Introduction

In a paper authored by Malcolm Broun QC, a leading Family Law silk, in 1992, on ‘Rights of Unmarried Couples Under the De Facto Relationship Act (1984) NSW’, Mr Broun QC wrote, in relation to the rights of same sex de facto relationships:

“These are going to become more important progressively. At the moment they are governed entirely by the general law and in respect of property it is necessary for a homosexual or lesbian couple to show constructive trusts, resulting trusts or some other basis for a property claim. I think it most unlikely that the legislation will ever permit same sex relationships to be treated in the same way as the De facto Relationships Act treats a man and a woman’s relationship. It is quite clear in my view that the De facto Relationships Act has no application to same sex relationships.

There has already been one very lengthy custody case...in which two women living together in a lesbian relationship procured the impregnation by donor of one of the women with a subsequent custody dispute. I do not think we need prepare for such disputes by a great deal of study. Hopefully they will be very rare...”

Fast forward now to the year 2007, some 15 years after Mr Broun QC’s observations. The Rudd Government undertook a historic reform to amend a range of Commonwealth laws that discriminate against same-sex couples and their children.

Background

By way of background, about 20 years ago, the term ‘sexual preference’ was added as an additional ground of discrimination under the Human Rights and Equal Opportunity Commission Regulations.

In 1997 the Senate Legal and Constitutional References Committee identified discrimination in Commonwealth laws and programs that dealt with tax and superannuation benefits.

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In 2003, NSW Parliament passed the Commonwealth Powers (Defacto Relationships) Act 2003 by which it referred to the Commonwealth Parliament its powers over the property rights of de facto couples.

In 2004, the United Nations Human Rights Committee found that Australia was in breach of the prohibition on discrimination in the International Covenant on Civil and Political Rights because the Veterans’ Entitlements Act denied a person a pension on the basis of their sexual orientation.

In May 2007, the Human Rights and Equal Opportunity Commission released its report Same-Sex: Same Entitlements – the outcome of a significant national inquiry and consultation on that issue. It personalised many examples of discrimination and the impact of discriminatory laws on Australians.

The Commission found that:

1. at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and their children. These laws breach the International Covenant on Civil and Political Rights. Laws that discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements also breach the Convention on the Rights of the Child.
2. At least 20,000 same-sex couples experience systematic discrimination on a daily basis;
3. Same-sex couples and their families are denied basic financial and work related entitlements which opposite-sex couples and their families take for granted;
4. Same-sex couples are not guaranteed the right to take carer’s leave to look after a sick partner;
5. Same-sex couples have to spend more money on medical expenses than opposite-sex couples to enjoy the Medicare and PBS safety nets;
6. Same-sex couples are denied a wide range of tax concessions available to opposite-sex couples;
7. The same-sex partner of a Defence Force veteran is denied a range of pensions and concessions available to an opposite-sex partner.

In October 2008 a suite of major federal reforms concerning family relationships passed federal parliament.² Broadly speaking these reforms:

² These comprised the following: Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth); Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008 (Cth); Same-Sex Relationships (Equal Treatment in Commonwealth laws – General Law Reform) Act 2008 (Cth) and Evidence Amendment Act 2008 (Cth).
(a) include same-sex couples within the category of ‘de facto relationship’ in all federal laws (which were previously limited to unmarried heterosexual couples);

(b) extend the definition of ‘parent’ and ‘child’ in much federal law to include lesbian parents who have a child through assisted reproductive means and, in more limited circumstances, to include parents who have children born through surrogacy arrangements.

The reforms also bring de facto couples, both heterosexual and same-sex, from the Territories and referring States (which to date include NSW but do not include Western Australia and South Australia) within the federal family law property division regime. (Same-sex couples remain excluded from definitions of eligible de facto relationships in adoption law in all States except Western Australia, the ACT and, in limited circumstances, Tasmania).

Prior to the 2008 reforms, there were at least six different definitions of ‘spouse’ operative in federal law, with an additional five definitions of ‘partner’ or ‘couple’, one of ‘marital relationship’ and four more variations of an ‘interdependent’ relationship category. While heterosexual de facto relationships fell within virtually all of the definitions, same-sex relationships were covered only by the very limited ‘interdependency’ categories.

The 2008 reforms mean that same-sex couples who meet the new de facto relationship definition are now treated as a couple in, among other things, federal superannuation schemes and Medicare benefits, workplace entitlement guarantees, migration, social security and taxation laws. Most of the changes came into effect on 1 March 2009.

In addition to expanding the Family Court’s jurisdiction to divide the property of unmarried couples and bringing same-sex couples within the broader federal approach to de facto relationships, the reforms introduce for the first time a uniform, central, federal definition of ‘de facto relationship’ with criteria for making a determination in cases of doubt. The central de facto definition is contained in s22C of the Acts Interpretation Act 1901 (Cth). This definition extends out to federal law generally, and is essentially the same as that inserted into s4AA of the Family Law Act 1975 (Cth), although there are minor differences, addressed below. While the AIA is intended to apply generally in federal law, it is the definition in the FLA that applies to proceedings under the FLA.

