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The Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld)

The Queensland Legislative Assembly first considered a referral of power to the Commonwealth in relation to financial matters arising out of de facto relationship breakdowns with the Commonwealth Powers Amendment Bill 1995 (Qld). That Bill lapsed, however, with the change of government in February 1996. Part 19 of the Property Law Act 1974 (Qld) was subsequently enacted to provide a legislative framework for the resolution of financial matters at the end of de facto relationships.

Following a new request for a referral of power, the Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld) was introduced into the Queensland Legislative Assembly. The main outcomes of a referral of power under the Bill are to-

- *provide uniform federal laws, administered by the Family Court, for the resolution of financial matters arising out of de facto relationship breakdowns;*
- *overcome the effect of the High Court decision in Re Wakim; and*
- *allow the superannuation interests of de facto couples to be regarded as a divisible asset in property settlement*
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1 INTRODUCTION

De facto relationships represent a significant and increasing proportion of Australian families. Under the Constitution, the Commonwealth's power to legislate in respect of marriage and matters relating to marriage and divorce does not extend to de facto relationships. Consequently, on the breakdown of their relationships, de facto couples do not have the benefit of the property distribution principles and procedures of the Family Court of Australia. Instead, they must rely on the de facto relationships legislation enacted by each of the States and Territories.¹

There is considered to be an "appalling lack of uniformity" in the de facto relationships legislation of the States and Territories.² Despite the enactment of such legislation, and the fact that some statutes are modelled closely on the *Family Law Act 1975* (Cth), it continues to remain more difficult for de facto partners to obtain property adjustment orders than their married counterparts.³

The issue of a referral to the Commonwealth of State power in relation to financial matters arising out of the breakdown of de facto relationships has been discussed by the Standing Committee of Attorneys-General (SCAG) since 1992.⁴ A Bill for such referral

¹ De facto relationships legislation was enacted by all States and Territories between 1984 and 2002. *Property Law Act 1974* (Qld); *Property Law Act 1958* (Vic); *De Facto Relationships Act 1996* (SA); *De Facto Relationships Act 1991* (NT); *De Facto Relationships Act 1999* (Tas); *Property (Relationships) Act 1984* (NSW); *Domestic Relationships Act 1994* (ACT); *Family Court Act 1997* (WA).

² Margaret Harrison, 'What's new in the Family Court', *Family Matters*, Australian Institute of Family Studies, No. 49, Autumn 1998, pp 52–53, p 52.

³ Lindy Willmott, 'De facto property claim: Eligibility – Queensland style', *Queensland Lawyer*, Vol 23, August 2002, pp 14–27, p 14. For example, in addition to satisfying the definition of 'de facto partner' in s 260 of the *Property Law Act 1974*, a court may make a property adjustment order only if it is satisfied that the de facto partners have lived together in a de relationship for at least two years, there is a child of the de facto relationship who is under 18 years of age, or the de facto partner who applied for the order has made substantial contributions to property, financial resources or family welfare such that failure to make an order would result in serious injustice to the de facto partner (s 287 of the *Property Law Act 1974*). These additional hurdles do not exist under the *Family Law Act 1975*.

⁴ Hon Daryl Williams MP, Attorney-General, 'Shaping family law for the future', *Transcript of Speech to National Press Club*, Canberra, 27 October 1999, <http://www.ag.gov.au/www/attorneygeneralHome.nsf/Alldocs/A98EC6DD25ED0199CA256B5900128720?OpenDocument&highlight=de%20facto>.

was introduced into the Queensland Legislative Assembly in 1995,⁵ however that Bill lapsed with the change of government in February 1996. The *Property Law Act 1974* (Qld) was subsequently amended to insert a new Part 19 to facilitate the resolution of financial matters at the end of de facto relationships.

Following a new invitation for referral, the Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld) was introduced into the Queensland Legislative Assembly on 9 September 2003 by the Hon R J Welford MP, Attorney-General and Minister for Justice.

The main outcomes of a referral of power under the Bill are to-

- provide uniform laws at a federal level for the resolution of financial matters arising out of de facto relationship breakdowns, with those laws being administered by the Family Court;
- overcome the effect of the High Court decision in *Re Wakim*⁶ which prevents de facto couples from commencing proceedings concerning their child custody and access issues and their property issues in the same court; and
- extend to de facto couples the recently commenced amendments to the *Family Law Act 1975* which allow superannuation interests of married couples to be regarded as property capable of division between the parties, and the subject of orders of the Family Court, in property settlement proceedings.

