for individual bias of decision makers to go unchecked.[237] This is compounded by the fact that the family law system is not value neutral. It protects the interests of children and family unity, and tends to privilege the status of being married over not being married. Historical values of established religions still provide the basis for legal definitions of family and eligibility for marriage.[238]

***Suitability for PRA matters to be dealt with in a specialist system***

9.107 PRA disputes over property arise out of the breakdown of a personal relationship. Although the FLA also covers issues relating to children, which the PRA does not, it is the focus on "relationships" that calls for its specialist treatment. "Family", however defined, is the "natural and fundamental group unit in society".[239] Issues that may justify the need for a specialist jurisdiction include the following:

- the dynamics of relationship breakdown in both heterosexual and gay and lesbian relationships;
- the nature and disposition of property (including "human capital") and the division of work in and out of the home in both heterosexual and gay and lesbian relationships;
- the prevalence, dynamics and effects of abuse, including physical, emotional, sexual and economic abuse on both adults and children – in heterosexual and gay and lesbian relationships;
- the potential impact of violence and abuse on property;
- the nature of gay and lesbian relationships;
- social attitudes and prevalent misconceptions about gay and lesbian relationships;
- the impact of homophobia on gay and lesbian relationships, particularly in relation to property arrangements.

237. Folberg at 449, 451.
238. Folberg at 451.
239. FLA s 43(b).

9.108 These issues may also be relevant to judicial education to ensure decisions made under the PRA are meaningful. Dealing with PRA matters in a generalist forum may suggest discriminatory treatment of de facto relationships in favour of marriage relationships.

9.109 In practical terms, having relationship matters heard in a generalist jurisdiction can be like appearing in an "alien culture". The vast majority of matters in the Supreme Court Master's Equity Division list (in which property relationship matters are heard) are corporations law matters. In 1999, there were 2242 corporations law matters and 55 property relationships matters.[240] Clearly there are far fewer property relationship cases than other matters listed for hearing. Whilst the Masters no doubt exercise great skill in dealing with all matters before them, they inevitably have less experience in dealing with property relationship matters than they will with the other matters before them. For the parties in property relationship proceedings, the anxiety of being in court (often for the first time) can be exacerbated by being in a jurisdiction that deals principally with very different matters. The reason that these matters are considered different, even though the immediate subject matter is property, is because the property dispute is inextricably linked to a close personal relationship that in most cases has ended, often leaving a great deal of pain. The property dispute therefore has an additional aspect that must be considered with sensitivity.

9.110 The Family Court presents a stark contrast. All parties present on a given day have similar problems and are dealt with by judges who have experience in family law. Consequently, these judges may be seen, possibly rightly, as more sensitive to the emotional and other intricacies that flow from close personal relationships, and that need to be considered when making orders.

9.111 It is pertinent that the Chief Justice of the Family Court has recently called for wider powers to include hearing disputes between de facto and same sex couples within the Family Court's jurisdiction so as to become a court hearing all relationship type

240. NSW Supreme Court, *Annual Report 1999* at 33.

matters.[241] The Attorney General responded that the Commonwealth has no constitutional power to implement uniformity relating to de facto property disputes.[242]

9.112 It is also noteworthy that in Western Australia,[243] the State Family Court is being considered as an appropriate jurisdiction to hear de facto matters. This is recognition of the need for de facto relationship matters to be considered in a specialist family jurisdiction.

9.113 While there are many reasons why a specialist jurisdiction might be better equipped to deal with PRA matters, there are two possible counter arguments.

9.114 First, since PRA cases are about property, the relationship aspect of the disputes should figure not much more strongly than in other property or contractual disputes between parties who have some personal or professional relationship. The judge can develop an understanding of the circumstances in the same way as he or she does in other property disputes. However, decisions involving children are highly subjective and present difficult emotionally laden questions. Family relationships are significantly different from other contractual and business relationships.

9.115 Secondly, the comparatively small number of PRA disputes that are heard in the courts may suggest that setting up a specialist system is unjustified. A specialist system could be more viable if it included not only the PRA matters but also the *Family Provision Act 1982* (NSW) matters, which would increase the total number. Further, if the recommendations made in this Discussion Paper are implemented, the number of matters is likely to increase.

