

Property and financial matters upon the breakdown of de facto relationships

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Reforms introduced in 2009 to the *Family Law Act 1975* (Cth) have meant that most same-sex and opposite-sex de facto couples (in all states and territories except Western Australia) who end their relationships can now have their property and financial matters dealt with in substantially the same way as married people. This paper aims to provide non-legal professionals in the family law sector with a general outline of the relevant reforms, their genesis, and the arguments in favour of and against their introduction.

Please note: The content of this paper is intended only to provide general information in summary form. It is not legal advice and should not be relied upon as such. Legal and other professional advice should be sought by you or your organisation.

KEY MESSAGES

- The 2009 reforms to the *Family Law Act* (Cth) brought most Australian same-sex and opposite-sex de facto couples within the federal family law system for the resolution of their property and financial matters upon separation.
- The reforms introduced a definition of de facto relationship and provided guidance to assist in determining whether a de facto relationship may be said to exist.
- The reforms enable access to property settlement and maintenance for most separated de facto couples in terms substantially the same as those available for married couples.
- The reforms enable most de facto couples to enter into Binding Financial Agreements, prior to commencing their relationship, during their relationship and upon separation.
- The reforms were aimed at extending the federal family law property and financial settlements regime to opposite-sex and same-sex de facto couples. They received strong support but have also been subject to criticism, including on the basis of their imposition of the consequences of marriage upon people who have made a conscious decision not to marry.

Introduction

Prior to 1 March 2009, people in de facto relationships were able to access the federal family law system in relation to their post-separation parenting arrangements. However, their property and financial settlements were covered by separate legislation that applied in their state or territory. Property and financial settlements generally accommodate the arrangements for dividing the former couple's assets and liabilities and whether (and if so, how much) maintenance is to be payable.

In practical terms, this legal situation meant that where matters could not be resolved by agreement, separating de facto couples were required to issue proceedings in the federal family law system with respect to their parenting arrangements, and to issue separate proceedings in their state/territory system in relation to their property and financial issues. This contrasts with the situation of separated married couples Australia-wide who have been able to access the federal family law system since its inception, for both their parenting and property/financial matters under the *Family Law Act 1975* (Cth) (hereafter referred to as “the *FLA*”). Previously, a broader range of considerations applied to the property and financial settlements of married people as compared to those applicable under some de facto property/financial regimes.

Recent changes to the *FLA* (applicable to all states and territories except Western Australia) mean that most same-sex and opposite-sex de facto couples can now have their property and financial disputes dealt with in substantially the same way as married couples, within the same specialist, federal family law system.¹ This means that these de facto couples are no longer required to incur the stress, financial expense and inconvenience of issuing separate proceedings in two different court systems for their post-separation parenting orders and property/financial settlement. It also means that the wider range of considerations for dealing with property and financial arrangements and the broader decision-making approach to the application of the relevant legislative provisions taken by the Family Law Courts applies to most couples who have separated, regardless of whether they were in a marriage, same-sex or opposite-sex de facto relationship.

To enable this change, all states, except Western Australia,² referred the relevant legislative powers to the Commonwealth, leading to the enactment of Part VIIIAB of the *FLA*, so that the Family Court of Australia and the Federal Circuit Court of Australia can now deal with property and financial matters arising from the breakdown of de facto relationships.³ The reforms also provided for the extension of the superannuation splitting provisions (that allow for the division of superannuation funds between married couples) to former de facto partners and also for *FLA* binding financial agreements to be an option for de facto couples.

This research paper is aimed at providing non-legal professionals in the family law sector with a general outline of these significant reforms, which were introduced by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (hereafter referred to as “the reforms”). Following a summary of the reforms, including the concept of a de facto relationship and an outline of the applicable considerations in the determination of property and financial matters, the paper will consider the rationale for these reforms. This will be followed by a discussion of arguments in favour of and critical of the reforms, and implications arising from their introduction.

1 Couples falling outside the *Family Law Act 1975* (Cth) definition of de facto relationship may still be covered by state/territory legislation and/or by general law, including common law and the law of trusts and equity.

2 The *Family Court Act 1997* (WA) provides for the Family Court of Western Australia to make property and financial orders for same-sex and opposite-sex de facto partners separating after 1 December 2002 (subject to the hurdle requirements, including the relationship requirements in s 205Z of the *Family Court Act 1997* (WA)). See s 13A of the *Interpretation Act 1984* (WA) for guidance in relation to the term de facto relationship in this context.

3 The Australian states referred the relevant legislative powers regarding the financial matters arising out of de facto relationships in accordance with s 51(xxxvii) of the *Commonwealth of Australia Constitution Act*. Note that the Commonwealth relied upon its powers over the territories to apply the amended *Family Law Act 1975* (Cth) to the Northern Territory and to the Australian Capital Territory. The Commonwealth's power to legislate in family law matters for married couples derives from s 51(xxi) (“marriage power”), s 51(xxii) (“divorce and matrimonial causes power”) and s 51(xxxix) (“incidental power”) of the *Commonwealth of Australia Constitution Act*.

Part 1: Summary of the reforms

What is the legal definition of a de facto relationship?

The reforms to the *FLA* provide that two people may be said to be in a de facto relationship if, “having regard to all the circumstances of their relationship”, they are “a couple living together on a genuine domestic basis”, they are not legally married to each other and they are not related to each other by family.⁴ As a result of the reforms the *FLA* now also clearly articulates that a de facto relationship can exist between two people of the same sex or two people of different sexes. A de facto relationship can also exist where one person in that relationship is also married or in another de facto relationship.⁵ The *FLA* provides that these circumstances could include *any* or *all* of the following circumstances included in Box 1 below.⁶

Box 1: Circumstances indicative of a de facto relationship

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- whether the relationship is or was registered under a prescribed law of a state or territory as a prescribed kind of relationship;
- the care and support of children; and
- the reputation and public aspects of the relationship.

Note: These circumstances are enumerated in s 4AA(2) of the *Family Law Act 1975* (Cth).

The *FLA* provides significant discretion with respect to the weight that may be accorded to the listed circumstances, and no particular finding about any of these circumstances is required or is decisive on the question of whether a de facto relationship exists.⁷ Moreover, the court is also “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”.⁸ That is, it is not an exhaustive list of relevant circumstances and is not meant to exclude the consideration of other circumstances that may emerge as relevant in a given case.

