

# NICHOLE'S NEWSLETTER

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Special de facto edition - November 2008

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## New de facto laws

Significant changes will be made to family law legislation regarding de facto property disputes over the coming months.

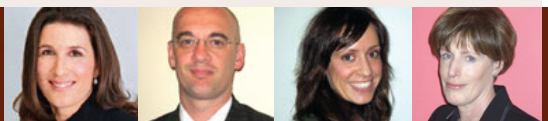
On 10 November 2008, the Federal Parliament passed the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act*, which will introduce a new Part VIIIAB to the Family Law Act 1975 ('FLA') to deal with de facto property disputes. Currently such disputes are dealt with exclusively by state courts under state law. The new Part VIIIAB will put these matters under the jurisdiction of the Family Court and the federal Family Law Act 1975. This Federal Act will come into force upon receiving the Royal Assent; which is not scheduled but predicted to take place sometime in December. The key parts of the new Federal Act that will introduce Part VIIIAB and Family Court jurisdiction over de facto financial matters will commence on either 'a day to be fixed by Proclamation', or else 6 months after the Act receives the Royal Assent if no day is fixed. Therefore while nothing is certain as yet, we can expect Part VIIIAB to commence sometime before July 2009 if the Royal Assent is given in December 2008.

In Victoria the new Relationships Act 2008 ('RA') will also commence on 1 December 2008, to replace Part IX Property Law Act 1958 ('PLA') which previously governed such disputes.

These new laws will substantially change the courts' approach de facto property disputes, particularly by introducing broader provisions for property division and maintenance. This special edition of our newsletter is dedicated to outlining key aspects of the new laws to keep an eye out for they are introduced.

## Dates to keep in mind!

- Until 1 December 2008, the PLA Part IX governs de facto property matters.
- After 1 December 2008, the RA will govern de facto property matters.
  - On this date, all rights under PLA will become rights under RA, except where parties have made an application for orders under PLA and this has not yet been determined.
- Once the Part VIIIAB commences (currently uncertain but tentatively predicted to be around June 2009):
  - de facto relationships breaking down BEFORE the commencement date will be governed by RA (i.e. state law)
  - de facto relationships breaking down AFTER the commencement date will be governed by Part VIIIAB FLA.
  - financial agreements made under state law (PLA or RA) before the commencement date, and where the couple are still together as of the commencement date, will generally be treated as Part VIIIAB financial agreements.



## What matters will come under what laws?

Currently de facto property matters come under state jurisdiction. Queensland, New South Wales, Tasmania and Victoria have referred this power to the Federal Government, and the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* has been drafted in response to this referral. Therefore in Victoria, de facto matters will be dealt with under state law (*PLA* and *RA*) until the new Federal Part VIIIAB commences.

### Vic law until Part VIIAB commences

The *RA* will replace and repeal Part IX *PLA* which currently regulates de facto property disputes in Victoria. This will be a straight replacement of rights: any rights that parties currently have under Part IX *PLA* will become rights under *RA* on 1 December 2008. The only exception here is that applications for court orders under Part IX *PLA* that have been made but not determined before 1 December 2008 will continue to be dealt with under the *PLA*.

### Vic law after Part VIIIAB commences

Once Part VIIIAB commences, this will take precedence over state law under s109 of the Australian Constitution. However aspects of the *RA* that are not covered by Part VIIIAB will still be enforceable. In particular this means that provisions in the *RA* regarding 'caring relationships' (outlined

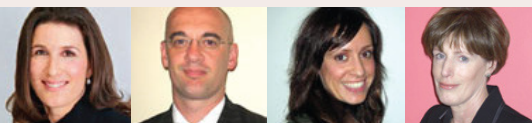
below) will still be enforceable; such relationships are excluded from Part VIIIAB as they were not included in the state's referral to the Commonwealth. Likewise, *RA*'s provisions regarding the domestic register will remain enforceable.