2 STATISTICS REGARDING DE FACTO RELATIONSHIPS

2.1 INCREASE IN NUMBER OF DE FACTO RELATIONSHIPS

The proportion of Australians in de facto relationships more than doubled between 1986 and 2001, increasing from 5.7% of all couples in 1986 to 8.2% in 1991 and 12.4% in 2001.⁷

⁵ Commonwealth Powers Amendment Bill 1995 (Qld).

⁶ *Re Wakim, Ex Parte McNally and Anor; Re Wakim, Ex Parte Darvall; Re Brown and Ors, Ex Parte Amann and Anor and Spinks and Ors v Prentice* (1999) 73 ALJR 839. The High Court held that certain aspects of the cross-vesting scheme were invalid.

⁷ Data in relation to 1986 and 1991 sourced from ABS, 'Australian Social Trends 1994 – Family – National summary tables', *Australia Now*. Data in relation to 2001 sourced from ABS, 'Australian Social Trends 2003 – Family and Community – National summary tables', *Australia Now*.

Queensland is above the national average with de facto couples representing 14% of all Queensland couples in 2001.⁸

2.2 DECREASE IN PEOPLE CHOOSING TO MARRY

Fewer people are choosing to marry. The lowest number of registered marriages in Australia over the past 20 years was recorded in 2001.⁹ The crude marriage rate (per 1,000 of population) decreased from 6.6% in 1991 to 5.3% in 2001. In comparison, the number of divorces in Australia increased from 45,600 in 1991 to 55,300 in 2001.¹⁰

The median age of males at first marriage increased from 25.6 years in 1986 to 26.7 years in 1991 and 28.7 years in 2001. The median age of females at first marriage also increased, rising from 23.5 years in 1986 to 24.5 years in 1991 and 26.9 years in 2001.¹¹

2.3 TRENDS IN DE FACTO RELATIONSHIPS

The proportion of Australian couples choosing to live together prior to formalising their relationship in a registered marriage more than doubled over the past 20 years. In 1981, 31% of couples cohabited prior to entering a registered marriage. By 2001, this proportion had reached 72%.¹²

In 1992, 65% of people in de facto relationships had never been married. This figure reflects the young age profile of de facto couples, with most falling within the 20–29 year age group. A further 34% of de facto partners were divorced, and the remaining 1% widowed.¹³

⁸ ABS, 'Australian Social Trends 2003 – Family and Community – State summary tables', *Australia Now*.

⁹ ABS, 'Fewer Marriages, more divorces – part of a twenty year trend', *Media Release*, 22 August 2002, ABS Catalogue number 3310.0.

¹⁰ ABS, 'Australian Social Trends 2003 – Family and Community – National summary tables'.

¹¹ ABS, 'Australian Social Trends 1994 – Family – National summary tables', *Australia Now*; 'Australian Social Trends 2003 – Family and Community – National summary tables', *Australia Now*.

¹² ABS, 'Fewer Marriages, more divorces – part of a twenty year trend'.

¹³ ABS, 'Australian Social Trends 1995 – Family – Formation: Trends in de facto partnering', *Australia Now*.

2.4 INCREASE IN DE FACTO COUPLES WITH CHILDREN

In 1992, 36% of de facto couples had children.¹⁴

The number of de facto couples with children is increasing at a faster rate than the number of de facto couples without children. In 1982, de facto couples represented 8% of all couples without children and 3% of all couples with children. In 1992, de facto couples comprised 13% of all couples without children and 6% of all couples with children. This was an increase of 88% in the number of de facto couples with children compared to an increase of 58% in the number of de facto couples without children.¹⁵

As a likely reflection of the increase in the number of de facto relationships,¹⁶ there has been an increase in the percentage of births outside registered marriage. In 1986, 16.8% of births in Australia occurred outside a registered marriage. This figure rose to 23% in 1991 and to 30.7% in 2001.¹⁷

3 HISTORY OF QUEENSLAND'S CONSIDERATION OF A REFERRAL OF POWER

Until 1999, de facto couples in Queensland relied on the broad principles of contract law, trusts and equity administered by the State courts to resolve property

¹⁴ This compares to 51% for registered marriage couples at the same time. ABS, 'Australian Social Trends 1994 – Family – Living Arrangements: Changes in living arrangements', *Australia Now*.