Recent case law considering the question of whether a de facto relationship exists, suggests that the question of whether a de facto relationship exists is one to be determined by reference to the *FLA* definition, rather than in accordance with “external society views of what constitutes a de facto relationship or by what the parties themselves thought their relationship to be”.⁹ Some cases have referenced a notion of “coupledom”, which has been identified as being “the core

4 s 4AA(1) *Family Law Act 1975* (Cth). s 4AA(6) provides that two persons are related by family if (a) one is the child (including an adopted child) of the other; or one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or (c) they have a parent in common (who may be an adoptive parent of either or both of them).

5 s 4AA(5) *Family Law Act 1975* (Cth).

6 s 4AA(1)(c) and s 4AA(2) *Family Law Act 1975* (Cth).

7 s 4AA(3) *Family Law Act 1975* (Cth).

8 s 4AA(4) *Family Law Act 1975* (Cth).

9 *Gissing v Sheffield* [2012] FMCAfam 1111 [21] per O’Sullivan J, quoting Bender FM in *Dakin v Sansbury* [2010] FMCAfam 628 [13]. See also *Sinclair v Whittaker* (2013) FLC 93-551.

of a de facto relationship” involving the “merger of two lives”.¹⁰ Nevertheless, the decided cases indicate that a couple are not required to live together on a full-time basis or even for a majority of the time during the period of their relationship for it to be characterised as de facto in nature.¹¹ Indeed, it has also been held that a de facto relationship may be established where the partners maintain “very individual lives as a couple preferring not to merge their existences”.¹² Evidence of inconsistent representations of the nature of a relationship made by a person in the relationship to bodies such as financial institutions, statutory child protection agencies, Centrelink or State Revenue have also been considered as not preventing a finding that a de facto relationship had existed.¹³ Further guidance about the circumstances that may or may not satisfy the requirements necessary to establish a de facto relationship are available from the recent case law in this area and three examples are discussed in Box 2. Importantly, the onus of proving the existence of a de facto relationship lies with the person making the application for a declaration of property interests and/or for an alteration of property interests and/or an application for maintenance. Where such applications are made, and are supported by a claim that a de facto relationship existed, the court may, for the purposes of determining the substantive property/financial proceedings, make a declaration that the relevant de facto relationship existed or never existed.¹⁴

Box 2: Case studies: Is there a legal de facto relationship?

The following case studies are based on judgments of the Family Court of Australia and the Federal Circuit Court of Australia and are intended to provide examples of the decision-making process when determining whether a de facto relationship has been established for the purposes of the *FLA*.

Gissing v Sheffield [2012] FMCAfam 1111: De facto relationship established

The couple in this case had been in a relationship for 17 years during which time they had lived in several properties, both together and separately. They had shared common residences for “significant periods of time”.

The couple’s business continued throughout the period of the relationship and they had an ongoing financial relationship until separation that involved “a very high degree of financial dependence by the respondent [female partner] on the applicant [male partner] and more importantly interdependence between the parties” [para 163]. The couple held joint bank accounts and intermingled their finances.

Throughout the relationship the couple bought and sold a number of properties together, and although only one person’s name was registered on title, joint funds were applied to the purchases.

The relationship was not clandestine in nature and the couple “acted and were treated by others as [owning] property together and carrying out work or renovations on those assets together” [para 179].

The couple’s relationship was indicative of a degree of commitment to a mutual shared life, with the couple “carrying on a mutual enterprise of sharing income ... and shared payment of expenses for their mutual support ...” [para 197].

The “exact nature of the sexual relationship of the parties” was unclear on the evidence but the court accepted that there was a sexual relationship.

Box 2 continues on next page

¹⁰ *Jonah v White* [2011] FamCA 221.

¹¹ *Moby v Schulte* [2010] FamCA 748 [140] per Mushin J. See also *Jonah v White* [2012] FamCAFC 200; *Sinclair v Whittaker* (2013) FLC 93-551 and *Smyth v Pappas* [2011] FamCA 434.

¹² *Smyth v Pappas* [2011] FamCA 434 [7] per Cronin J and see also *Sinclair v Whittaker* (2013) FLC 93-551.

¹³ *Sinclair v Whittaker* (2013) FLC 93-551; *Gissing v Sheffield* [2012] FMCAfam 1111 and *Onslow v Onslow* [2013] FCCA 1434.

¹⁴ s 90RD(1) *Family Law Act 1975* (Cth). Note also that s 90RD(2) provides that the court may also make a declaration about: the period or periods of the de facto relationship for the purposes of s 90SB(a); whether there is a child of the de facto relationship, whether one of the parties made substantial contributions referred to in s 90SM(4)(a), (b) or (c); when the de facto relationship ended and where each of the parties to the de facto relationship were ordinarily resident during the de facto relationship.

The male partner in this case made inconsistent representations to Centrelink but these representations did not mean that the relationship was not a de facto relationship for the purposes of the *FLA*.

A de facto relationship was established on these facts.

Jonah v White [2012] FamCAFC 200: De facto relationship not established

The male and female in this case had also been in a relationship for 17 years, which began shortly after the female commenced working for a business conducted by the male.

The male paid \$24,000 to assist the female purchase a house and he also paid her a monthly financial sum for a period of 11 years.

The male and female saw each other for around two or so days every second or third weekend, travelled overseas together for a period of two and a half weeks and spent similar time periods together on occasion in Australia.

The male and female had a longstanding relationship in which they had a consistent sexual relationship. The female regarded it as an exclusive relationship and the male conceded that the relationship was "exclusive (save for 'a few one night stands') and his relationship with his wife" [para 28].

However, the male and female maintained separate households and did not own any joint property or pool resources.

Their relationship was clandestine and there was no evidence of any relationship or intended relationship between the female and the male's children who were young when the relationship commenced.

The male and female did not have a reputation as a couple, rarely mixed with each other's friends and there were "very few public aspects to their relationship" [para 69].

A de facto relationship was not established on these facts.

Sinclair v Whittaker (2013) FLC 93–551: De facto relationship established

The couple began dating in late 2002 and began a sexual relationship in January 2003. At this time, the couple resided at separate residences.

In August 2004, the female's housemate vacated her residence and the male moved some of his belongings into her residence and began paying \$600 per month towards the rent.