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3 The only two areas of federal laws that specifically excluded heterosexual de facto partners were the Family Law Act 1975 (Cth) property provisions and the Member of Parliament (Life Gold Pass) Act 2002 (Cth) (which sets lifetime travel entitlements of federal parliamentarians and their spouses).

4 For example, the definition was operative for the purposes of superannuation death benefits.

**ACTS INTERPRETATION ACT 1901 - SECT 22A**

**References to de facto partners**

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the *de facto partner* of another person (whether of the same sex or a different sex) if:

(a) the person is in a registered relationship with the other person under section 22B; or

(b) the person is in a de facto relationship with the other person under section 22C.

**SECT 22B**

**Registered relationships**

For the purposes of paragraph 22A(a), a person is in a *registered relationship* with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship.

**SECT 22C**

**De facto relationships**

(1) For the purposes of paragraph 22A(b), a person is in a *de facto relationship* with another person if the persons:

(a) are not legally married to each other; and

(b) are not related by family (see subsection (6)); and

(c) have a relationship as a couple living together on a genuine domestic basis.

(2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;
(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the reputation and public aspects of the relationship.\(^5\)

(3) No particular finding in relation to any circumstance mentioned in subsection (2) is necessary in determining whether 2 persons have a relationship as a couple for the purposes of paragraph (1)(c).

(4) For the purposes of paragraph (1)(c), the persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of:

(a) a temporary absence from each other; or

(b) illness or infirmity of either or both of them.

(5) For the purposes of subsection (1), a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship (within the meaning of section 22B) with someone else or is in another de facto relationship.

(6) For the purposes of paragraph (1)(b), 2 persons are related by family if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

\(^5\) This ‘criteria’ is picked up from the Property (Relationships) Act 1984 NSW s4(1), which in turn, were inserted in 1999 and drawn from the general caselaw such as the decision of Powell J in D v McA (unreported, 27 June 1986); Roy v Sturgeon (1986) 11 NSWLR 454 at 458, and also having been identified in the New South Wales Raw Reform Commission’s Report on de Facto Relationships LRC 36 (1983) at 17.11.
(c) they have a parent in common (who may be an adoptive parent of either or both of them).

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

(7) For the purposes of subsection (6), **adopted** means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

The definition is consistent with the new definition of “de facto relationship” in s4AA of the Family Law Act 1974. That definition specifically provides that for the purposes of the Family Law Act:

(a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

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

The new definition is important from an estate planning perspective in areas governed by Commonwealth legislation, including superannuation, tax, social security and family law.

However, unlike NSW, the federal definition does not include the requirement that there be ‘two adult persons’, so mature minors (or those who were minors at the outset of a relationship) are also included. A major difference between the State and new federal definitions is that federal law expressly provides that a person can be in a de facto relationship, even if they are married or living in a de facto relationship with someone else.

Like NSW, federal law specifically provides that no particular finding in relation to any of the abovementioned indicia circumstance is necessary in determining whether 2 persons have a relationship as a couple.  

It is clear that case law from the States and Territories will be very relevant in helping to determine the existence and duration of contested de facto relationships in the teething stages of the Family Court’s jurisdiction.

Importantly, in the federal definition, there is no requirement regarding the duration of the relationship.

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6 Acts Interpretation Act 1901 (Cth) s22(3); Family Law Act 1975 (Cth) s4AA(3).

7 See, eg, *Robinson v Thompson* (2007) DFC 95-409; [2007] NSWSC 1148; BC200709111 in which one party denied the existence of a 19 year same-sex de facto relationship throughout the duration of the trial; and also *Di Silvo v Public Trustee* [2009] NSWSC 894, in which one party denied the existence of a 34 year de facto relationship in the context of a claim under the Family Provision Act 1984 (NSW).
In addition to the standard list of criteria for determining whether a de facto relationship existed, the FLA includes ‘whether the relationship is or was registered under a prescribed law of a State or Territory’. The federal definition separately provides that any reference to a de facto relationship includes a registered relationship under the prescribed law of a State or Territory. This slight difference in drafting means that while registered couples will be taken without further proof to qualify as de facto relationships in most areas of federal law, for family law purposes, registration of the relationship is merely one factor to be taken into account in determining the existence of the de facto relationship.

The federal definition clarifies that a couple who are temporarily separated or who are separated by illness or infirmity should still be regarded as living together, following the approach of case law from the States. It remains to be seen how broadly or narrowly ‘temporarily’ is interpreted in this context. In State case law couples who have maintained separate residences for several years due to work commitments have still been held to be in a de facto relationship through that time, as have couples involuntarily physically separated by, for example, jail terms of several years’ duration.