¹⁵ ABS, 'Australian Social Trends 1995 – Family – Formation: Trends in de facto partnering'.

¹⁶ ABS, 'Australian Social Trends 1995 – Family – Formation: Trends in de facto partnering'.

¹⁷ ABS, 'Australian Social Trends 1994 – Family – National summary tables', *Australia Now*; 'Australian Social Trends 2003 – Family and Community – National summary tables', *Australia Now*.

disputes arising on the breakdown of their relationships.¹⁸

The Queensland Parliament's response to a recognition of the need for statutory regulation of de facto relationship breakdowns, together with the Commonwealth's request for a referral of power, can be summarised as follows –

- introduction of the Commonwealth Powers Amendment Bill 1995 (Qld);
- enactment of a new Part 19 of the *Property Law Act 1975*; and
- introduction of the Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld).

3.1 COMMONWEALTH POWERS AMENDMENT BILL 1995 (QLD)

In October 1995 the then Minister for Justice and Attorney-General, the Hon M J Foley MLA,¹⁹ introduced the Commonwealth Powers Amendment Bill 1995 (Qld) (the 1995 Bill) into the Queensland Legislative Assembly. The purpose of the 1995 Bill was to refer to the Commonwealth power to legislate in relation to the resolution of disputes concerning financial matters between de facto partners. The 1995 Bill was in similar terms to the current Bill.²⁰

However, the 1995 Bill lapsed with the change of government in February 1996.

3.1.1 Reasons for a Referral of Power

The then Minister noted that there was a profound lack of uniformity in the de facto relationships legislation of the States and Territories.²¹ The following alternatives had

¹⁸ In 'Law and Resolution of De Facto Property Disputes' (Research Bulletin 9/96), Queensland Parliamentary Library, Anita Sweet provides an historical overview of the legal approach for the resolution of property disputes between de facto partners, a review of the de facto relationships legislation of the States and Territories and the recommendations for change proposed in Queensland as at November 1996, <http://www.parliament.qld.gov.au/ConcordDocs/RB0/RB0996AS.PDF>.

¹⁹ The Hon M J Foley MLA was also Minister for Industrial Relations and Minister for the Arts.

²⁰ Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), *Explanatory Notes*, p 1.

²¹ Hon M J Foley MLA, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts, Commonwealth Powers Amendment Bill 1995 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 19 October 1995, pp 525-527, p 526.

been considered for the resolution of the financial and property disputes of de facto partners following a breakdown of their relationship –

- a referral of power to the Commonwealth;
- use of the forum of SCAG to seek uniform legislation; and
- for Queensland to enact its own legislation.²²

The Minister indicated that a referral of power was chosen because –

- it would result in jurisdiction being conferred on the Family Court for the handling of de facto disputes;
- there was wide support for bringing de facto property cases under the Family Court's procedures because child custody and access issues involving de facto couples were already dealt with by that court;
- family law practitioners were familiar and satisfied with the procedures of the Family Court;
- there would be considerable savings to litigants as a result of the Family Court's well-developed case management procedures and the wealth of experience of its specialist judges, conciliation registrars, and mediators; and
- a more predictable approach to judicial interpretation, leading to it being more likely that negotiation between parties to settle their disputes would be achieved.²³

3.1.2 Meaning of 'De facto Relationship'

'De facto relationship' was defined in the 1995 Bill as "the relationship between 2 persons who, although they are not legally married to each other, live in a relationship like the relationship between a legally married couple". It was unclear from the definition whether the term applied to same-sex couples, however use of the word "persons" suggested that it could.²⁴ The then Federal Attorney-General, the Hon Michael Lavarch MP, indicated that same-sex couples would have to continue to use state laws to settle property disputes.²⁵

²² Hon M J Foley MLA, Second Reading Speech, p 526.

²³ Hon M J Foley MLA, Second Reading Speech, p 526-527.

