

Property Law and Another Act Amendment Bill 2009

Explanatory Notes

Objectives of the Bill

The objectives of this Bill are to:

- amend the *Property Law Act 1974* (PLA) to clarify the relationship and operation of Part 19 of the PLA with the *Family Law Act 1975* (FLA), following the Commonwealth Parliament's acceptance of the referral of power from the Queensland Parliament for financial matters arising from the breakdown of de facto relationships; and
- amend the *Duties Act 2001* (DA) to clarify the relationship and operation of the DA with the FLA, following the Commonwealth Parliament's acceptance of the referral of power from the Queensland Parliament for financial matters arising from the breakdown of de facto relationships.

Reasons for the objectives of the Bill and how they will be achieved

Up until 1 March 2009, de facto couples who separated in Queensland had to access two different jurisdictions to have disputes resolved. Disputes about the division of property were dealt with in Queensland courts under Part 19 of the PLA and disputes about children were dealt with in Federal family law courts under the FLA. In addition, separating de facto couples in Queensland, did not have the opportunity to seek spousal (as contrasted to parental) maintenance, seek orders to divide superannuation or access the counselling and mediation services supporting the Federal family law jurisdiction.

In 2003, the Queensland Parliament passed the *Commonwealth Powers (De Facto Relationships) Act 2003* (the Referral Act). The Referral Act refers to the Commonwealth the power about financial matters arising from the break down of de facto relationships. The Referral Act commenced on 24 October 2008.

The Commonwealth Government has accepted the referrals of power from all States (except Western Australia and South Australia who have not yet referred powers to the Commonwealth) for financial matters arising from the breakdown of a de facto relationship. The *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (the De Facto Property Bill) amended the FLA to take up this referral of power. The De Facto Property Bill was passed by both Houses of the Commonwealth Parliament on 10 November 2008. The amendments in the De Facto Property Bill commenced on 1 March 2009.

The key effect of the Commonwealth taking up the referral from Queensland is that from 1 March 2009, the Queensland legislation relating to financial matters arising from a de facto relationship breakdown (most of Part 19 of the PLA) will be excluded from operation. De facto partners whose relationship breaks down after 1 March 2009 must apply for a property division under the FLA and can no longer apply under the PLA.

The significant advantages of the Commonwealth taking up the referral from Queensland are:

- (a) the provision of a predominantly nationally consistent financial settlement regime, to minimise jurisdictional disputes and uncertainties that sometimes impede settlement of these matters under State and Territory law;
- (b) the Federal family law courts have experience in relationship matters and have procedures and dispute resolution mechanisms more suited to handling family litigation;
- (c) the relevant Federal family law courts will hear both financial and child-related matters arising between separated de facto couples together; and
- (d) the relevant Federal family law courts may make orders relating to superannuation splitting, orders relating to the maintenance of a party, orders about the bankruptcy of a party and orders binding third parties in related proceedings.

The new provisions in the FLA will cover the field in relation to financial matters following a de facto relationship breakdown, so that most of the provisions in the PLA will not apply to de facto relationships. However, there are some provisions that will continue to apply and these include:

- (a) the operation of Part 19 to de facto relationships that broke down prior to 1 March 2009 (except where the couple have chosen to opt into the FLA);
- (b) cohabitation agreements defined under section 264 of the PLA that do not refer to financial matters following a relationship breakdown;
- (c) declarations under section 280 or Division 5 of Part 19 of the PLA that are not made for the purposes of the resolution of financial matters following a relationship breakdown; and
- (d) the operation of Part 19 to those de facto relationships that broke down in a State that has not referred the power for financial matters following a de facto relationship breakdown to the Commonwealth and the geographical requirements in the FLA do not allow an application to be made under the FLA. An application may still be made under Part 19 of the PLA.

The Bill amends Part 19 of the PLA to clarify the relationship between the FLA and the PLA and to also clarify the operation of Part 19 since the new provisions of the FLA commenced. The Bill also includes a provision that will resolve any jurisdictional disputes that may arise between the PLA and the FLA.