A major issue that has arisen under the State property division regimes is how to approach the question of when a de facto relationship ends, or how to determine the duration of a relationship in which there have been separations and reconciliations. In NSW, a more formal and literal approach has been applied in finding that de facto relationships are ended by

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8 *Family Law Act 1975 (Cth)* s4AA(2)(g).

9 *Acts Interpretation Act 1901 (Cth)* s22C(4).

10 In *PY v CY* ([2005] DCA 247 the couple had cohabited for 9 years, then lived separately for a further 3 years when the female partner moved away to care for her parents. During those 3 years, the male partner visited every second week, and towards the end of that time they searched for another joint residence. The trial judge and all three judges of the Queensland Court of Appeal held that the relationship continued through that 3 year period.

11 See, eg, *W v T* [2005] QSC 168 where the Queensland Supreme Court held that a de facto relationship existed over a 20 year period, notwithstanding there was a common residence for only the first 4 years. After that time, the male partner had a job managing a caravan park and stayed overnight at the park 4 nights a week, and stayed at the residence of the female partner on the other nights.

12 In *Howland v Ellis* [1999] NSWSC 1142 the NSW Supreme Court initially held that the de facto relationship ceased when the male partner was removed to jail even though the couple continued to regard themselves as in a committed relationship, with the female partner visiting prison and awaiting her partner’s release for over 4 years from the time of his imprisonment. This was overturned by the NSW Court of Appeal which held unanimously that the involuntary nature of the separation meant that it did not end the relationship.
temporary separations. Especially in earlier cases, the NSW Supreme Court preferred to find that parties had been in a number of short de facto relationships with each other, rather than one long relationship interspersed with breaks or interrupted by temporary separations.13


The new part gives the Family Court jurisdiction to deal with financial matters related to de facto relationships (including same-sex relationships).

The Family Court is now able to make orders regarding de facto relationships similar to those regarding marriage, such as orders for maintenance, declarations of and adjustments to property interests. Parties to a current or past de facto relationship will also be able to make binding financial agreements to oust the jurisdiction of the Family Court. The Family Court has power to make splitting and flagging orders in relation to the superannuation interests of a person in a de facto relationship. From an estate planning point of view, it is important to ensure that you obtain instructions about the existence of any former de facto relationships and whether any court orders concerning superannuation have been made.

**Superannuation and the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008 (Cth)**

The Same-Sex: Same Entitlements Inquiry noted that superannuation is one of the main ways of saving for retirement. It is designed to provide financial security for individuals and their families in retirement; or when a person dies unexpectedly. Further, superannuation is often a person’s largest asset apart from the family home. Most people expect that their

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13 See, eg, *Lipman v Lipman* (1989) 13 Fam LR 1 (parties in a 13 year relationship with a 5 month separation, the court held that there were 2 relationships); *Gazzard v Winders* (1998) 23 Fam LR 716 (parties had a 15 year relationship with a 6 week separation in the midst of it. Powell JA was determined to view it as two separate relationships, but Beazley JA disapproved. The question was not resolved on appeal). In contrast, see *Jones v Grech* [2001] NSWCA 208 (parties in a relationship over a 32 year period and during several of the early years the male partner was also formally married. Through some of the years he regularly stayed in the female partner’s premises, and through 2 periods covering several years, the parties lived full-time in a joint residence. Powell JA in dissent would have taken into account only those contributions made in the final 4 year period of cohabitation, and ignored the preceding 28 years of the relationship. The majority judges, Davies and Ipp AJA, considered the context of the relationship over the entire period). See also *Milevsky v Carson* [2005] NSWSC 299 (where the parties had a relationship over 22 years, with a 4 year break in the middle. In that case the court introduced an ‘aggregate’ approach, treating it as a long relationship comprised of all the years in which the couple were together. The NSWCA has since returned to the short separate relationships approach in *Delany v Burgess* [2007] NSWCA 360.
superannuation entitlements will be inherited by a partner, children or other dependants. But for people in same-sex couples and families, this is not currently always the case.

The Same-Sex: Same Entitlements Inquiry recommended that the federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex couples and opposite-sex couples enjoy the same financial and work-related entitlements and ensure that the best interests of children in same-sex and opposite-sex families are equally protected in these areas.


A new definition of ‘couple relationship’ was inserted into Commonwealth superannuation and related legislation. This new definition ensures that same-sex and opposite-sex couples enjoy equal access to superannuation death benefits flowing from Commonwealth superannuation schemes.