## Court annexed mediation services

9.116 Both research and anecdotal evidence point to the fact that judicially imposed solutions have many disadvantages. These include

241. "Family Court calls for wider powers" (editorial) *The Age* (18 January 2001) at 4.
242. *The Age* (18 January 2001) at 4.
243. See above at para 9.87 for current proposal.

the increased polarisation of parties as the possibility of litigation increases, the expense of proceedings, their intimidating character and the rigidity of the possible outcomes. Whether mediation is used as part of the litigation process and offers a true alternative to litigation or not, it is widely recognised as an increasingly useful tool that has the capacity to provide a just and equitable remedy to disputants.[244] It is a commonly held belief supported by empirical studies that mediated and conciliated settlements are more flexible, less costly and lead to more satisfaction with the process, particularly in the area of family law.[245] Clearly, mediation has become a popular alternative to litigation. It provides a service that is informal and consensual and therefore more accessible.[246]

9.117 The success of the Family Court is compelling evidence of the benefits of mediation services. Many clients who avoid court proceedings have said the reason for opting for conciliation counselling and mediation is to avoid litigation and its attendant costs.[247] The *Declaration of Principles on Court Annexed Mediation* adopted by the Council of Chief Justices of Australia and New

244. H Astor, "Mediation of Intra-Lesbian Disputes" (1996) 20(4) *Melbourne University Law Review* 953.
245. Research has shown that decisions reached mutually between the parties, with the assistance of the court's PDR services and community based services tend to be highly rated by clients and appear to be durable and workable: L Maloney, T Fisher, A Love and S Ferguson, *Managing Differences: Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction* (AGPS, 1996); Family Court of Australia, *Evaluation of the Family Court Mediation Service* (Research Report 12, 1994); Family Court of Australia, *Client Attitudes to the Counselling Service of the Family Court of Australia.* (Research Report 15, 1996).
246. For further discussion of the advantages of mediation see H Astor and M Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) and in relation to mediation as a tool in resolving intra-lesbian disputes see H Astor, "Mediation of Intra-Lesbian Disputes" (1996) 20(4) *Melbourne University Law Review* 953.
247. Family Court of Australia, *Evaluation of the Family Court Mediation Service* (Research Report 12, 1994).

Zealand re-iterated the importance of mediation as part of the adjudicative process.[248]

9.118 Relationship disputes that fall outside the heterosexual family law context have more reason to prefer mediation to litigation. Commenting on the use of mediation to resolve intra-lesbian disputes, one writer has commented that:

> Homophobia has created an inhospitable environment in the formal justice system for lesbians and gay men. Both groups have of necessity found or created other methods of resolving disputes. Whilst many lesbians and gay men have negotiated satisfactory resolutions to their disputes there are also, no doubt, others who have been forced to accept inequitable or unjust settlements because accepting less than justice was preferable to using the formal justice system. … The recent development and expansion of mediation as a method of dispute resolution has led to an interest in its capacity to provide an acceptable and appealing method of dispute resolution for the lesbian and gay community".[249]

9.119 The Supreme Court, District Courts and Local Courts of NSW encourage the use of various forms of PDR or mediation services. In the Supreme Court recent amendments have allowed the court to compel mediation in certain circumstances as it thinks fit.[250]

9.120 However, there are arguments that have been used to resist the wider use of court annexed mediation, where court officers conduct the mediation. The main arguments relate to the constitutional validity of the involvement of court officers in court

248. Referred to in J J Spigelman, "Supreme Court: mediation and the court" (2001) 39(2) *Law Society Journal* 63 at 63. Two of the points listed in the Declaration were that mediation is an integral part of the court's adjudicative processes and the "shadow of the court" promotes resolution; and the success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.
249. H Astor, "Mediation of Intra Lesbian Disputes" (1996) 20(4) *Melbourne University Law Review* 953 at 953-954.
250. See para 9.21.

annexed mediation and the perception of the lack of independence of the judiciary as a result of court annexed mediation. A related question is whether courts should have the power to mandate mediation and indeed whether mediation ought to be mandatory.

### *Constitutional validity and other concerns regarding court annexed mediation*

9.121 Some relatively recent High Court decisions[251] which have extended and reinforced the doctrine of separation of powers under the Constitution have brought into question whether court annexed mediation offends this doctrine. This relates to judges and court officers involvement in mediation. In relation to a judge's involvement, one commentator's view is that his or her conduct of mediations may diminish public confidence in the integrity of the judiciary.[252] Given that most mediations are conducted by court officers, and that mediation has assumed a prominent role in dispute resolution processes, it is a matter of concern that this question has been raised. The issue draws attention to the possibility of unnecessary communication between mediator and trial judge, which can cause a loss confidence in the integrity of the court,[253] and the limited avenues for review where the mediation is unsatisfactory.[254]