²⁴ In footnote 109 to 'Law and Resolution of De Facto Property Disputes' (Research Bulletin 9/96), it was noted that it was not intended that the term extend to same-sex couples and that the Government intended to amend the definition to clarify this uncertainty.

²⁵ 'Settlements made easier', *Courier Mail*, 11 October 1995, p 11.

3.2 PART 19 OF THE PROPERTY LAW ACT 1974 (QLD)

In 1999, Queensland enacted its own de facto relationships legislation. The legislation was enacted on the basis that neither uniform legislation nor a referral of power to the Commonwealth was possible at that time or in the foreseeable future. SCAG had recently rejected a Law Council of Australia proposal for uniform legislation. The then Federal Attorney-General had indicated that he would consider accepting a referral of power, even if not all of the States and Territories referred it. However, at a meeting of SCAG on 11 November 1999, only Tasmania and the ACT indicated interest in referring power. It was anticipated that Commonwealth legislation would take several years to develop and would not, in any event, extend to same sex couples. There were also delays, at that time, of up to two years in the Family Court in Brisbane compared to six months in the District Court. It was considered that the only option for Queensland was to enact its own legislation.²⁶

On 21 December 1991, Part 19 of the *Property Law Act 1974* (Part 19) was enacted to provide a legislative mechanism for de facto partners, including same-sex couples, to resolve property disputes following the breakdown of their relationships.²⁷ To a greater extent than other de facto relationships legislation in Australia, Part 19 is modelled on the *Family Law Act 1975*.²⁸ Except to the extent that it does not provide for spousal maintenance, Part 19 also reflects the provisions of draft legislation recommended by the Queensland Law Reform Commission (QLRC),²⁹ in its 1993 Report, with respect to adjustments in property.³⁰

3.3 COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003 (QLD)

The Commonwealth subsequently renewed its invitation for the States to refer power to the Commonwealth over financial matters arising out of the breakdown of de facto

²⁶ Property Law Amendment Bill 1999 (Qld), *Explanatory Notes*, p 3.

²⁷ The introduction of Part 19 of the *Property Law Act 1974* was considered by Cathy Green in 'Property Law Amendment Bill 1999' (Legislation Note 10/99), Queensland Parliamentary Library, <http://www.parliament.qld.gov.au/ConcordDocs/LN1/LN1099CG.PDF>.

²⁸ Lindy Willmott, p 26.

²⁹ Queensland Law Reform Commission, *De Facto Relationships*, Report No 44, June 1993, Appendix B.

³⁰ Property Law Amendment Bill 1999 (Qld), *Explanatory Notes*, p 4.

relationships. The Commonwealth Attorney-General, the Hon D Williams MP, announced that agreement about such a referral was reached at the meeting of SCAG on 8 November 2002.³¹

The Commonwealth Powers (De Facto Relationships) Bill 2003 was prepared through SCAG and is to be enacted in a similar form by other States that accept the Commonwealth's invitation to refer power.³²

4 THE FAMILY COURT AS THE MOST APPROPRIATE FORUM

It is anticipated that a referral of power to the Commonwealth will result in amendments to the *Family Law Act 1975* and jurisdiction being conferred on the Family Court to determine proceedings brought by de facto partners for a resolution of their financial matters on a breakdown of their relationship.³³

In its 1993 Report, the QLRC named the Family Court as the most suitable forum to hear and determine property disputes arising from the breakdown of de facto relationships.³⁴ If there was a referral of power in this area, the QLRC considered that the Commonwealth should confer jurisdiction on the Family Court to hear and determine matters arising under any legislation that is passed.³⁵

The QLRC considered that the Family Court provided the following advantages –

- expertise in the resolution of property and maintenance matters;
- speed of resolution due to well developed case management procedures;
- dispute resolution conferences to avoid some matters going to trial;
- familiarity of family law practitioners with court procedures; and

³¹ Hon Daryl Williams MP, Attorney-General, 'Commonwealth wins De Facto Property Powers', *Media Release*, 8 November 2002.

³² Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), *Explanatory Notes*, p 2.

³³ Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), *Explanatory Notes*, p 4; Hon R J Welford MP, Attorney-General and Minister for Justice, Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 9 September 2003, pp 3274-3276, p 3275.