Although the Act has used the terminology of ‘couple relationship’ rather than ‘de facto relationship’, the approach of the Act reflects the recommendations of the Human Rights Equal Opportunity Commission in that current terminology such as ‘spouse’ or ‘eligible spouse’ is retained and redefined. This has been achieved through the following measures:

- In some of the superannuation legislation amended by the Act, ‘spouse’ is redefined to include a person who is in a ‘couple relationship’ rather than a ‘marital relationship’, and the phrase ‘husband and wife’ is replaced with the term ‘partner’.
- In some of the superannuation legislation amended by the Act, the phrase ‘as the husband or wife of the person’ is replaced with the phrase ‘in a relationship as a couple (whether the persons are the same sex or different sexes)’.
- Retaining the terminology of ‘spouse’ and ‘eligible spouse’ ensures that the amendments do not alter the treatment of married or opposite-sex de facto couples.

This point is made repeatedly in the Explanatory Memorandum accompanying the legislation:

“The effect of [these amendments] is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.”

The new definition of ‘partner’ explicitly refers to same-sex couples and removes any doubt about whether same-sex relationships are included in the category ‘couple relationship’.
The Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) regulates private superannuation schemes. Where private superannuation trust deeds refer directly to the definitions contained in the SIS Act, they will have the immediate effect of including same-sex couples. However, the legislation does not require all trust deeds to incorporate these definitions.

The definitions of “child” and “spouse” is s 10 of the Superannuation Industry (Supervision) Act 1993 have been amended to recognise both same-sex relationships and relationships which are registered under State legislation. The effect of this change is that for the purposes of payment of death benefits, it will no longer be necessary for same-sex partners to rely on coming within the category of a “person in an interdependency relationship” so as to be regarded as a dependent of the deceased member.

Therefore, as children of a spouse are also dependents, a child of one of the partners in a same-sex relationship can be a dependant of the other partner for the purposes of payment of superannuation death benefits.

The definitions of ‘child’ and ‘child of a couple relationship’ in the Act remove discrimination by including the children of most same-sex relationships. This is achieved by broadening of the definition of child to include reference to a person who is the ‘product of a relationship’ with a partner: ‘if, at any time, the person had a partner (whether the persons are the same sex or different sexes) – a child who is the product of the person’s relationship with that partner’.

The Explanatory Memorandum states that:

“The new definition expands the classes of children that may be taken to be a child of the member for the purposes of determining eligibility for ... benefits. It adds a new criteria that, if at any time the person had a partner, a child who is the product of the person’s relationship with that partner may be taken to be the member’s child.”

To determine whether a child is the product of a relationship the Act states that:

‘a child cannot be the product of the relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons or is born to a woman in the relationship.’

The amendments in the Act ensure that children born into same-sex families have the same rights and entitlements to superannuation benefits as children born into opposite-sex families.

The new definition of ‘child’ clearly intends to exclude children from previous relationships. A child from a previous relationship cannot be considered a ‘product’ of a current relationship.
However, the superannuation legislation generally provides for entitlements to be given to a ‘step-child’. As the term is not defined in the legislation itself, it will likely be interpreted to exclude a child under the care of his or her biological parent’s same-sex partner. This is because courts have interpreted the term to mean that the child’s biological parent must marry the intended step-parent.

If a couple is married, then a child from a previous relationship is considered a step-child of the non-biological parent. If a couple is not married, a child from a previous relationship does not qualify as a step-child. A child in a same-sex family will never be able to be considered a ‘step-child’ while the members of a same-sex couple are unable to marry.

However, in the context of federal superannuation legislation, entitlement to benefits is generally restricted to an ‘eligible child’ who is dependent on person who is the member of a superannuation fund. This means that where a child is not dependent on a donor who is a superannuation fund member they will have no entitlement to superannuation benefits.

**How do the changes work for children born to lesbian couples?**

A child born to a lesbian couple will generally have a birth mother and a lesbian co-mother (non-biological mother).

**Example A: Where one member of a lesbian couple gives birth using donated sperm.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship. (This is the situation outlined in Example 1 in the Explanatory Memorandum).

**Example B: Where one member of a lesbian couple gives birth using donated sperm and a donated egg.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship. (This is the situation outlined in Example 2 in the Explanatory Memorandum).

**Example C: Where one member of a lesbian couple gives birth following intercourse with a man.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship.

In each of these cases, the child may also be entitled to the superannuation benefits of the biological donor father.
The Expanding Notion of a De-Facto Relationship and a ‘Domestic partnership’. To register or not to register?

As noted above, the federal definition of defacto relationship includes a ‘registered relationship’. On 23 February 2010 the NSW Attorney General announced that the Government will introduce legislation to create a Relationships Register. The purpose of the Register is to make it “easier for committed unmarried couples to access legal entitlements and prove they are in committed or de facto relationships”14. It is believed that the relationship register and expanded definition of de facto relationship will ensure that NSW is aligned with the Federal Government’s removal of discrimination against people in unmarried or same-sex relationships in Commonwealth laws relating to workers compensation, veterans’ affairs, educational assistance and superannuation.

