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NEW DE FACTO LAWS THROUGHOUT MOST OF AUSTRALIA

From 1 March 2009 new laws were introduced into the *Family Law Act 1975*, bringing the division of assets following the breakdown of de facto relationships under the jurisdiction of the Family Court of Australia. The new laws do not yet apply in South Australia or Western Australia. If a couple living in a de facto relationship separate after 1 March 2009 and they cannot agree about how to divide their assets, their case will now be heard by the Family Court of Australia, or another Court with family law jurisdiction. This represents an enormous change to the law in this area, as anyone whose de facto relationship came to an end before 1 March 2009 must rely on State laws and State Courts to decide their property settlement.

A 'de facto relationship' is one in which a couple, whether heterosexual or same sex, live together on a genuine domestic basis, but are not married or related by family. To decide whether a couple is living in a de facto relationship the Court will have regard to all the circumstances of the relationship, including but not limited to; whether they have a shared residence, the length of the relationship, the degree of financial dependence between the couple, whether they own any property together and whether the couple is known publicly as a 'couple'. Before the

laws will apply a de facto couple must have lived together for at least two years, or have a child together, or have made a substantial contribution to the assets owned by their former partner.

Before the changes to the law, State Courts deciding property settlements were required to divide assets in a way that was "just and equitable" based on the contributions each party made during the relationship. The Court could not take into account the circumstances each party would face in the future. This was regardless of whether one party was to have responsibility for the care and housing of young children or if they earned substantially less than their former partner. The new laws give couples who separate after living in a de facto relationship practically the same status regarding their property settlement as couples who were married and have separated. From 1 March 2009, upon the breakdown of a de facto relationship, what each de facto partner needs in the future, particularly in relation to the care of children, disparity in income, age and state of health will be very relevant in determining how assets will be divided. The new laws also expand the circumstances in which maintenance can be paid and Superannuation can now be "split" as part of a property settlement.

Couples who separated before 1 March 2009 must still use the State laws and Court system, unless they agree to "opt in" to the new system. Parties cannot opt in if they already



have a Court Order about their property division from a State Court or they have entered into a Financial Agreement about the division of their assets under State law. Opting in is not compulsory and can only be done by agreement between the former de facto couple. Opting in to the new system may have very serious consequences and lead to a very different result from the one which may be made by a State Court. The parties must sign a document agreeing to opt in to the system and must obtain independent legal advice about this choice. The solicitor giving the advice must sign a certificate confirming that the person choosing to opt in has been given legal advice about the advantages and disadvantages of choosing to enter the new system.

Please note that we do not yet know exactly how the laws will be applied by the Family Courts. We will provide information in our upcoming Newsletters about how the new laws are being applied as soon as the Family Court begins publishing decisions about de facto property settlements. If you need assistance please do not hesitate to contact our Family Law Team on (02) 4929 9333.



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