³⁴ QLRC Report 1993, p 3.

³⁵ QLRC Report 1993, p 4.

- predictability of outcomes regarding the distribution of property.³⁶

5 REFERRAL OF POWER TO THE COMMONWEALTH

5.1 CONSTITUTIONAL BASIS FOR A REFERRAL OF POWER

Section 51(xxxvii) of the Constitution provides that the Parliament of a State may refer to the Commonwealth Parliament any matter which lies within the legislative power of the State and that the Commonwealth Parliament thereupon acquires the power to legislate with respect to that matter within the referring State.

The power is not often used.³⁷ For example, Queensland in 1950 and Tasmania in 1952 referred the matter of air transport to the Commonwealth.³⁸ Between 1986 and 1990 five States, including Queensland, referred power regarding ex nuptial children to the Commonwealth.³⁹ More recently, the Queensland Parliament referred power in relation to terrorist acts⁴⁰ and corporations and financial products and services⁴¹ to the Commonwealth.

5.2 NEED FOR REFERRAL

The Constitution provides the Commonwealth Parliament with exclusive power to make laws with respect to marriage, divorce and related matters.⁴²

³⁶ Queensland Law Reform Commission, *De Facto Relationships*, Working Paper No 40, September 1992, pp 15–17.

³⁷ P H Lane, *An Introduction to the Australian Constitutions*, The Law Book Company Limited, 1994, p 121

³⁸ *Commonwealth Powers (Air Transport) Act 1950* (Qld).

³⁹ P H Lane, *An Introduction to the Australian Constitutions*, p 121; *Commonwealth Powers (Family Law – Children) Act 1990* (Qld).

⁴⁰ *Terrorism (Commonwealth Powers) Act 2002* (Qld).

⁴¹ *Corporations (Commonwealth Powers) Act 2001* (Qld).

⁴² Constitution, paragraphs 51 (xxi) and (xxii).

Although these paragraphs provide a foundation for substantial Commonwealth legislation concerning family relationships, their inadequacy to support a legislative framework reflecting the realities of modern Australian family life has been recognised.⁴³ With the exception of an extension of the Family Court's jurisdiction to the maintenance and custody of ex nuptial children, the Commonwealth has confined its legislation to the regulation of formal, legally sanctioned marriages.⁴⁴

6 FURTHER REASONS FOR REFERRAL SINCE LAPSE OF THE 1995 BILL

Since the lapse of the 1995 Bill, the importance of a referral of power to the Commonwealth has increased due to –

- the High Court decision in *Re Wakim*; and
- amendments to the *Family Law Act 1975* which enable the division of superannuation interests in property settlement proceedings.⁴⁵

6.1 RE WAKIM: INVALIDITY OF CROSS-VESTING SCHEME

6.1.1 Cross-vesting Legislation

In the context of a de facto relationship breakdown, the practical effect of the cross-vesting legislation was that a de facto couple whose relationship had ended could have both custody and access arrangements concerning their children and their property matters dealt with by the Family Court.⁴⁶

⁴³ P Hanks, *Constitutional Law in Australia*, Butterworths, 1996, pp 435-436, citing Constitutional Commission, *Final Report*, AGPS, Canberra, 1988, pp 669, 679.

⁴⁴ P Hanks, *Constitutional Law in Australia*, pp 436-437.

⁴⁵ Hon Mr N J Newell MP, Commonwealth Powers (De Facto Relationships) Bill 2003, Second Reading Speech, Legislative Assembly, *New South Wales Parliamentary Debates*, 5 September 2003, <http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard>.

⁴⁶ The High Court decision in *Re Wakim*, and the cross-vesting scheme generally, was considered by Cathy Green in 'Jurisdictional Cross-Vesting in the light of *Re Wakim*' (Research Note 5/99), Queensland Parliamentary Library, <http://www.parliament.qld.gov.au/ConcordDocs/RN0/RN0599CG.PDF>.

6.1.2 High Court Decision in *Re Wakim*

In June 1999, the High Court in *Re Wakim* held that the cross-vesting scheme was constitutionally invalid to the extent that it vested State jurisdiction in the federal courts. Therefore, the State Parliaments could not invest federal courts with State jurisdiction, even with the consent of the Commonwealth Parliament.