The Honourable Mr Hatzistergos MLC announced that “couples who choose to register their relationship will be provided with one document that helps prove their relationship and will be spared the frustration of constantly having to supply agencies with copious amounts of paperwork”. It is envisaged that the Register will also enable couples to have the registration terminated if the relationship dissolves.”

To be eligible to register a relationship on the Relationships Register:

- Couples must be in a committed, exclusive relationship;
- Couples must not be married or in another relationship that is registered or registrable;
- Couples must be at least 18 years of age;
- One person must be a resident of NSW.

It is intended that the register’s features will be remodeled on aspects of existing registers in Tasmania, Victoria and the ACT. However, to reflect the Commonwealth Government’s suggestions, the NSW register will not extend to ‘caring’ relationships unlike the Victorian and Tasmanian registers. The Government will draft legislation to amend the Births, Deaths and Marriages Registration Act 1995, the Property (Relationships) Act 1984 and other legislation to implement the register. Regulations will also be needed. The amendments are intended to enable registered relationships to be considered on par with de facto relationships under NSW law. The Government is “also working to ensure there is reciprocal recognition of relationships registered in NSW with other jurisdictions that have registers in place.

14 NSW Attorney-General, NSW Government to set up Relationships Register, media release, 23 February 2010.
In September 2005 the City of Sydney adopted the City of Sydney Relationships Declarations program as a means of recognising the partnership status of both same sex and mixed sex couples. Under the program two people may declare that they are partners and have this declaration recorded in the City of Sydney Relationships Register.

While making a relationship declaration does not confer legal rights in the way marriage does, it may be used to demonstrate the existence of a de facto relationship within the meaning of the NSW Property (Relationships) Act 1984 and other legislation, such as family provision proceedings under the Succession Act 2006.

Registration can affect how the partners will be treated on the death or incapacity of the other. Registration removes the need to put forward evidence to prove the existence of a domestic relationship. Whilst NSW is yet to implement a Register, it might be worthwhile to have both partners make a statement or declaration as evidence that their relationship is a de facto relationship or not.

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, 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.

Relationship registration schemes currently exist in Tasmania, Victoria and the ACT\(^\text{15}\), and these are all prescribed in federal law from 1 March 2009.\(^\text{16}\) The reference to ‘State or Territory’ in the legislation appears to indicate a deliberate exclusion of any overseas partnership registration scheme.

In Victoria, the Relationships Act commenced on 1 December 2008. It provides a way for domestic and same sex partners to register their relationship. The registration affects the legal treatment of the relationship in several contexts, including intestacy, guardianship and family provision. Registration removes the need to produce other evidence of the existence of a domestic relationship. The Act also provides for the resolution of property matters between parties to a domestic relationship and the making of binding financial agreements.

\(^\text{15}\) See Relationships Act 2003 (Tas) Pt 2; Civil Partnership Act 2008 (ACT); Relationships Act 2008 (VIC).

\(^\text{16}\) Family Law Regulations 1984 (Cth) regs 12BC, 15AB, as amended by the Family Law Amendment Regulations 2009 (No 1) (Cth).
In NSW the definition of ‘defacto relationship’ and ‘domestic relationship’ continue to be set out in sections 4 and 5 of the Property (Relationships) Act 1984 (NSW). Family provision claims made under the Succession Act 2006 (NSW) in respect of an ‘eligible person’ who was the defacto spouse of the deceased use the definitions of ‘defacto relationship’ and ‘domestic relationship’ which are contained in ss 4 and 5 of the Property (Relationships) Act 1984.

PROPERTY (RELATIONSHIPS) ACT 1984 - SECT 4

De facto relationships

4 De facto relationships

(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are not married to one another or related by family.

(2) 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 for 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.

(3) 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.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.

PROPERTY (RELATIONSHIPS) ACT 1984 - SECT 5

Domestic relationships

5 Domestic relationships

(1) For the purposes of this Act, a domestic relationship is:

(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).

(3) A reference in this Act to a child of the parties to a domestic relationship is a reference to any of the following:

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

(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*, to be the father, except where such a presumption is rebutted,

(c1) where the domestic relationship is a de facto relationship between two women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996*,

(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*).

(4) Except as provided by section 6, a reference in this Act to a party to a domestic relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.

**SUCCESSION ACT 2006 - SECT 57**

**Eligible persons**

57 **Eligible persons**

The following are "eligible persons" who may apply to the Court for a family provision order in respect of the estate of a deceased person:

... (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,

(c) 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 *Property(Relationships) Act 1984*, a child of that relationship,

**Note:** A stepchild or foster child is not a child of a domestic relationship-see section 5 (3) of the *Property (Relationships) Act 1984*.