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251. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 and *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.
252. P Tucker, "Judges as mediators: a chapter 3 prohibition" (2000) 11 *Australasian Dispute Resolution Journal* 84 referring to the principles enunciated in *Grollo v Palmer* (1995) 184 CLR 348 at 365.
253. *Ruffles v Chilman* (1997) 17 WAR 1. In this case, the trial judge ordered mediation after the plaintiff's evidence had been heard. The deputy Registrar conducted the mediation and in the course of the mediation said that he had spoken to the trial judge and that it was his belief that the judge had taken an adverse view of the plaintiff's evidence. The mediation was unsuccessful and at the resumption of the trial an application made by the plaintiff to the trial judge to disqualify himself was refused. See also D Spencer, "Communication between mediator and judge leads to finding of bias" (1997) 8 *Australasian Dispute Resolution Journal* 308.
254. *Commonwealth Bank v Gain* (1997) 42 NSWLR 252.

9.122 Another possible conflict arises because the confidentiality obligations of a court mediator may be balanced against the court officer's obligation to law and order. For instance, a mediator who becomes aware of a serious non-violent offence ought keep it confidential. This would present a dilemma if the mediator is a court officer, particularly if he or she is a judge.[255]

9.123 There is also the concern about whether court annexed mediation affects the public perception of the independence of the judiciary. Long before the High Court's pronouncements about whether court annexed mediation offends the doctrine of separation of powers, Sir Laurence Street, the former Chief Justice of NSW and now a leading mediator, sounded this warning:

> A Court that makes available a judge or Registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the Court system is based. Private access to a representative of a Court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the Courts observe.
>
> … The involvement of a custodian of power as mediator imports the real risk of a party feeling a sense of coercion and hence disenchantment with the mediated outcome that can reflect back adversely on the Court.
>
> … The warning that I venture to give … is against the use by a Court of a procedure that is in its very substance antithetical to the maintenance of public confidence.[256]

9.124 Apart from the issue of "private access", Street has also argued that the public perception is that the court is an integrated institution and that the difference between Registrars and judges

255. Tucker at 93.
256. Address to the 75th Anniversary Conference of the Chartered Institute of Arbitrators, 4 October 1990, London; reproduced at (1992) 66 *ALJ* 194. For a contrary perspective from Chief Judge M Pearlman see (1993) 67 *ALJ* 941.

is not commonly understood. Recognition of this distinction is of no value where judges do conduct mediations as in the Federal Court. However, in the context of the Family Court, the Supreme Court and District Court the distinction is very relevant, as judges do not conduct mediations in these courts.

9.125 Another criticism of court annexed mediation is that the benefits of mediation can be "distorted by its proximity to the court".[257] The parties may feel constrained to agree to suggestions made by virtue of the status of the mediator being a court officer. This concern may however be alleviated by the growing number of disputants using court annexed mediation which is evidence of the public confidence in such processes. The success of the Family Court's focus on mediation through the provision of court annexed services and trained mediators is evidenced by the level of satisfaction of clients whose disputes have been resolved without proceeding to litigation.[258] It is also worth noting that the *Declaration of Principles on Court Annexed Mediation* adopted by the Council of Chief Justices of Australia and New Zealand recommends that mediators should "normally" be court officers, like Registrars, but does not contemplate circumstances in which it would be appropriate for a judge to mediate.[259]

9.126 Irrespective of the above concerns, one further independent issue in relation to court annexed mediation is whether mediation ought to be conducted outside the courts. If court annexed mediation continues to be advocated, it may be regarded as a part of litigation precluding the possibility of change.[260] There is also a view that the onus of providing ADR services to the public should

257. H Astor, *Quality in Court connected mediation programs: an issues paper* (The Australian Institute of Judicial Administration, Melbourne, 2001) at 9.
258. Family Court of Australia, *Evaluation of the Family Court Mediation Service* (Research Report 12, 1994).
259. Referred to in J J Spigelman, "Supreme Court: mediation and the court" (2001) 39(2) *Law Society Journal* 63.
260. H Astor, *Quality in Court connected mediation programs: an issues paper* (The Australian Institute of Judicial Administration, Melbourne, 2001) at 11.

fall on the executive and the legislature rather than the courts. In this context, one writer has said:

> Whilst ordering that parties attend Court annexed or Court ordered mediation could be seen as an exercise of judicial power in the course of the administration of justice, the objective of decreasing the public's resort to the Courts and encouraging parties to deal with their own disputes has strong overtones of social engineering as well as cost saving. The creation of environments for parties to resolve disputes in this manner is therefore perhaps properly one for parties charged with implementing such policies – the executive.
>
> … It is submitted that in the current climate of demand for ADR procedures, the onus should be cast upon the executive to provide facilities and regulate the use of ADR. This would additionally reduce the burden on the Court system by not requiring Courts to oversee disputants' utilisation of ADR procedures, and leave the Courts sufficiently detached from ADR procedures to enable them to review, free from adverse perceptions, any assertions of inappropriate conduct.[261]

9.127 Clearly, there is a distinction between the location of the services and the provider of the services. The need for some services to be located at the court does not necessarily mean that those services have to be provided by the court. Greater use of the community infrastructure would no doubt ensure a more diverse choice of providers and enable people to access the full range of services offered. This would also allow for a greater geographical spread of services, enabling people to choose providers more conveniently located than the current court located services. The present Government is, it appears, committed to supporting a greater use of community based services to supplement the existing court annexed services.

9.128 As ADR becomes increasingly entrenched as a court annexed service, it would probably require the High Court to make an adverse ruling on court annexed mediation to prompt any change. Until or unless there is a change in the social and legal culture that dispenses with the need for mediation, it is unlikely

261. Tucker at 96.

that court annexed mediation will be removed. It allows for the court to have control over the quality of mediation by providing appropriate and consistent training while also ensuring that the mediation service is consistent with the needs of the jurisdiction, the dispute and the case management objectives.

### *Mandatory mediation*

9.129 There is considerable debate surrounding the issue of mandatory mediation. The main argument against it is that it is a contradiction in terms.[262] Philosophically, the imposition of mandatory mediation is a retrograde step in the establishment of an ADR culture.[263] It is also likely to lead to increased rather than reduced cost and delay[264] and remove the "willingness" element, which would undermine the effectiveness of settlements.[265] It has also been suggested that mandatory dispute resolution disadvantages poorer litigants in that it can place an additional financial burden on litigants who may have in any event settled before the final hearing.[266]

9.130 Where mediation is mandatory,[267] the legislation has either identified a particular type of mediation process to be mandatory because of the issues involved[268] or the legislation empowers the court to order mediation if it considers the circumstances

262. R Ingleby, "Court Sponsored Mediation: the case against mandatory participation" (1993) 56 *Melbourne University Law Review* 441; H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) at 41.
263. D Spencer, "Mandatory Mediation and Neutral Evaluation: A Reality in NSW" (2000) 11 *Australasian Dispute Resolution Journal* 237 at 251.
264. T F M Naughton QC, "Mediation and the Land and Environment Court of NSW" (1992) 9 *Environmental Planning Law Journal* 219.
265. J David, "Designing a dispute resolution system" (1994) 1 *Commercial Dispute Resolution Journal* 26 at 32-33.
266. M Dawson, "Non-consensual Alternative Dispute Resolution: Pros and cons" (1993) 4 *Australasian Dispute Resolution Journal* 5 at 8.
267. See discussion at para 9.18 (mediation in the Supreme Court) and para 9.59 (PDR in the Family Court).
268. For example Order 24 conferences under the *Family Law Rules*. See para 9.41.

appropriate.[269] Although the NSW Parliament has stressed the economic efficiency of mandatory mediation in the Supreme Court, it is not always cost effective.[270] Indeed cost effectiveness alone ought not to be the primary reason for mandating ADR. Instead, mandatory mediation should only be imposed if it is more likely to serve the interest of parties, the justice system and the public than would voluntary attendance.[271] One compelling factor in favour of mandatory court annexed mediation is that even if settlement is not achieved, the opportunity to define and possibly reduce the issues to be litigated may be beneficial to the parties and the justice system.

### *Confidentiality*

9.131 The other serious limitation of PDR methods is in the context of the public/ private divide. A notable characteristic of mediation is that it is private and confidential in contrast to the public nature of the administration of justice by courts. Clearly, the "public" administration of justice serves to reflect important public values, especially in the context of criminal matters, but also in civil litigation. Public conduct of litigation is an important form of accountability for the legal system and judges, in particular.

9.132 However, the notions of what and who is "right and wrong" which are often of importance in many other cases are of less significance in relationship type cases. Often, there is a need for a continuing relationship particularly where children are involved, where privacy is especially important and other personal circumstances may well outweigh the factors favouring public proceedings. To that extent, PDR as part of the court's adjudicative process would appear to be well suited to serve the needs of many relationship disputes.