From a family law perspective, the consequence of *Re Wakim* was that the Family Court could no longer hear property proceedings between de facto partners together with disputes regarding their children. Separate proceedings had to be commenced in the State courts for resolution of the property disputes.

6.1.3 Response to *Re Wakim*

Following *Re Wakim*, all States enacted model *Federal Courts (State Jurisdiction) Acts*⁴⁷ to enable the “ineffective judgments” of the federal courts given in purported exercise of State jurisdiction under the cross-vesting scheme to be taken as judgments of the Supreme Court and enforceable as such.

The model Acts, however, do not address future arrangements for new cases. In terms of new cases, the Law Council of Australia has stated that it favours a referral of power to the Commonwealth in relation to the resolution of de facto property disputes as the immediate solution to *Re Wakim*.⁴⁸

6.2 DIVISION OF SUPERANNUATION INTERESTS

On 28 December 2002 the provisions of the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth), amending the *Family Law Act 1975* and other legislation regulating superannuation, came into effect.

The purpose of the amendments was to enable superannuation interests to be divided on the breakdown of a marriage, either by agreement between the parties or a court order.⁴⁹

⁴⁷ *Federal Courts (State Jurisdiction) Act 1999* (Qld).

⁴⁸ Law Council of Australia, *Cross Vesting - The Solution to the Jurisdictional Problems after the Decision in Re Wakim: Ex Parte McNally*, 21 March 2000, pp 4-5.

⁴⁹ Australia. Department of the Parliamentary Library, Information and Research Services, *Family Law Legislation Amendment (Superannuation) Bill 2000*, Bills Digest No 55, 2000-01, <http://www.parliament.qld.gov.au/ConcordDocs/B02/B020910GB02.PDF>. The Bills Digest discusses the treatment of superannuation under the *Family Law Act 1975* and the approaches

6.2.1 Background to the Amendments

The legislative changes were introduced as the solution to the long-standing problem in family law of how to properly deal with an asset that is ordinarily not available for immediate division and is beyond the effective control of the parties.⁵⁰

Under the *Family Law Act 1975*, the Family Court has power to make such orders with respect to property as it considers just and appropriate. Superannuation, as a ‘financial resource’, was a matter to be *considered* in the making of a property order but could not *itself* be the subject of a property order. The Family Court adopted a number of approaches to dealing with superannuation,⁵¹ the most common of which were to –

- allow each party to retain their superannuation entitlements and to make an adjustment to account for superannuation when making orders for a property settlement; or
- adjourn property settlement proceedings until the superannuation interests of one party vested.⁵²

There were a number of difficulties and uncertainties associated with these approaches including, for example, the nature of the particular superannuation scheme involved, the value of the present assets of the parties, the appropriate method for valuing superannuation interests, legislative prohibitions on the transfer of superannuation interests between spouses, and restrictions on the powers of the Family Court to make orders which were binding on superannuation fund trustees.⁵³

adopted by the Family Court prior to the amendments, the Commonwealth inquiries and reports leading to the amendments and the main provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth).

⁵⁰ Adrian Stone, ‘Superannuation splitting: cure or curse?’, *Law Institute Journal*, Vol 77(7), July 2003, pp 50-53, p 51.

⁵¹ *Family Law Legislation Amendment (Superannuation) Bill 2000*, Bills Digest No 55, 2000-01, p 2.

⁵² Alison Ross and Bruce Provan, ‘Superannuation and family law: a good substitution but overdue’, *Proctor*, September 2002, pp 12-13, p 12.

⁵³ *Family Law Legislation Amendment (Superannuation) Bill 2000*, Bills Digest No 55, 2000-01, pp 3-4.

6.2.2 Reasons for Reform

Increasing numbers of Australian employees have superannuation policies and the relative value of those policies is increasing and projected to continue increasing.⁵⁴ In March 2003, Australian superannuation assets totalled approximately \$508 billion.⁵⁵

During a long-term relationship, partners can build up large superannuation assets. In recent years, the size of superannuation assets as a proportion of total household wealth has steadily been increasing, from 14% of a couple's total net assets in the late 1980s to about 25% in the late 1990s.⁵⁶

Equity issues for both males and females were important factors leading to the amendments. Typically, it is men rather than women who belong to superannuation funds. Where women belong to a superannuation fund, their entitlements are generally worth less than those for men, reflecting differences in the time women spend in paid employment, their salaries when in paid employment, and the nature of their employment.⁵⁷ The superannuation entitlement of one party was often offset by providing the other party with a larger share of the present asset pool.⁵⁸ The result was that one party, usually the wife, was left with the residential premises but no retirement income, and the other party, usually the husband, was left with no accommodation but a significant retirement income that may be inaccessible for a number of years.