... It is interesting to note that the *Succession Amendment (Intestacy) Act 2009* (NSW), which commenced on 1 March 2010, introduces a concept of a “domestic partnership”. (The Act deals with intestate succession and the order of distribution). The Act also introduces a new definition of “spouse” to mean a person:

*“who was married to the intestate immediately before the intestate’s death, or*
(b) who was a party to a **domestic partnership** with the intestate immediately before the intestate’s death“. (Emphasis mine).

A “domestic partnership” is a de facto relationship that has been in existence for a continuous period of at least 2 years, or has resulted in the birth of a child: new s105.

(For s105(a) see s22 of the AIA and effect of registration under a State law.)

This means that where a person leaves both a spouse and a de facto partner the intestacy rules provide that the entitlement of the de facto partner will depend on the length of the de facto relationship or birth of a child.

**Instituting an inter vivos claim as an estate planning measure**

Persons in de facto relationship have, since last year, had the option of accessing the Family Court for the determination of disputes following the breakdown of a marriage. However, persons can only access the federal jurisdiction if their relationship broke down prior to 1 March 2009\(^\text{17}\) or unless both parties ‘opt into’ the new regime\(^\text{18}\).

Persons can still access the State courts, especially where proceedings are already on foot or, if the relationship does not come within the scope of the federal jurisdiction.

Under the *Property (Relationships) Act 1984* (NSW), the only matters the State courts take into account in determining the financial consequences on relationship breakdown are the contributions made by each of the partners during the course of their relationship to the property pool.

The property pool historically has not included superannuation\(^\text{19}\). The State courts developed a concept of ‘compensation’ to counteract contributions made by a de facto partner. That is, in determining a person’s entitlement to the property pool based on their contributions, the courts looked at the benefits a spouse received from the other spouse, such as gifts, holidays, a nice home to live in and restaurants attended, to reduce that party’s overall entitlement.

This makes it difficult to see how relationships are to be viewed as partnerships, a concept that was developed very early on in the family law sphere when the Family Court dealt with property matters.

\(^{17}\) Section 86 Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)

\(^{18}\) Section 86A Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)

\(^{19}\) Though see Chanter v Catts (2006) DFC 95-329 – in which the NSW Court of Appeal did treat superannuation as property (albeit that the superannuation was in a self managed fund)
Even if we ignored the concept of compensation, the assessment of contributions by the State courts have been inconsistent that it is not easy to advise a client about the likely outcome. However, State courts generally are less robust in their assessment of contributions. Accordingly, a case that is determined in the State courts versus a case determined in the Family Court with the same set of facts is likely to yield significantly different results.

The problem with the reforms however is that a significant number of people consciously make the decision not to marry. Whether it is because they have heard horror stories come out of the Family Court or they had firsthand experience with marriage breakdowns and the Family Court such that they never want to go there.

Some people entered into de facto relationships because of the difference in the law applicable to people who live as de facto versus those who are married. There was a choice, but that choice came to an end on March 1, 2009.

The State courts do not look at the future needs of each of the parties. Under the federal law, the court will assess not only past contributions but will also consider whether an adjustment should be made to future contributions by reason of the 17 factors in section 90SF(3) of the FLA.

In most cases, the following matters in section 90SF(3) will be taken into account by the court in determining whether and what adjustment the court should make to the notional division of the parties’ property as a result of the contribution-based assessment of the parties’ contributions to the property pool:

- the age and state of health of each of the de facto parties;
- the income, property and financial resources of each of the parties and the physical and mental capacity of each for appropriate gainful employment;
- whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years;
- commitments of each of the parties are necessary to enable the party to support himself or herself or a child of another person that the party has the duty to maintain;
- the responsibilities of either party to support any other person;
- a standard of living that in all the circumstances is reasonable;
- the need to protect the party who wishes to continue that party’s role as a parent;
- if either party is cohabitating with another person, the financial circumstances relating to the co-habitation; and
- any child support that a party is to provide, or might be liable to provide in the future for a child of the de facto relationship.
The above factors cannot be understated. They can make a huge difference in the assessment of parties’ ultimate entitlements.

**What about spouse maintenance?**

Under the *Property (Relationships) Act* there is no legal obligation on de facto parties (including same sex partners) to support each other financially.

There are limited circumstances where a spouse can apply for spouse maintenance and it is usually granted for very short periods of time and generally in cases where the relationship was of significantly long duration and the party required retraining or they had a disabled child.

The State courts take into account a party’s entitlement to Centrelink benefits in determining whether to grant spouse maintenance. That is, if a party is entitled to or receives Centrelink benefits, then that will reduce that party’s needs for maintenance.

Under the federal law, there is a right to spouse maintenance. This is premised on the basis that parties have an obligation to support each other to the extent that one spouse has a need and the other spouse has capacity to pay. This is a significant departure and increase in the rights (and obligations) of spouses who live in a de facto relationship including same sex relationships.