In December 2005, the couple purchased a property with the male paying the deposit and stamp duty, and with both parties contributing funds to be used for the acquisition of furnishings and accessories for this property. The female lived at the property permanently and the male lived there approximately three nights per week.

The couple "enjoyed a shared life and consistently, rather than exclusively, shared accommodation and many other activities, both recreational and day-to-day" [para 33]. The couple visited family members together and shared significant events with each other's family members. The male referred to the female's mother as "Mum", and the male's driver and personal assistant also regarded the parties as a couple.

Apart from the purchase of the property, the couple kept their finances separate.

The male gave the female a 2.17-carat diamond promise ring.

The female made representations to government agencies and lenders that she was single rather than living in a de facto relationship. This fact was taken into account as part of the circumstances of the case, but this representation and her perception of the relationship at this time were not determinative.

A de facto relationship was established on these facts.

Prerequisites for non-married people seeking property adjustment or maintenance

The question of *whether* a relationship is a de facto relationship, together with the question of *when* a de facto relationship may be said to have commenced, are questions of significance in the context of property and financial settlements. This is because the *FLA* provides that to seek an order for property adjustment or maintenance where the couple were not married, one of the following “gateway requirements” (Watts, 2009, p. 126) must be satisfied that:

- the period or total of the periods of the de facto relationship is at least two years;¹⁵ or
- there is a child of the de facto relationship;¹⁶ or
- one person in the relationship made contributions of a substantial nature and a failure to make an order or declaration would result in serious injustice;¹⁷ or
- the relationship is or was registered under a prescribed law of a state or territory.¹⁸

In addition to these requirements, there are also geographical requirements relating to the ordinary residence of the person/s in the relationship to be satisfied in order for the *FLA* regime to apply to a de facto couple.¹⁹

The significance of an early determination on the threshold question of whether a de facto relationship has been established has been highlighted in recent case law. This is because a de facto relationship must be established prior to the court exercising its jurisdiction; for example, to make orders for interlocutory injunctions (i.e., a provisional or interim order made during a court proceeding) restraining a partner from evicting another partner from real estate in their name, or otherwise dealing with that property.²⁰

The questions of whether and when a couple have separated may also be contested. This is because applications for orders for property settlement or maintenance must be made within two years of the date that the de facto relationship ended, unless leave (permission) is granted by the court to permit the application to be made out of time.²¹

As with marriages, the issue of whether and when a de facto couple has separated is a question of fact to be determined in the context of the particular relationship. Therefore, the fact that a couple are no longer living at the same residence or the fact that either or both partners are engaging in sexual relations outside the de facto relationship, may not be sufficient evidence of separation. In cases where the couple had registered their de facto relationship in accordance with their relevant state or territory legislation, separation may be more clearly established by the termination or revocation of a registered relationship.

The date of separation is also relevant from the perspective of whether the reforms apply to the relationship. This is because only de facto relationships that have broken down since 1 March 2009 (1 July 2010 for South Australia)²² or cases where the former couple agree to opt in to the *FLA* de facto

15 s 90SB(a) *Family Law Act 1975* (Cth). See *Dahl v Hamblin* (2011) FLC 93-480 [48] where the Full Court of the Family Court of Australia held that “one or both (de facto partners) may commence proceedings under Part VIIIAB if they can establish that their relationship has existed for periods aggregating at least two years and that at least one of those periods occurred after the commencement of Part VIIIAB on 1 March 2009. It matters not at least for the purposes of establishing jurisdiction under s 90SB [jurisdiction with respect to maintenance, declarations of property interests and alterations of property interests (property settlements)], how long ago the other period, or periods occurred, or what were the circumstances of any breakdown in the relationship ...”.

16 s 90SB(b) *Family Law Act 1975* (Cth).

17 s 90SB(c) *Family Law Act 1975* (Cth). Note that in this subsection, “substantial contributions” refers to substantial contributions of a kind referred to in s 90SM(4)(a), (b) and (c).

18 s 90SB(d) *Family Law Act 1975* (Cth).

19 s 90RG, s 90SK and s 90SK(1A) of the *Family Law Act 1975* (Cth).

20 See, for example, *Norton v Locke* (2013) FLC 93-567.

21 s 44(5) and s 44(6) of the *Family Law Act 1975* (Cth).

22 s 2 of the *Family Law Amendment (Validation of Certain Orders and Other Measures) Act 2012* (Cth) provided for a commencement date of 1 March 2009 for the exercise of jurisdiction by New South Wales, Victoria, Queensland, Tasmania, Northern Territory, Australian Capital Territory and Norfolk Island with respect to the de facto reforms introduced by the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* (Cth) and of 1 July 2010 for the exercise of such jurisdiction in South Australia.

property/financial regime,²³ are covered by the reforms. For those couples who separated prior to 1 March 2009 (or 1 July 2010 for South Australian de facto couples) and who do not agree to opt in to the *FLA* regime and those couples whose relationship falls outside of the *FLA* requirements of a de facto relationship, the property and financial matters arising out of their relationship may be dealt with in accordance with their relevant state or territory legislation and/or general law, including common law and the law of trusts and equity.

How are property and financial matters now dealt with for separating de facto couples?

The discussion above has identified that from 1 March 2009 for all states and territories (except Western Australia and from 1 July 2010 for South Australia), property division and other financial arrangements upon the breakdown of both opposite-sex and same-sex de facto relationships have been dealt with under the umbrella of the federal family law system. As noted above, prior to the reforms, de facto couples were covered by state and territory legislative regimes and/or by general law. Initially this legislation dealt only with opposite-sex de facto couples, but from the mid 1990s, the states and territories began amending the relevant legislation to extend the law's application to same-sex couples. Before the current federal reforms, the property and financial settlement provisions applicable to de facto couples upon separation differed across the state and territory legislative regimes.²⁴

The following discussion will outline the property and financial provisions applicable to de facto couples as introduced by the reforms.