### Relationships that break down before Part VIIIAB commences

Part VIIIAB will only automatically apply to de facto relationships that break down after Part VIIIAB commences. Therefore, relationships that breakdown after 1 December 2008 and before Part VIIIAB commences will come under *RA*. However, parties of relationships that broke down before the commencement day may choose for Part VIIIAB to apply to their relationship. Parties are only able to make such choice if there are no state court orders or financial agreements dealing with their financial matters, and their choice is unconditional. This choice must be made in writing and signed, and include certification that both parties received independent legal advice regarding the advantages and disadvantages of making this choice. The choice is irrevocable; however a court may set it aside if satisfied that doing so is just and equitable having regard to the circumstances in which the choice was made.

### Non-referring states' laws after VIIAB is introduced

As the Commonwealth's power to enact



Part VIIIAB is contingent upon state referral, the legislation will generally only be available where at least one of the parties is an ordinary resident in a state that has made this referral (a 'participating state'). To avoid forum-shopping, Part VIIIAB will also require that parties either:

- have been ordinary residents in the participating state for at least one third of their relationship;
- were ordinary residents in the participating state when the relationship broke down; or
- the applicant has made substantial contributions to the parties' property or welfare in a participating jurisdiction.

Therefore couples who began cohabitation in a non-participating state may access the new Part VIIIAB if they move to a participating state for a substantial time.

Of course, non-participating states may later refer their de facto property power to the Commonwealth. If so, Part VIIIAB will only automatically apply to relationships in these states that break down after such referral. However, again, parties to relationships that break down before such referral may choose for Part VIIIAB to apply to their relationship. This choice must be made through the same process as outlined above for relationships that breakdown in participating states before Part VIIIAB commences.

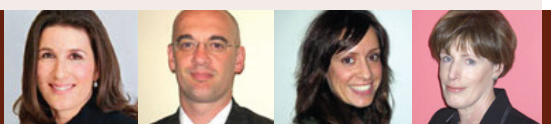
## **Domestic register under the RA**

Part 2.2 *RA* creates a Relationships Register for parties in domestic relationships in Victoria. This will be maintained by the Registrar of Births, Deaths and Marriages. Registration will provide conclusive proof of the existence of a domestic relationship for legal purposes. Same-sex couples, who are not able to marry under federal law, may also wish to register their relationship as a sign of public commitment to each other.

## **'Caring' relationships under the RA**

Under the *RA*, a domestic relationship for the purposes of the Relationships Register and financial 'relationships' agreements can include couples where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other. This is irrespective of the parties' genders and whether they live under the same roof, but expressly excludes where one party provides care for a fee or reward, or on behalf of another person or organization.

This extends the availability of the Relationship Register and financial agreements to relationships that are



not marriage-like but rather 'caring' - for example where a person's child, friend or even housekeeper provides substantial care for them for no reward or fee. The property implications of such relationships were previously dealt with under trust and equity law.

It should be noted that these 'caring' relationships are not included in the domestic relationships definition for the purposes of the *RA's* property division and maintenance provisions in Part 3.3 - however registered relationships are. Therefore parties in a 'caring' relationship will be able to access *RA's* Part 3.3 where they have registered this relationship, but not otherwise.

### *Relationships Amendment (Caring Relationships) Bill 2008*

As the *RA* currently standards, there is ambiguity regarding the link between general domestic relationships and these caring relationships, and determining what law will apply to each. However on 12 November 2008 the Legislative Assembly moved the second reading of the *Relationships Amendment (Caring Relationships) Bill 2008*. This Bill clarifies the *RA* by distinguishing between marriage-like domestic relationships and caring relationships.

The Bill clearly provides that 'caring partners' will only be able to apply for

property and maintenance orders if their relationship was registered. It also provides that relationship agreements can only be entered by caring partners in contemplation of, during or after a registered caring relationship. Under the current *RA*, parties do not necessarily have to register their relationship before entering a relationship agreement.

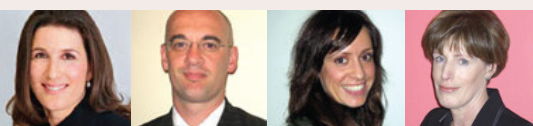
This *RA* Amendment Bill will also provide that before registering a caring relationship, caring partners must each obtain a certificate of independent legal advice regarding the effect, and advantages and disadvantages of registering the relationship. This will provide extra protection to vulnerable people such as the elderly or disabled, who may otherwise register their relationship with their carer against their best interests.