The Family Court, in determining whether or not a partner is entitled to spouse maintenance, will consider a threshold question of whether or not a spouse has a need. Once that need has been established then the court will look at the capacity of the other spouse to maintain the first spouse. Centrelink benefits are not taken into account under the new law.

Certainly under the new law it will be much easier to obtain a spouse maintenance order on behalf of a de facto partner than it is under the State law. It is also likely that the duration of the spouse maintenance order will be for a significantly longer period of time.

**Protecting against claims by agreement. Relationships Agreements and Financial Agreements – do they work?**

Since 2000, parties to a marriage have been able to enter into a binding financial agreement concerning their property, financial resources and maintenance. The effect of such an agreement is to enable parties to opt out of the financial provisions of the Family Law Act.

Defacto couples are able to enter into binding financial agreements under the *Property (Relationships) Act*. 
The new definition means that same-sex and heterosexual de facto couples can also now enter into binding financial agreements.

The benefits of a binding financial agreement are suitable for persons who, for example:

- seek privacy, because of their public profile and do not want their personal affairs scrutinized by a Court;
- court delays are unsuitable;
- no remedy, or adequate remedy, is provided by the Family Law Act;
- a party who has a right to occupy a property which is lost on marriage or a party who will lose a source of income on marriage (eg a war widows pension);
- parties who wish to conclude spouse maintenance at the same time they conclude the division of their assets. Practitioners must be aware that an obligation to pay spouse maintenance contained in a financial agreement continues after the death of the party and binds the legal representative of the estate. This is different to if the Family Court ordered spouse maintenance;
- parties who divide their assets but in respect of one asset do not wish to end ‘for all times their financial relationship’;
- parties who wish to continue to run a business together into the future or continue to share an investment property;
- parties who have agreed a division but whose assets are difficult or expensive to value;
- parties who bring pre-marriage assets to the marriage, which might be co-owned with a third party, and the third party does not wish to embroiled in Family Court proceedings.

Division 4 of the new Act deals with financial agreements and de facto relationships—referred to as ‘Part VIIIAB financial agreements’. Notably the new Act has incorporated and where applicable replicated the Family Law Act’s financial agreement provisions that apply to married persons.

There is a geographical requirement for Part VIIIAB financial agreements. Section 90UA requires provides that de facto spouses can only enter into a Part VIIIAB financial agreement if they are ordinarily resident in a participating jurisdiction when they make the agreement. NSW is a ‘participating jurisdiction’.

The effect of a binding financial agreement is that the agreement binds the parties and the maintenance and property provisions in Division 2 will not apply. However, the exclusion does not apply to proceedings between a de facto partner and a bankruptcy trustee (subsection 90SA(2)).

Part VIIAB financial agreements are essentially agreements made:

- *before* a de facto relationship: s90UB
• during a de facto relationship: s90UC
• after break up of a de facto relationship: s90UD, or
• agreements covered by section 90UE.

Financial agreements may vary or terminate previous financial agreements.

Section 90UF provides that in the event of a breakdown of a de facto relationship, a separation declaration is required for the provisions relating to property or financial resources of a binding financial agreement to come into effect. This is the equivalent to a section 90DA separation declaration for financial agreements affecting parties to a marriage. It is an anti-avoidance measure aimed to protect the rights of creditors.

Section 90UJ sets out the requirements for legally binding financial agreements. The agreement must: be signed by both parties, not be terminated nor set aside by a court, and contain an annexure with certificates indicating that each party has received independent legal advice as to the effect and to the advantages/disadvantages of the agreement.

After signing a financial agreement, the original must be given to one party and a copy of the agreement to the other party (paragraph 90UJ(1)(e). There is no requirement that the agreement be registered with the court.

A Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties marry each other (subsection 90UJ(3).

Section 90UL enables parties to vary or revoke a financial agreement by either including a provision to that effect in another agreement according to subsections 90UB(4), 90UC(4) or 90UD(4) or by making a written termination agreement. To be legally binding a termination agreement must fulfil similar requirements to those set out in section 90UJ. The provision has a similar effect to section 90H of Part VIIIA.

Section 90UM sets out the circumstances in which a Part VIIIAB financial agreement may be set aside by a court. The circumstances include where:

- the agreement was obtained by fraud
- a party entered into the agreement with the purpose of defrauding creditors, or with reckless disregard of the interests of creditors
- the agreement is void, voidable or unenforceable, or
- it is impracticable for the agreement, or part of it, to be carried out in the circumstances that have arisen since the agreement was entered into.

The court may also set aside an agreement in circumstances that have arisen since the agreement was entered into that are of an exceptional nature relating to the care, welfare and development of a child and in which the child or a party to the agreement would suffer hardship.
As the Explanatory Memorandum notes, the grounds are identical to the ones relating to setting aside a financial agreement between parties to a marriage (existing section 90K). The principles of law and equity apply in determining whether a Part VIIIAB financial agreement is valid, enforceable or effective: section 90UN. It is the equivalent of section 90KA.