Factors governing property settlement

The provisions in Part VIIIAB (at s 90SL and s 90SM) of the *FLA* regulating the declaration of property interests (identifying each partner's interests in the property) and the alteration (redistribution) of property interests between separated de facto couples, parallel the provisions applicable to married couples.²⁵

Overarching just and equitable question

Consistent with property/financial cases involving married partners, the *FLA* provides that the overarching question in property/financial matters for separating de facto couples is whether or not it is “just and equitable in all the circumstances” of the case to make an order for property/financial settlement between the parties.²⁶ The case law applying the property and financial settlement regime to married couples indicates that the breakdown of a marriage (and now also the breakdown of a de facto relationship) “does not bring, as an automatic consequence, an alteration of existing legal and equitable interests [in the pool of assets]. Just as, if an order is to be made, equality is neither to be assumed nor is it a starting point ... the making of an order *at all* is not to be assumed”.²⁷

At the time of writing, there exists some uncertainty surrounding the manner in which the just and equitable requirement is to be applied.²⁸ It is arguable, based on recent case law, that the existing legal and equitable interests of each partner in the asset pool are to be identified so as to inform the

23 See Item 86A of the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* (Cth).

24 For discussion of the state and territory regimes in place prior to the reforms, see for example Fehlberg, & Behrens (2008), pp. 564–582; 588–589; Millbank (2006), pp. 82, 83–85; Willmott, Mathews, & Shoebridge (2003), pp. 39–40; and Kovacs (2009), pp. 108–109. See also Young, Monahan, Sifris, & Carroll (2013), pp. 623–627, 826–844, for further historical and also more recent discussion of the state and territory legislative regimes.

25 s 78 and s 79 of the *Family Law Act 1975* (Cth). s 90SM provides for the alteration of the interests of the former de facto partners (or altering the interests of the bankruptcy trustee with respect to vested bankruptcy property) including orders for settlement or transfer of property. s 90SL of the *Family Law Act 1975* (Cth) provides for a declaration to be made (subsequent to the breakdown of a de facto relationship) as to the former partners' interests in the property, together with the power to make consequential orders for the sale, partition or possession of that property.

26 s 90SM(3) *Family Law Act 1975* (Cth).

27 *Watson v Ling* (2013) FLC 93-527, [14] per Murphy J applying *Stanford v Stanford* (2012) 293 ALR 70 [39].

28 See, for example, discussion in Parkinson (2013).

consideration of whether it is just and equitable to make an order for property/financial settlement between the parties, as a precondition to, or at least separately from, the application of the *FLA* provisions regarding the assessment of contributions and additional considerations detailed below.²⁹

What is included in the pool of assets and liabilities?

Property or assets of the de facto partners (whether in both or either party's name) may include real estate, funds in accounts with banks or other financial institutions, shares, interests in businesses/companies and trusts, vested interests in estates and household chattels.³⁰ Superannuation interests are also treated as property.³¹ Indeed, it was following the reforms that orders for property settlement with respect to de facto relationships incorporated the allocation of superannuation interests between former de facto partners, in the same way as has been possible for their married counterparts since 2002.³² Liabilities may include mortgages, business or other loans, hire purchase or lease agreements, credit card debt and other personal debt.³³

Assessment of contributions

When determining what orders (if any) to make by way of property settlement between the former de facto partners, the following types of contributions, which are specified in the *FLA*, are considered:³⁴

- (1) Financial contributions; and/or
- (2) Non-financial contributions

that are made directly or indirectly by or on behalf of either de facto partner or a child of the de facto relationship:

- to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
- otherwise in relation to this property.

Direct financial contributions to the acquisition of an asset are those made to the purchase/cost price of the asset, for example, to the purchase price of real estate. Financial contributions to the conservation and improvement of an asset include payments towards the cost of repairs, maintenance and enhancements of that asset. Indirect financial contributions include contributions made towards expenses other than those directly related to the purchase, maintenance or improvement of the relevant asset (for example, the payment of living expenses such as utilities and groceries). Non-financial contributions include those contributions made to the relevant asset that are not financial in character. Each of these contributions may be considered regardless of whether the property remains the property of either de facto partner or of a child of the de facto relationship.

- (3) Contributions made by a de facto partner to the welfare of the family (constituted by the parties to the de facto relationship and any children of the de facto relationship), including any contribution made in the capacity of homemaker or parent; and
- (4) Any child support that a de facto partner has provided, is to provide, or may be liable to provide in the future for a child of the de facto relationship.

²⁹ See Parkinson (2013), pp. 82–86.

³⁰ See s 4(1) of the *Family Law Act 1975* (Cth) and case law discussion regarding what constitutes property including *Duff v Duff* (1977) FLC 90-217; *White v White* (1979) FLC 90-682; *Mullane v Mullane* (1983) FLC 91-303; *Best v Best* (1993) FLC 92-418; *Biltoft v Biltoft* (1995) FLC 92-614; *B v B* (2000) FLC 93-002; *Coghlan v Coghlan* (2005) FLC 93-220; *Kennon v Spry* (2008) FLC 93-388; *Pittman v Pittman* (2010) FLC 93-430; *Sand v Sand* (2012) FLC 93-519; *Martin v Newton* (2011) FLC 93-490.

³¹ s 90MC(2) of the *Family Law Act 1975* (Cth).

³² s 90MC of the *Family Law Act 1975* (Cth).

³³ See case law discussion of what may constitute a liability including *Biltoft v Biltoft* (1995) FLC 92-614.

³⁴ s 90SM(4) *Family Law Act 1975* (Cth).

Upon assessing these contributions, a percentage division of the net pool of assets between the former de facto partners may be determined, which may then be adjusted following any of the applicable additional prospective considerations outlined directly below.

Additional considerations: Consideration of prospective factors relating to the future needs of the parties

Following the assessment of contributions, consideration needs to be given to whether an adjustment should be made to the percentage division of assets on the basis of additional prospective factors, primarily relating to the future needs of the former partners. These additional, prospective considerations are enumerated in s 90SM(4) of the *FLA* as follows:

- the effect of any proposed order upon the earning capacity of either de facto partner; and
- the considerations specified in s 90SF(3) of the *FLA*, so far as they are relevant (see further in Box 3); and
- any other order made under the *FLA* affecting a party or child of the de facto relationship.