The Bill also amends the *Duties Act 2001* (the DA) to clarify the current exemptions on certain dutiable transactions arising from the breakdown of de facto relationships, which will now fall under the duty exemptions in the FLA.

Estimated Cost for Government Implementation

The costs associated with the implementation of the Bill will be met within existing resources.

Consistency with Fundamental Legislative Principles

There are minor differences between the provisions of the PLA and FLA that may amount to a slight reduction in the rights of Queensland de facto couples (for example, stricter procedural requirements to make a binding financial agreement and the distinction in the definition of ‘child’). However, it is considered the significant advantages for de facto couples to access the Federal family law jurisdiction greatly outweigh these minor differences.

Given that Part 19 of the PLA will continue to apply to those de facto relationships not covered by the amendments to the FLA, there will not be any reduction in the rights of Queenslanders.

Consultation

The Chief Justice of Queensland, the Chief Judge of the District Court, the Chief Magistrate, Legal Aid Queensland, Queensland Law Society, Bar Association of Queensland, Family Law Practitioner's Association Queensland, Queensland Public Interest Clearing House, Women's Legal Service, National Association of Community Legal Centres and Action Reform Change Queensland have been consulted on the proposed amendments to the PLA and DA.

Is the Bill substantially uniform or complementary with Commonwealth or another State's legislation?

The PLA and the DA are not Acts that are uniform or complementary with the Commonwealth or another State's legislation.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Act to be the *Property Law and Another Act Amendment Act 2009*.

Part 2 Amendment of Property Law Act 1974

Clause 2 states that this part amends the *Property Law Act 1974* (PLA).

Clause 3 amends the PLA by inserting a new section 255A (Relationship of this part with the Family Law Act in relation to particular financial matters).

New subsection 255A(1) states that by virtue of the *Commonwealth Powers (De Facto Relationships) Act 2003* the Queensland Parliament has referred to the Commonwealth Parliament the power about financial matters arising from a de facto relationship break down and sets out the terms of this referral.

New subsection 255A(2) states if the new provisions of the *Family Law Act 1975* (FLA) apply to a de facto relationship, then part 19 of the PLA can no longer apply to that de facto relationship.

New subsection 255A(3) states that if the new provisions of the FLA do not apply to a de facto relationship, then part 19 of the PLA will continue to apply to that de facto relationship.

Clause 4 amends section 257 (Application of pt 19) to insert two new subsections.

New subsection 257(3) confirms that part 19 does not apply to a de facto relationship to the extent that the FLA will now apply to that de facto relationship.

New subsection 257(4) clarifies any possible jurisdictional issue that may arise in circumstances where an application about a de facto relationship has been made to a court exercising jurisdiction under the PLA and another application has been made to a court having jurisdiction under the FLA about the same or related matter. This new subsection provides that the court exercising the PLA jurisdiction must stay their proceeding until the Commonwealth proceeding is finally dealt with.

Clause 5 amends section 259 (Definitions for pt 19) to include a new definition for '*Commonwealth Act*'. Commonwealth Act means the *Family Law Act 1975* (Cwth).

Clause 6 amends section 285 (Not affected by other rights) to clarify the definition of the word "law" by stating that it does not include a Commonwealth Act (that is, the *Family Law Act 1975* (Cwth). The amendment to this definition is to overcome a jurisdictional issue that may arise by virtue of section 109 of the *Commonwealth of Australia Constitution Act*. Section 109 of the *Constitution* is relevant because the amendments to the FLA will provide that the Commonwealth will have

jurisdiction over de facto couple financial matters arising from a relationship breakdown.

Clause 7 amends Schedule 6 (Dictionary) to insert the new definition of 'Commonwealth Act' for part 19, see section 259.

Part 3 Amendment of Duties Act 2001

Clause 8 states that this part amends the *Duties Act 2001*.

Clause 9 amends section 424 (Exemption – matrimonial and de facto relationship instruments) to omit the note and to insert three new notes to clarify the operation of section 424 following the commencement of the amendments to the FLA by referring to the relevant sections in the FLA where the exemption provisions are found.

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