Finally, the *RA* Amendment Bill will also clarify that caring relationships may exist between family members.

As the Victorian Parliament are still considering the *RA* Amendment Bill, there is no way of knowing if and when it will be passed. If passed, the Bill provides that it should commence no later than 1 December 2009.

### *Caring Relationships and Federal Law*

These caring relationships were not included in the states' referral of power



to the Commonwealth, therefore are not covered by the new federal Bill or Part VIIIAB. Part VIIIAB expressly excludes domestic relationships in which parties are related to each other. This means that caring relationships will not attract any of the new federal law provisions under Part VIIIAB. However, it also means that the aspects of *RA* regarding caring relationships will continue to operate when the new federal law is passed, as there will be no overlap between the *RA* and Part VIIIAB here.

## Same sex couples

Both of the new laws recognise and apply to same-sex de facto relationships.

The *RA* will recognise a child adopted by a same-sex couple as being a child of this relationship; but makes no provision for such recognition for children born to one of the partners through assisted reproductive technology.

Part VIIIAB will take a broader approach to this. Regardless of the de facto parties' genders, Part VIIIAB will recognise that a child is of the de facto relationship where he/she is:

- adopted by both of the parties, or by one of the parties with the other's consent
- born to a party of the relationship

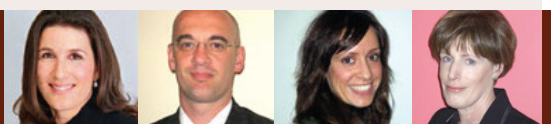
as a result of assisted reproductive technology which was carried out with the other party's consent

## Property division

Both of the new laws provide that courts should divide the de facto couple's property through approaches similar to that currently used for marriage couple's property division under the *FLA*. Both of the new laws guide the courts to consider:

- the parties' direct and indirect financial and non-financial contributions to the parties' property and financial resources;
- the parties' contributions to the welfare of the other party or their children (including contributions made as a homemaker or parent);
- & other matters similar to those currently outlined in s75(2) of *FLA* for married parties' property division e.g. the parties' income, property and financial resources, financial needs and obligations, age and state of health, responsibilities to support
- other people, the length of relationship, and the extent to which each party has contributed to the other's financial resources and earning capacity.

The *RA* further directs the court to consider the nature and duration of the domestic



relationship.

Part VIIIAB further directs the court to consider any other order made under the *FLA* or *Child Support (Assessment) Act* that would affect the parties or their child/ren, and the effect of the property order on the parties' earning capacity.

The *RA* does not give the court the power to make orders to split superannuation interests.

## De facto maintenance

The new laws significantly change existing de facto legislation.

### Maintenance under the *RA*

Under the *RA*, maintenance will only be available where the applicant is unable to support his/herself because of circumstances arising out of the de facto relationship e.g. where the applicant's earning capacity has been adversely affected by the relationship because he/she left paid employment to care for the couple's children. Therefore maintenance will not be available where the applicant is unable to support him/herself for reasons not related to the relationship e.g. poor health.

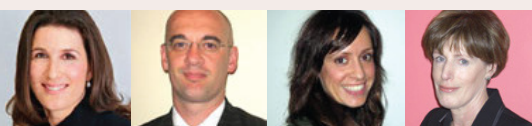
In determining whether to make an order for maintenance under the *RA*, the court must consider a list of factors very similar

to those provided in s 75(2) of the *FLA* for spousal maintenance orders e.g. the parties' income, property and financial resources, financial needs and obligations, age and state of health, responsibilities to support other people, the length of relationship, and the extent to which each party has contributed to the other's financial resources and earning capacity.

### Maintenance under Part VIIIAB

The terms providing for de facto maintenance applications and orders under Part VIIIAB almost exactly replicate those currently in force regarding spousal maintenance. Accordingly de facto maintenance may be ordered where the respondent is able to pay, and where the applicant is unable to support him/herself due to his/her care of a child of the relationship, age, physical or mental incapacity to gain appropriate employment, or any other adequate reason. As such, maintenance will be available in broader circumstances under Part VIIIAB than the *RA*.