Box 3: “Future needs” considerations

The “future needs” considerations that are drawn from the maintenance provisions in s 90SF(3) of the *FLA* include:

- the age and state of health of each of the de facto parties;
- the income, property and financial resources of each of the de facto parties and the physical and mental capacity of each of them for appropriate gainful employment;
- whether either party has the care or control of a child (under 18 years) of the de facto relationship;
- the commitments of each of the de facto parties that are necessary to enable the party to support themselves, a child or another person that the party has a duty to maintain;
- the responsibilities of either de facto party to support any other person;
- the eligibility of either de facto party for a pension, allowance or benefit;
- a standard of living that is reasonable;
- the extent to which the payment of maintenance would increase the earning capacity of the recipient by enabling them to undertake education or training or to establish a business or otherwise obtain an adequate income;
- the effect of any proposed order on the ability of a creditor to recover their debt;
- the extent to which the de facto party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
- the duration of the de facto relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- the need to protect a de facto party who wishes to continue that party’s role as a parent;
- if either de facto party is cohabiting with another person—the financial circumstances relating to that cohabitation;
- any fact or circumstance which in the opinion of the court, the justice of the case requires to be taken into account;
- the terms of a de facto financial agreement that is binding on either or both parties to the de facto relationship; and
- the terms of any financial agreement that is binding on either or both de facto parties to the de facto relationship.

Note: For a complete list of the “future needs” considerations see s 90SF(3) of the *Family Law Act 1975* (Cth).

The cross-reference to the considerations specified in s 90SF(3) draws on the maintenance or “future needs” considerations to assist in determining whether an adjustment is required to the preliminary percentage division of the pool of assets that was based on the partners’ contributions. These considerations are broad in scope and, as foreshadowed above, include the factors outlined in Box 3.

The inclusion of these “future needs” considerations in the provisions applicable to de facto relationships, brings the approach taken for most separating de facto couples in line with the long-standing approach taken to determining property settlement between married couples.³⁵ Prior to the reforms, a less extensive range of factors were nominated for consideration in the context of property adjustments between de facto couples in some states and territories (for example, New South Wales, South Australia and the Northern Territory) where considerations of the kind captured in the “additional considerations” were not included at that time.³⁶ Decision-makers exercising this state/territory jurisdiction also tended to focus on assessing the contributions of former de facto partners as opposed to conducting the broader “completely open family law enquiry” (CCH, 2014, para. 57–260).

Extending the application of maintenance and binding financial agreements to de facto relationships

Prior to the reforms, maintenance for de facto couples was not available nation-wide. In the states and territories where it was available, the provisions were not uniform. As a result of the reforms, former de facto partners may seek and receive maintenance on the same basis as their married counterparts, that is, if the payer is “reasonably able” to pay and the payee is unable to “support himself or herself adequately”.³⁷ A payee may be unable to support themselves by reason of having the care of a child of the relationship, or because of their “age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason”.³⁸

The prospective “future needs” considerations outlined in Box 3 (on page 9) are the considerations to be applied in the assessment of an application for maintenance and, as noted earlier, these are consistent with the considerations applicable in the context of spousal maintenance applications between married couples.

As noted in section two above, since the reforms de facto couples in all states and territories (except Western Australia) can also make *FLA* binding financial agreements that stipulate the property and financial arrangements that will apply post separation, with a view to avoiding the need to apply to the court to determine or approve these arrangements.³⁹ The provisions that cover binding financial agreements between de facto couples, in large part, reflect the provisions that are in place for married couples and they permit de facto partners to enter into pre-relationship agreements, agreements during the period of the de facto relationship, and upon the breakdown of the de facto relationship.⁴⁰ Although couples entering binding financial agreements are not required to have the content of their agreements approved by the court (as is required by consent orders for property/financial settlement), there is, at present, some level of uncertainty associated with the application of the law relating to binding financial agreements, which may affect both married and de facto couples alike who do not wish to have their property/financial settlements governed by the *FLA* provisions.⁴¹

³⁵ See s 79 and s 75(2) of the *Family Law Act 1975* (Cth).

³⁶ Note, however, that, for example, the *Relationships Act 2008* (Vic) had made provisions for the court to consider the “future needs”/maintenance factors in the decision-making process: s 45 (which incorporates the maintenance considerations in s 51 of that Act).

³⁷ See s 90SE and s 90SF of the *Family Law Act 1975* (Cth), in particular s 90SF(1) of the *Family Law Act 1975* (Cth).

³⁸ s 90SF(1) of the *Family Law Act 1975* (Cth). Note that a payee’s entitlement to receive an “income tested pension, allowance or benefit” is to be disregarded when determining whether maintenance is payable, s 90SF(4).

³⁹ Division 4 of Part VIIIAB of the *Family Law Act 1975* (Cth).

⁴⁰ Financial agreements between de facto parties that pre-dated the reforms may also be regarded as binding financial agreements under the *FLA* if they comply with current *FLA* requirements with respect to making binding financial agreements.

⁴¹ See, for example, the discussion of the interpretation of s 90G(1)(c) of the *Family Law Act 1975* (Cth) in *Parker v Parker* [2012] FLC 93-499 in Campbell (2012).

Part 2: History and arguments for and against the reforms

What was the rationale for these reforms?

The explanatory memorandum accompanying the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 identified that the introduction of the reforms was aimed at providing a “nationally consistent financial settlement regime” that would apply upon the breakdown of de facto relationships and marriages alike by extending “the financial settlement regime under the Act (*FLA*) to parties to a de facto relationship” (Commonwealth of Australia, 2008b, p. 1).

While the *FLA* has been applied in the determination of parenting arrangements regardless of marital status since the 1980s, calls to remove the remaining legal distinctions with respect to property and financial matters for opposite-sex and same-sex de facto couples (thereby extending to them the protection of the federal family law system) gained increasing momentum.⁴² In his second reading speech introducing the reform bill to Parliament, the former Commonwealth Attorney-General Robert McClelland referred to a broader federal government policy against discrimination on the basis of sexuality, and described the provision of exclusive jurisdiction to the federal Family Law Courts with respect to the legal consequences of all relationship breakdown as being consistent with this goal (Commonwealth of Australia, 2008a). The goal of rectifying laws that discriminate against people (and their children) on the basis of their marital status or sexuality was an important factor driving these calls for reform (Human Rights and Equal Opportunity Commission, 2007; Weston, Qu & Kaspiew, 2008). In its report *Same-Sex: Same Entitlements*, the Human Rights and Equal Opportunity Commission observed the benefits of extending the application of the *FLA* property/financial regime as:

- including access to the federal family law system, which operated on the basis of a more broadly defined concept of property (that included superannuation) that tended to “attribute a higher value to non-financial homemaking contributions”;
- adopt a broader view of future needs as well as past contributions when determining property settlements; and
- to make use of “cheaper and faster” dispute resolution mechanisms (p. 273).