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269. As is the case in the Supreme Court. It must be noted that the *Supreme Court Act 1970* (NSW) provides no guidance on what it should "consider" to order mandatory mediation.
270. H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) at 41.
271. David at 32-33 (quoting the National Standards for Court Connected Mediation Programs of the US Institute of Judicial Administration).

### *The need for a greater focus on court annexed PDR services in PRA matters*

9.133 It is clear that an increased focus on PDR services would be advantageous in dealing with many PRA matters. However, it is important to consider whether in the PRA context such services ought to be court annexed and whether some or all of them ought to be mandatory. While we do have the benefit of the experience of the Family Court in this regard, it may be prudent to go back to first principles and consider the objectives of court annexed mediation and mandatory PDR in the context of PRA matters.

9.134 In a recent paper on quality in court and tribunal connected mediation, Professor Hilary Astor argued that:

> The objectives of Court connected mediation for any Court or tribunal are likely to be strongly influenced by the way the Court or tribunal perceives its role ….
>
> The objectives of a Court connected mediation scheme will also be strongly influenced by the nature of the work done by the Court or tribunal. If only certain types of cases are to be referred to mediation, the objectives will of course relate to the characteristics of that subset of cases. Different case characteristics, such as the percentage of unrepresented litigants, frequent disputes involving vulnerable third parties, the likelihood of severe power imbalances between disputants and other factors will influence the objectives and thus the characteristics of the mediation scheme. …
>
> The objectives determined by the Court or tribunal will influence the characteristics of mediation or conciliation itself, including the role of the mediator and the style of mediation that is used … for example in disputes involving families a style which maximises the chances of preserving an ongoing relationship between the parties may be the most desirable. However, if the prioritised objective of mediation is to produce the maximum number of settlements, then a more aggressive and directive role for the mediator may be envisaged.[272]

272. H Astor, *Quality in Court connected mediation programs: an issues paper* (The Australian Institute of Judicial Administration, Melbourne, 2001) at 4.

9.135 Whether PRA disputes are dealt with in a specialist forum or not, it is important that a set of objectives appropriate to the needs and characteristics of the jurisdiction be developed. If those objectives are focussed on making dispute resolution more responsive and sensitive to parties' needs, then a court annexed scheme may be suited to PRA disputes. The benefits of such a scheme will only be satisfied if the mediators are well trained in mediating disputes of this nature.

## Simpler practice and procedure

9.136 A comparison of the practice and procedure in the Supreme and District Courts with the procedure in the Family Court indicates that the latter is more user friendly with its easily accessible court forms and less complicated procedural rules. The Family Court has simplified its procedures over a period of time. However, the use of forms has sometimes caused difficulties. Although some forms are relatively straightforward, there are a large number of forms; identifying the correct form to use can be difficult for parties and non-specialist lawyers.[273]

### *The need for simpler procedures for PRA matters*

9.137 Relationship disputes affect many people who may never otherwise go to court. A significant proportion of these people are self-represented.[274]According to a recent research report, litigants in person in the Family Court are more likely to have limited formal education and less likely to be able to afford legal representation.[275]

9.138 Despite the fact that the Family Court operates on a "modified" adversarial system, it was thought necessary that

273. ALRC, *Managing Justice* (Report 89, 2000) at para 8.93.
274. The Family Court indicates that 37% of clients are self represented, the Family Court of Australia, "Self-Represented Litigants Project" (as at 18 December 2001) «www.familycourt.gov.au/litigants/».
275. J Dewar, B Smith and C Banks, *Litigants in Person in the Family Court of Australia* (Research Report 20, Family Court of Australia, 2000).

research be commissioned to identify the needs of litigants in person so they can be better assisted. If this is the case in a "helping" court other courts with complex procedural rules could usefully consider simplifying rules and procedures when dealing with clients similar to those who appear before the Family Court. While there is a significant focus on children in the Family Court, unless the property in dispute under the PRA is worth a significant sum (which leads to the assumption that the clients may be financially well off and can afford legal fees), it would seem unfair that PRA clients are denied a simpler user friendly system. Even where the value of the property is significant, there appears no reason why a simpler procedure would be detrimental. It may be easier to tailor and simplify procedural rules to suit a specialist jurisdiction.

## Costs rules

9.139 There is a clear distinction between the FLA approach to costs and the approach adopted in general litigation. The approach adopted in the Supreme Court and the District Court indicates that PRA matters are treated just like any other matter before the court in that costs follow the event. However, as explained above, PRA matters are more akin to FLA matters and hence, perhaps, ought to be treated similarly. Although there is no legislative expectation for so doing, the Local Court at St James Centre adopts this approach to costs. It may be appropriate that the costs rules in relation to PRA matters mirror the FLA approach described above.