6.2.3 Effect of Amendments

The main outcome of the amendments is that superannuation is treated as 'property', capable of division between the parties and being directly the subject of orders of the Family Court in property settlements. These orders are binding on superannuation trustees. Parties also continue to have the ability to reach an agreement between

⁵⁴ *Family Law Legislation Amendment (Superannuation) Bill 2000*, Bills Digest No 55, 2000-01, p 5.

⁵⁵ Australian Prudential Regulation Authority, *Superannuation Trends*, March Quarter 2003.

⁵⁶ Australian Institute of Family Studies, *Superannuation and Divorce in Australia*, Working Paper No 18, May 1999, p 27.

⁵⁷ *Family Law Legislation Amendment (Superannuation) Bill 2000*, Bills Digest No 55, 2000-01, p 6.

⁵⁸ Adrian Stone, p 51.

themselves in relation to the treatment of their superannuation.⁵⁹ For the first time, a spouse also has the right to obtain information from a fund about their partner's superannuation policy.

6.2.4 Impact on Separating De Facto Couples

The Commonwealth has indicated that it is not prepared to make amendments to the superannuation industry supervision legislation to give effect to any State legislation for the division of the superannuation interests of de facto couples. The Commonwealth considers that it is preferable for issues concerning the division of superannuation to be dealt with at the federal level. This will result in uniformity between the married and de facto couples in the division of superannuation interests and ensure that the treatment of de facto couples does not vary between individual States and Territories.⁶⁰

7 COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003 (QLD)

7.1 REFERRAL OF POWER

To the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament, **financial matters** relating to **de facto partners** arising out of the breakdown (other than by reason of death) of the **de facto relationships** between persons of *different sexes* and of the *same sex* are referred to the Commonwealth Parliament (**clause 4**).

7.2 SAME-SEX DE FACTO COUPLES

The referral of power with respect to de facto relationships between persons of different sexes and persons of the same sex operates separately (**clause 4(2)**). This has been done to ensure the validity of any Commonwealth legislation⁶¹ in the face of clear indications from the Commonwealth that it intends to exercise power in relation to

⁵⁹ Alison Ross and Bruce Provan, p 12.

⁶⁰ Hon N J Newell MP, Second Reading Speech.

⁶¹ Hon N J Newell MP, Second Reading Speech.

heterosexual de facto couples only.⁶² If this is the case, same-sex de facto couples will continue to have the benefit of Part 19 of the *Property Law Act 1974*.

7.3 MEANING OF ‘DE FACTO RELATIONSHIP’

De facto relationship is defined as a marriage-like relationship (other than a legal marriage) between two people and includes a de facto relationship that ends before the Act commences. A de facto relationship will exist even if a de facto partner is legally married to someone else or is in another de facto relationship (**clause 3**).

This definition differs from that in section 36 of the *Acts Interpretation Act 1954* (Qld), which applies in the interpretation of Part 19 of the *Property Law Act 1974*.

‘De facto relationship’ is defined in the *Acts Interpretation Act 1954* as the relationship existing between two persons as a couple because each is the de facto partner of the other. ‘De facto partner’ is then defined⁶³ as either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family. A range of factors are listed for consideration in deciding whether a person is a de facto partner.

The Bill departs from the *Acts Interpretation Act 1954* definition to ensure that the referrals made by the States relate to the same category of relationship.⁶⁴

7.4 MEANING OF ‘FINANCIAL MATTERS’

Financial matters, in relation to de facto partners, means all or any of –

- the maintenance of de facto partners;
- the distribution of the property of de facto partners; and
- the distribution of any other financial resources of de facto partners, including prospective superannuation entitlements or other valuable benefits of or relating to de facto partners (**clause 3**).