The “long overdue” reforms meant that separating de facto couples would be covered by legislative provisions equivalent to those applicable to married couples and would no longer be required to run parallel matters in separate courts for parenting and for property/financial arrangements, with the amendments enabling single proceedings to be issued in the federal family law court system to resolve both post-separation parenting and property/financial issues (Commonwealth of Australia, 2008a; Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 13 and Chapter 2 generally).

The Family Court of Australia and the Federal Circuit Court of Australia (then known as the Federal Magistrates Court of Australia)⁴³ were identified as the most efficient and effective forums, being “the specialist courts in Australia with vast experience in relationship breakdown matters ... [and with] procedures and dispute resolution mechanisms which are more suited to handling family litigation arising on relationship breakdown”, thus ameliorating the differences arising from the varying state and territory de facto property and financial regimes (Commonwealth of Australia, 2008a; Commonwealth of Australia, 2008b, p. 3). The Senate Standing Committee summarised the issues with the pre-reform system as encompassing “duplication, inconsistency, cost and inconvenience” with the reforms introducing a “simpler, cheaper, less traumatic [system that] ... protects vulnerable

⁴² Earlier attempts to bring de facto property and financial matters under the jurisdiction of the Family Court by cross-vesting the jurisdiction of the states to the Family Court of Australia where de facto parties also had parenting matters to be determined, had previously broken down as a result of complications arising from the constraints of the Australian Constitution.

⁴³ The Federal Magistrates Court of Australia is now known as the Federal Circuit Court of Australia following the passage, assent and proclamation of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).

parties in de facto relationship breakdowns, particularly children” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, pp. 23–24).

Significant support for the reforms was also apparent in the submissions made to the Senate Legal and Constitutional Affairs Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (“the Inquiry”), with a “key reason” nominated for the reforms being that “it would streamline processes for both same-sex and opposite-sex de facto couples, and allow them access to the specialised forum of the Family Court ... to resolve property and maintenance disputes at the same time as child related proceedings” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 13). Evidence before the Inquiry from the Family Law Section of the Law Council for Australia highlighted the “significant cost and ... [the] stress on the families” who were required to have their parenting matters and financial issues resolved in two different jurisdictions (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 14).

The increasing uptake of de facto cohabitation and the consequential increase in the number of children being born to de facto partners, together with research indicating a greater likelihood of parental separation and financial disadvantage to be experienced by children of de facto relationships, were further significant factors highlighted as justifying the need for the reforms.⁴⁴ In their submission to the Inquiry, the Australian Institute of Family Studies (AIFS) referred to 2006 census data indicating that 15 per cent of parties living together were cohabiting as de facto couples, with AIFS identifying the potential for the reforms “to alleviate some of the stress associated with relationship breakdown for this section of the population” (Weston et al., 2008, p. 1). The Family Law Section, Law Council of Australia, also pointed to the “high and ever-increasing percentage” of Australians choosing to live in de facto rather than married relationships as advancing “the objective that family law should apply in a consistent and uniform way to married and de facto relationships nationally”, describing the legislation as “much needed and socially advantageous” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 14).

The varying state and territory de facto regimes were also identified as providing the children of de facto parties with “less protection compared to children of married couples” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 14).

Referring to data from the Australian Bureau of Statistics, the Household, Income and Labour Dynamics in Australia (HILDA) and the Longitudinal Study of Australian Children (LSAC) in support of these observations (Weston et al., 2008, p. 1–2),⁴⁵ AIFS identified in their submission to the Inquiry that:

- children were increasingly being born to parents living in de facto relationships;
- these children were less well-off than children living with married parents; and
- these children were more likely to experience parental separation.

AIFS concluded that “given the increasing prevalence of cohabiting relationships, and the increasing number of children cared for in such relationships, the removal of legal distinctions between the post-separation financial regulation of cohabiting and married relationships appears justified” (Weston et al., p. 3).

Findings from the most recent wave of AIFS’ Longitudinal Study of Separated Families reflect the utility of extending the application of the *FLA* property and financial regime to separated de facto couples given that they are now more likely to engage legal services since the post-reform period as opposed to settling their property and financial arrangements without a specific process of dispute resolution.⁴⁶

⁴⁴ See for example, Willmott et al. (2003), p. 38.

⁴⁵ For more detailed discussion of the relevant research see Qu, & Weston (2008).

⁴⁶ The wave three data from the Longitudinal Study of Separated Families (LSSF) identified that “post-reform” participants were more likely to nominate their main pathways for property division as involving lawyers (28% v. 11%) or courts (7% v. 1%). Much lower proportions of parents in the post-reform group had resolved their property/financial matters without a specific process of dispute resolution. The researchers observe that while “it cannot be assumed that these differences are attributable in part to the reforms, nor can it be assumed that they are not” (Qu, Weston, Moloney, Kaspiew, & Dunstan, 2014, p. 101).

Evidence before the Inquiry from the Family Law Section, Law Council of Australia, also identified that the pre-reform system was such that “a large segment of the community, especially women, [were left] without adequate legal protection” and that “older women [were] ... severely disadvantaged on relationship breakdown” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 17). On the flipside, the availability of the option of superannuation splitting, the simpler process by which to obtain consent orders from the Family Law Courts and the reduced costs of avoiding proceedings in the state and territory courts were also identified by the Senate Standing Committee as arguments that were advanced in favour of the reforms from the perspective of the more economically powerful party to the de facto relationship (Senate Standing Committee on Legal and Constitutional Affairs, 2008, pp. 25–26).

In recommending the reforms, the Senate Standing Committee in its concluding views summarised the significant reasons underlying the rationale for change, including the need to “streamline legal processes ... and to provide a national scheme” that enabled the increasing number of Australians in de facto relationships access to the federal family law system for both parenting and property/financial matters (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 49). The reduction of the costs and inconvenience for de facto parties, and the reduction of the burden on the court systems were also nominated as significant reasons for the reforms, as was the reforms’ importance for children of de facto relationships that had broken down (p. 49). The Senate Standing Committee indicated its strong support for the inclusion of same-sex couples in the definition of de facto relationships and that the “removal of discrimination the basis of sexuality in the family law system is long overdue” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 49).

Criticisms of the reforms

The goal of affording the same property and financial rights to all cohabiting couples without discriminating on the basis of marital status or gender is a laudable one. The expediency of establishing a single, specialist jurisdiction to deal with all post-separation family law matters and the benefits of the protection afforded to children and vulnerable partners in de facto relationships are also clear.