Again, in determining whether to make an order for maintenance under Part VIIIAB, the court must consider a list of other factors replicating those provided in s 75(2) for spousal maintenance orders, outlined above.



## Financial agreements

### Under the *RA*

The *RA* provides that parties may enter a 'relationship agreement' regarding financial matters before, during, or after co-habitation. The court cannot make any property orders that are inconsistent with the terms of an enforceable relationship agreement. The *RA* largely leaves these agreements to be made and dealt with in accordance to the law of contract.

### Under Part VIIIAB

Division 4 of Part VIIIAB will provides for binding financial agreements (Part VIIIAB financial agreements) between parties to a de facto relationship. These can be made before, during or after cohabitation. The law for Part VIIIAB financial agreements will largely replicate that currently in the *FLA* for spousal financial agreements e.g. provisions requiring separation declarations and specific criteria relating to maintenance, and provisions regarding termination of agreements, circumstances in which the court can set aside agreements, and validity and enforceability of agreements.

If a de facto couple have entered a financial agreement under state laws in a participating state before Part VIIIAB's commencement date, then upon this commencement date their financial agreement will become a Part VIIIAB agreement provided the couple have not

separated or married.

If a de facto couple have entered a financial agreement under state laws in a non-participating state before Part VIIIAB's commencement date, and before the breakdown of the relationship the couple move to a participating state for a substantial part of their relationship or their state becomes a participating state, then their agreement will become a Part VIIIAB agreement.

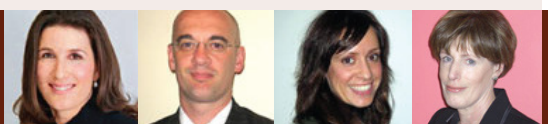
### Procedural requirements

Agreements under both *RA* and Part VIIIAB *FLA* must comply with criteria similar to that currently required by *FLA* financial agreements, including that the agreement:

- be in writing;
- include certification of independent legal advice regarding the effect of the agreement and advantages and disadvantages; and
- include statements by the parties that such advice has been received.

This is not expressly required by the *RA*; however as state financial agreement will become Part VIIIAB agreements upon Part VIIIAB's commencement, this provision should be included to ensure complete compliance with Part VIIIAB.

- Recall that the Full Family Court in *Black and Black* [2008] FLC 93-357 held that these requirements must be strictly adhered to.



## Superannuation

Under the *RA*, de facto couple's superannuation interests will continue to be treated as a financial resource, as opposed to property. The court can only make orders in regard to interests in property under the *RA*, so splitting orders are not possible here. However, in making these orders, courts may have regard to the parties' property and financial resources, and their contribution and entitlements to these. Therefore property orders under the *RA* will be able to involve adjustments to accommodate superannuation interests of the parties, but will not be able to split these interests.

Part VIIIAB will therefore significantly extend state law, as it will treat de facto couple's superannuation interests as 'property', as currently occurs for married couples.

This will allow the court to make splitting orders to divide parties' superannuation interests. The introduction of Part VIIIAB increases the likelihood that a party's superannuation interests will be subject to multiple splitting orders e.g. if a party married and divorced then entered a de facto relationship which broke down, and both of these relationships gave rise to splitting orders. Part VIIIAB establishes that in the case of multiple splitting orders, the 'splits' should occur in the order of the

relationships. Therefore if 50:50 splits were ordered in the above example, the party's ex-spouse would get half of the party's original superannuation interests, and the ex-de facto would get one quarter.

Part VIIIAB agreements can include provisions regarding superannuation interests. These provisions are to be treated as a superannuation agreement under Part VIIIAB, and will have effect only in accordance with Part VIIIAB.

## Interrelation of Part VIIIAB and Part VII proceedings

The new Bill outlines when and how matters arising under Part VIIIAB will be relevant to those arising under Part VIII and vice versa. These provisions are quite complicated. In summary, orders or agreements made under Part VIIIAB by a party to Part VIII proceedings will be relevant in consideration of orders under these proceedings... and vice versa. Moreover, new de facto partners of parties to Part VIII proceedings can be joined to such proceedings, and new de facto partners and marriage spouses of parties to Part VIIIAB proceedings can be joined to those proceedings.