⁶² Hon Daryl Williams MP, Attorney-General, Transcript of Interview, 8 November 2002, <http://www.ag.gov.au/www/attorneygeneralhome.nsf/Web+Pages/61648B55DA46065CCA256C6D0078BD83?OpenDocument>.

⁶³ Section 32DA of the *Acts Interpretation Act 1954*.

⁶⁴ Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), *Explanatory Notes*, p 5.

As noted above, Part 19 of the *Property Law Act 1974* does not provide for spousal maintenance, unlike the *Family Law Act 1975*.

7.5 COMMENCEMENT AND TERMINATION OF REFERENCE

The Bill will commence on proclamation (**clause 2**). This ensures that the referral will occur only after any proposed amendments to the *Family Law Act 1975* are considered adequate.⁶⁵

The reference can be terminated at any time by proclamation of the Governor (**clause 5**).

8 POSITION OF OTHER STATES IN RELATION TO REFERRAL

Referral legislation, in the same terms as the current Bill, was passed by the New South Wales Legislative Assembly on 16 September 2003.⁶⁶

Similar legislation has not yet been introduced in the remaining States. To date, only South Australia has indicated that it will not refer power. Western Australia, which is in a special position in having its own state Family Court, will not refer power.⁶⁷

9 KEY CONSIDERATIONS FOR A REFERRAL OF POWER

9.1 ADVANTAGES OF REFERRAL⁶⁸

- A referral of power does permit change, if the referral is seen not to achieve desirable outcomes.

⁶⁵ Hon R J Welford MP, Attorney-General and Minister for Justice, Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 9 September 2003, pp 3274-3275, p 3275.

⁶⁶ Commonwealth Powers (De Facto Relationships) Bill 2003 (NSW). The Bill is currently before the Legislative Council.

⁶⁷ Hon R J Debus, Attorney-General and Minister for the Environment, Commonwealth Powers De Facto Relationships Bill 2003 (NSW), Second Reading Speech, Legislative Assembly, *New South Wales Parliamentary Debates*, 16 September 2003, <http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/hansard>.

⁶⁸ 'Law and Resolution of De Facto Property Disputes', Research Bulletin 9/96, p 37.

- A referral is more feasible than seeking an amendment to the Constitution by referendum, as historically, most referendums have failed.
- It is undesirable for de facto couples in one State to have a different set of rights and obligations to couples in another State.⁶⁹ It is also more likely that citizens will have a better understanding of the basic principles which affect de facto relationships if there is uniform legislation at a federal level.⁷⁰
- If, instead of referral, the States agreed to enact and maintain uniform legislation, process delays could result in legislative anomalies. Success of the uniform legislation would depend upon a high degree of continuing co-ordination.⁷¹
- Referral will overcome the effect of *Re Wakim* by allowing both child and property issues associated with de facto relationship breakdowns to be dealt with by the Family Court, thereby reducing duplication of proceedings, costs, and the stress accompanying relationship breakdowns.⁷²
- Referral will allow for the division of superannuation interests between separating de facto spouses in property settlement proceedings.

9.2 DISADVANTAGES OF REFERRAL⁷³

- A reference of powers may be revoked by a State generally or by reason of the way in which it may be framed.
- The Commonwealth may delay legislating until most or all of the States have referred their powers. To some extent, and in comparison to the 1995 Bill, this concern is alleviated by Part 19 of the *Property Law Act 1974* which will continue to apply to de facto couples in Queensland until the referral under the current Act takes effect.
- If only some States refer power, or the reference of power is not coherent, uniformity will not be achieved and threshold jurisdictional matters will have to be resolved in many cases.
- If, as has been indicated, the Commonwealth legislation enacted upon the referral does not extend to same-sex de facto couples, the financial matters of separating

⁶⁹ QLRC Working Paper 1992, p 23.

⁷⁰ QLRC Working Paper 1992, p 22.

⁷¹ Hon N J Newell MP, Second Reading Speech.

⁷² Hon R J Welford MP, Second Reading Speech, p 3275.

⁷³ 'Law and Resolution of De Facto Property Disputes', Research Bulletin 9/96, p 37.

heterosexual and same-sex de facto couples in Queensland will be regulated by different statutory regimes.

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