However, concern has been raised about the legitimacy of undertaking such a “profound policy shift” as to impose “the legal consequences that flow from the parties’ conscious commitment and attach from the time of that commitment” upon people for whom this conscious commitment is absent—indeed, on parties who “may well have made the conscious, considered and very deliberate decision not to marry” (Kovacs, 2009, pp. 105–106). People can no longer choose to circumvent the legal consequences of a marriage relationship by opting for a de facto relationship instead. The potential for the reforms to apply in the context of casual relationships or casual affairs has also been noted (Stidston, 2012, pp. 46, 49; Wainwright & Cook, 2013, p. 6). Kovacs (2009) has argued that the reforms gave rise to “radical consequences” (p. 109), cautioning that they may undermine the endurance of stable de facto relationships if people are required to arrange their lives with a view to circumventing the *FLA* (p. 110). In the context of a discussion about the maintenance provisions introduced by the reforms, Kovacs observed that:

People often choose not to marry precisely because they wish to avoid the legal obligations of marriage. They may have already experienced a costly divorce and wish to preserve their assets for their children or their income for their own future security. They may live together in a relationship which in fact endures for 2 years or more (or periods totalling 2 years or more) but which one or both of them never intended to be a life long commitment. (Kovacs, 2009, p. 111)

Professor Patrick Parkinson’s submission to Inquiry similarly observed that the reforms had the effect of applying the “marriage paradigm ... to people who have never chosen that, who had a free choice whether to choose it and who would be shocked to know that they are being treated

as if they are married when they are not” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 20).

Professor Parkinson argued further that the Australian public had not been asked whether they wanted marriages and de facto relationships to be treated equally and that as a result, the reforms were premature (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 20). More recently, Parkinson has also observed the limited empirical evidence of public attitudes to the division of property (Parkinson, 2012, p. 678). This view contrasted with other submissions to the Senate Standing Committee, including that of the New South Wales Law Society who suggested that the reforms reflected the change in community values—that is, that the reforms reflected “the viewpoint that the law should treat the economic consequences of the breakdown of opposite-sex and same-sex de facto relationships in the same way as the economic consequences of the breakdown of marital relationships” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 21).

The ability of parties to enter a binding financial agreement to avoid these legal consequences was also raised in response to concerns about the extension of the property/financial regime applicable to married people, albeit that this mechanism may be too costly an option for many de facto couples (Senate Standing Committee on Legal and Constitutional Affairs, 2008). Millbank (2008), for example, has argued that “It makes absolute sense to put de facto and married couples in the same property regime. It does not remove people’s choice; it protects the vulnerable party in an economic and emotional relationship” (Millbank in Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 24).⁴⁷

Objections to the reforms have also been based on a perceived diminution of the status of marriage by affording de facto parties with the rights and responsibilities previously only afforded to people who have undertaken the commitment to marry (Willmott et al., 2003, p. 45; Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 13). Parkinson, for example, submitted to the Senate Standing Committee that the reforms should not precede an investigation of whether they would “undermine marriage (which the Government ought to be promoting because of its much greater stability), [by] treat[ing] marriages and de facto relationships as being entirely equivalent” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 17).

Although arguments in support of the primacy of marriage suggested that the greater stability that marriage provided was a preferred environment for raising children, AIFS’ evidence to the Inquiry indicated that although the research had identified de facto relationships as less stable and that the developmental outcomes for the children of de facto parents were less positive than for children of married parents, these differences were “largely explained” by the differences in characteristics between marriage and cohabitation, including that “those who cohabit are more likely to be younger and to be of a lower socioeconomic status” (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 18). The implication is that on the available research, it is not clear that children fare better when born to married parties by virtue of the fact that their parents are married, rather than their welfare being related more to the differences between the parents who do marry and the parents who do not (rather than differences in their marital status) (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 19).

The very fact that the reforms introduced substantive changes to the law then applicable to de facto parties in some states (including New South Wales),⁴⁸ was one that drew criticism from some commentators who argued that as a result of the incorporation of the full suite of additional, proscriptive considerations, the reforms provided an avenue for “opportunistic claims” by de facto partners who have made limited contributions to the parties’ pool of assets but have significant future needs (Kovacs, 2009, p. 110), although it is notable that the same potential for opportunistic

⁴⁷ See also Millbank (2009).

⁴⁸ Note, however, that the Senate Committee observed that the New South Wales Law Reform Commission had already recommended bringing the New South Wales legislation, as the it then was, into line with the *FLA* (Senate Standing Committee on Legal and Constitutional Affairs, 2008, p. 25).

claims arises in the context of marriages. Kovacs also drew attention to the broader impact of the reforms on creditors with the Family Law Courts now able to award property to the de facto partner of an insolvent person ahead of the trustee in bankruptcy and other creditors, a measure that significantly extends the privilege previously only afforded to married couples; a privilege which was already the subject of criticism (Kovacs, 2009, pp. 112–113).

Conclusion

This paper provides non-legal professionals with a general outline of the reforms, introduced in 2009, to the way that de facto property and financial settlements are made upon separation. Awareness of these reforms among family law sector professionals is essential to enable the provision of appropriate assistance and referral to relevant services. The reforms extending the federal family law property and financial provisions to separating de facto couples are not a panacea. As illustrated in the case studies in Box 2, non-married litigants may still face the indignity of their privacy being invaded (Behrens, 2010, pp. 359–360; Behrens, in Farouque, 2012). While married parties, by virtue of their marriage certificate, are not required to prove that their relationship existed, de facto couples may be required to “divulge ... their personal habits and sexual proclivities” (Nambiar, in Farouque, 2012; *Smyth v Pappas* [2011] FamCA 434) to satisfy the threshold requirement before consideration of their substantive claim for property and financial settlement.

Despite the difficulties, on balance, the introduction of a (near) national, uniform, property/financial regime for separating families has been broadly identified as being warranted (Senate Standing Committee on Legal and Constitutional Affairs, 2008). The shift in the public policy debate and, more particularly, the strength of calls supportive of the reforms, has given rise to a broadening of the scope of legislative protection for people in de facto relationships that were disadvantaged by the state and territory regimes. It has streamlined the application of the *FLA* property and financial provisions in the post-separation context and provided the Family Law Courts, the courts with the expertise in family law matters, with largely exclusive jurisdiction to determine property and financial settlements for separating families without discrimination on the basis of marital status or sexuality. Following on from the insights available from AIFS’ most recent wave of the Longitudinal Study of Separated Families, further and more specific research will now be required to explore whether and if so, how, these reforms are effective in accommodating the post-separation property and financial settlements of de facto couples.