9.140 Since the FLA rule is advantageous to the more prosperous litigant, another alternative may be a rule that costs should prima facie come out of the joint estate.

## OPTIONS FOR INCORPORATING KEY FEATURES

### Option 1: Reference of power

9.141 Given the nature of the disputes that arise under the PRA, the most appropriate forum to hear such disputes is the Family Court because of the attendant advantages inherent in a specialist jurisdiction that places emphasis on PDR. The recently established FMC lends itself to being used as the lower court with summary jurisdiction, less complex rules than the Family Court and a much larger jurisdictional limit than the NSW Local Courts.[276] However, given the constitutional issues that may arise, this may not be a feasible option.

### Option 2: Establish a specialist division within the District Court

9.142 Given that establishing a specialist state family/relationships court may be unfeasible, it may be worth considering establishing a specialist division within the existing District Court.

9.143 Currently the most significant advantage of the Supreme Court hearing PRA cases is that it has no jurisdictional limit. This is however at the cost of a highly complex procedure which is often very expensive. On the other hand, it is necessary that the Supreme Court has jurisdiction to hear property matters that exceed the jurisdictional limit of the District Court. If the jurisdictional limit is the issue, an option may be to make the jurisdictional limit of the District Court in relation to PRA matters unlimited, just as it is the case in relation to motor vehicle matters. It will also be necessary to amend the District Court's jurisdiction in equity proceedings such that it has the same jurisdiction as the Supreme Court in relation to PRA matters even though matters are no longer transferred from the Supreme Court which under this option will not have jurisdiction in respect of PRA matters.

276. The ceiling is $300,000.

9.144 In addition it may be necessary to increase the jurisdictional limit of the Local Court in relation to PRA matters. The current jurisdictional limit in the Federal Magistrate's Court is $300,000, which allows for many more cases to be dealt with by that court.

9.145 Removing or lifting the jurisdictional limit will allow parties to avoid the complex procedure associated with the litigating in the Supreme Court. However, given that the District Court currently mirrors the Supreme Court procedure in PRA matters, this will leave other problems unresolved, only concentrated in one jurisdiction. Moreover, it may be cumbersome to simplify the procedure for PRA matters while still dealing with such matters among others in the general division.

9.146 The better option may be to establish a specialist family/relationships division within the District Court. This appears to be how the Local Court in St James Centre operates. Admittedly this will be harder to implement in country courts. However, it would make sense to set up specialist divisions in the District and Local Courts in the Metropolitan areas to operate as State equivalents of the Family Court and FMC.

9.147 Setting up a specialist division would mean that judges who have experience in family law may be assigned to hear such matters as was the legislative intention in relation to the selection of Family Court judges.

9.148 Although court annexed mediation services can be available to litigants whether or not there is a specialist division of the court that deals with PRA matters, it may be easier to deal with issues such as choice and training of mediators if such a specialist division exists. As stated above, objectives, characteristics and the eventual effectiveness of the PDR scheme will be much better framed and achieved if it is done within a specialist division.

## Option 3: Maintain a modified version of the status quo

9.149 Maintaining a modified version of the status quo is the Commission's third option. This would mean that the current jurisdictional divisions would continue with the Supreme Court dealing with matters that are beyond the jurisdictional limit of the District Court. However, the District Court limit of $250,000 may need to be increased to $750,000 and Local Court limits may also need to be increased. This would mean that the vast majority of matters could be dealt with in the lower courts leaving only the very high value property disputes within the Supreme Court's jurisdiction. The cost of going to the Supreme Court may not be as much of a problem for litigants in that league.

9.150 With regard to PDR, there ought to be facilities for court annexed counselling and mediation and legislative recognition of the importance of such a focus. This would require that the relevant legislation be amended to empower judges to make orders for PDR. In addition it would require that suitably qualified and trained staff are made available to conduct mediation and counselling services within the court. Ideally, this would mean having family law accredited specialists conduct mediations and arbitrations. It will also be necessary to allocate resources for ongoing, regular training of all court personnel involved in dealing with property relationship matters.

**ISSUE 31**

**Which proposal do you favour concerning the most appropriate jurisdiction to hear disputes under the PRA? Why or why not?**

# TABLE OF LEGISLATION

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*Family Law Act 1975 (continued)*

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