Sections 90VA to VD deal with proceeds of crime and forfeiture issues that might arise out of Part VIIIAB financial agreements. Section 90WA provides exemption from duty for instruments executed under certain provisions in Part VIIIAB.

It is intended that the de facto financial provisions apply to the exclusion of any State or Territory law, unless:

- the relationship is not covered by the legislation; and
- they are not parties to a Part VIIIAB financial agreement.

Of course, there is a limitation period (s 44): Applications for maintenance, declarations of property interests or property settlement must be made within 2 years of breakdown of the relationship (s 44(5)). A party may make application for leave to apply out of time, and the court is to take into account those factors specified in s 44(6).

Further, the Family Court has jurisdiction to make declarations as to whether there is a de facto relationship. A declaration can only be made if a person to the alleged de facto relationship was ordinarily resident in a participating jurisdiction when the proceedings commenced.

A significant number of people have entered into de facto relationships deliberately. The reforms mean that they are exposed to the Family Law arena. Solicitors, financial advisers and accountants will need to reassess their clients’ needs, including their asset protection, estate planning and financial planning, by reason of the new law as the financial consequences could spell disaster for their clients.

One way to protect clients is to have them and their spouse (married, de facto or in same sex relationships) enter into Binding Financial Agreements (BFAs). Such agreements can give peace of mind to your client as they provide certainty of outcome in the event of relationship breakdowns.

It's all in the timing
There is only one catch: the new law applies to de facto relationships that have broken down (ie, parties separated) after March 1, 2009\(^2\), or where the de facto partners have agreed to opt

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\(^2\) Section 86 Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)
into\textsuperscript{21} the new regime. If the parties separated before March 1, 2009, the State law will continue to apply.

The effect of the new Act will be to overtake the provisions of any existing State legislation in participating States in relation to many, but not all, financial disputes. The State legislation will be retained insofar as it will apply to those couples not covered by the federal legislation.

Part VIIIAB and Part VIIIB of the new Act will not apply to parties to a de facto relationship that broke down prior to its commencement.

This means that State and Territory law will apply in relation to orders and/or injunctions in force at commencement in relation to maintenance and distribution of property. Proceedings already instituted in relation to such orders and/or injunctions, proceedings arising out of the breakdown of the relationship about financial matters or agreements made in relation to financial matters arising out of the breakdown of the relationship will also continue to be governed by existing State and Territory legislation.

The first cases to be litigated in the Family Court no doubt will turn on whether parties separated before or after March 1, 2009, as the stakes are high and the outcomes are starkly different if the matter was litigated in the Family Court versus the State courts.

And a word of warning: it would be foolish for a financial activist client to agree to opt into the new regime as the new regime can result in the non-financial activist’s partner receiving significantly more than they would otherwise receive if the matter was litigated in the State courts both as to property settlement and spouse maintenance.

\textsuperscript{21} Section 86A Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)
Case Study - 1
Assume that Ben and Sarah lived together in a de facto relationship for 15 years, during which time they accumulated $1 million in property plus $200,000 in super, all of which is in Ben’s name. They have three children aged 12, 10 and 8. At the beginning of their relationship, neither Ben nor Sarah had any assets. Assume further that Sarah has been unemployed since the birth of the eldest child 12 years ago. Ben is an engineer and earns $100,000 per annum.

If the matter proceeded in a State court in NSW, the best result that Sarah could achieve would be about 40-50 per cent of the property pool (excluding super), as the court would only assess contributions. Under the new law, the Family Court will assess the contributions at 50-50 as to the property and super. The sting for Ben will come in the form of the section 90SF(3) assessment.

The court will take into account the following matters:

- Ben’s income;
- Sarah’s inability to find gainful employment; and
- the level of care that each of the parties are providing for the children.

The above factors are likely to result in an adjustment of about 10-15 per cent of the property pool. That is, Sarah could well end up with $600,000 to $650,000 of the property pool and a super split of $100,000. The court also has the discretion to trade-off cash for super and vice versa. If Sarah shows the court that she needs, say, at least $650,000 to buy a home, the court may ultimately order a smaller super split in her favour and adjust the balance from the available cash.

Marriage revokes all former wills. 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).

Also note: In *Di Salvo v Public Trustee* [2009] NSWSC 894, the plaintiff claimed an order for provision for her maintenance and advancement in life out of the estate of her late partner. His will left the plaintiff a right of residence in his property (provided she pay the outgoings) and the household goods. The Estate denied that the plaintiff was in a defacto relationship with the deceased. The plaintiff proved that she had been in a defacto relationship with the deceased for 34 years. Associate Justice McLaughlin ordered that the plaintiff receive the house in lieu of the provisions in the will.