Resources on de facto relationships and the *FLA*

Family Law Courts—De facto relationships information page: <www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Separation+and+Divorce/De+facto+relationships>.

Family Relationships Online—**Property division when de facto relationships break down** (Fact Sheet): <www.familyrelationships.gov.au/BrochuresandPublications/Pages/propertydivisionwhendefactorelationshipsbreakdown.aspx>

Family Relationships Advice Line: 1800 050 321 <www.familyrelationships.gov.au/services/fral/pages/default.aspx>

Bibliography

Case law

B v B (2000) FLC ¶ 93-002

Best v Best (1993) FLC ¶ 92-418

Biltoft v Biltoft (1995) FLC ¶ 92-614;

Coghlan v Coghlan (2005) FLC ¶ 93-220

Dahl v Hamblin (2011) FLC ¶ 93-480
Dakin v Sansbury [2010] FMCAfam 628
Duff v Duff (1977) FLC ¶ 90-217
Gissing v Sheffield [2012] FMCAfam 1111
Jonab v White [2011] FamCA 221
Jonab v White [2012] FamCAFC 200
Kennon v Spry (2008) FLC ¶ 93-388
Martin v Newton (2011) FLC ¶ 93-490
Moby v Schuller [2010] FamCA 748
Mullane v Mullane (1983) FLC ¶ 91-303
Norton v Locke (2013) FLC 93-567
Onslow v Onslow [2013] FCCA 1434
Parker v Parker [2012] FLC ¶ 93-499.
Pittman v Pittman (2010) FLC ¶ 93-430
Sand v Sand (2012) FLC ¶ 93-519
Sinclair v Whittaker (2013) FLC ¶ 93-551
Smyth v Pappas [2011] FamCA 434
Stanford v Stanford (2012) 293 ALR 70
Watson v Ling (2013) FLC ¶ 93-527
White v White (1979) FLC ¶ 90-682

Legislation

Family Court Act 1997 (WA)
Family Law Act 1975 (Cth)
Family Law Amendment (Validation of Certain Orders and Other Measures) Act 2012 (Cth)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)
Federal Circuit Court of Australia Legislation Amendment Act 2012 (Cth)
 Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth)

Other material

Behrens, J. (2010). "De facto relationship?" Some early case law under the *Family Law Act*. *Australian Journal of Family Law*, 24(3), 350–360.

Campbell, J. (2012). Binding financial agreements unbound. *Law Institute Journal*, 86(11), 34.

CCH. (2014). *Australian family law and practice commentary: De facto relationships*, ¶ 57-000–57-500.

Commonwealth of Australia. (2008a). Parliamentary debates, House of Representatives, 25 June 2008, 5823 (Robert McClelland, Attorney-General).

Commonwealth of Australia. (2008b). *Explanatory memorandum*, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth).

Farouque, F. (2012, 26 March). De factos tell all in property disputes. *The Age*, p. 1.

Fehlberg, B., & Behrens, J. (2008). *Australian family law: The contemporary context*. (Sydney: Oxford University Press).

Galloway, L. (2008). The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008: A guide to practice and policy. *Australian Journal of Family Law*, 22(2) 93–101.

Harland, A. (2008). A new era in de facto relationships law: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth). *Current Family Law*, 13, 195–201.

Harland, A. (2008). De facto relationships enter the mainstream. *Law Society Journal*, (December), 64–67.

Harland, A. (2009). Same-sex law reforms and notions of parenthood. *Current Family Law*, 14, 132–138.

Human Rights and Equal Opportunity Commission. (2007). *Same-sex: Same entitlements. National Inquiry Into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*. Sydney: Human Rights and Equal Opportunity Commission.

Kovacs, D. (2009). The federal law of de facto property rights: The dream and the reality. *Australian Journal of Family Law*, 23(2), 104–121.

Millbank, J. (2009). De facto relationships, same-sex and surrogate parents: Exploring the scope and effects of the 2008 federal relationship reforms. *Australian Journal of Family Law*, 23(3), 160–193.

Millbank, J. (2006). The changing meaning of "de facto" relationships. *Current Family Law*, 12, 82.

Nicholls, M. (2012). De facto claims in Australia. *Family Law Review*, 2, 181–184.

Parkinson, P. (2012). *Australian family law in context: Commentary and materials* (5th ed.). Pyrmont, NSW: Thomson Reuters.

Parkinson, P. (2013). Family property law and the three fundamental propositions in *Stanford v Stanford*. *Family Law Review*, 3, 80.

Qu, L., & Weston, R. (2008). *Snapshots of family relationships*. Melbourne: Australian Institute of Family Studies.

Qu, L., Weston, R., Moloney, L., Kaspiw, R., & Dunstan, J. (2014). *Post-separation parenting, property and relationship dynamics after five years*. Melbourne: Australian Institute of Family Studies.

- Senate Standing Committee on Legal and Constitutional Affairs. (2008). *Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]*. Canberra: Commonwealth of Australia. Retrieved from <www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/family_law/report/report_pdf.ashx>.
- Stidston, W. (2012). Are there really no strings attached? *Law Institute Journal*, 86(12), 46–49.
- Watts, G. (2009). The de facto relationships legislation. *Australian Journal of Family Law*, 23(2), 122–143.
- Wainwright, S., & Cook, T. (2013). What's mine is ... yours?: Being a couple, married or not, has legal consequences. *Lawyers' Journal*, 54, 6–7.
- Weston, R., Qu, L., & Kaspiew, R. (2008). *Inquiry Into the Family law Amendment (De Facto Financial Matters and Other Measures Bill 2008 [Provisions]: Submission From the Australian Institute of Family Studies*. Melbourne: Australian Institute of Family Studies.
- Willmott, L., Mathews, B., & Shoebridge, G. (2003). De facto relationships property adjustment law: A national direction. *Australian Journal of Family Law*, 17(1), 37–61.
- Young, L., Monahan, G., Sifris, A and Carroll, R. (2013). (8th ed.). *Family law in Australia*. (Chatswood, NSW, Lexis Nexis Butterworths).

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