

# **Property Law (Amendment) Bill**

No.

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By Authority F D Atkinson Government Printer Melbourne



# LEGISLATIVE COUNCIL

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Read 1° 12 August 1987

*(Brought in by the Honourable J. H. Kennan)*

## A BILL

to amend the *Property Law Act* 1958 to provide for the resolution of disputes between de facto partners about real property and for other purposes.

### **Property Law (Amendment) Act 1987**

The Parliament of Victoria enacts as follows:

#### **Purpose.**

1. The main purpose of this Act is to amend the *Property Law Act* 1958 to provide for the resolution of disputes between de facto partners about real property.

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#### **Commencement.**

2. This Act comes into operation on a day to be proclaimed.

#### **New heading and Part IX inserted in Property Law Act.**

3. After section 274 of the *Property Law Act* 1958 insert—

No. 6344  
Reprinted to No.  
9858.  
Subsequently  
amended by Nos.  
9967, 10087,  
10096, 10167,  
16/1986, 59/  
1986, 110/1986,  
119/1986 and  
128/1986.

**“PART IX—REAL PROPERTY OF DE FACTO PARTNERS****Division 1—Preliminary”****Definitions.**

‘275. In this Part—

“Applicant” includes a cross-applicant. 5

“Child” in relation to de facto partners means—

(a) a child born as a result of sexual relations between the partners; or

(b) a child of the woman of whom her de facto partner is presumed, under Part 2 of the *Status of Children Act 1974*, to be the father; or 10

(c) a child adopted by the partners.

“De facto partner” means—

(a) in relation to a man, a woman who is living or has lived with the man as if she were his wife although not married to him; and 15

(b) in relation to a woman, a man who is living or has lived with the woman as if he were her husband although not married to her.

“De facto relationship” means the relationship between de facto partners of living or having lived together as if they were husband and wife although not married to each other. 20

“Financial resources” includes—

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided; and 25

(b) property which, under a discretionary trust, may become used for the purposes of or vested in one or both of the de facto partners; and

(c) property, the alienation or disposition of which is wholly or partly under the control of one or both of the de facto partners and which is lawfully capable of being used for the purposes of one or both of the de facto partners; and 30

(d) any other valuable benefit.

“Property” includes real and personal property and any estate or interest in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other thing in action, and any right with respect to property.’. 35

**Application.**

“276. This Part applies to a person who has been a de facto partner whether before or after the commencement of the *Property Law (Amendment) Act* 1987 but does not apply to a person who was a partner in a de facto relationship which ended before the commencement of that Act.”.

**Other rights of de facto partners not affected by this Part.**

“277. Nothing in this Part affects any right of a de facto partner to apply for any remedy or relief under this Act or any other Act or any other law.”.

**Declaration of interests in real property.**

“278. (1) In proceedings between de facto partners with respect to existing title or rights in respect of real property, a court may declare the title or rights, if any, that a de facto partner has in respect of the property.

(2) The court may make orders to give effect to the declaration, including orders about possession.”.

**Division 2—Orders for adjustment of property interests****Application for orders under this Division.**

“279. (1) A de facto partner may apply to a court for an order for the adjustment of interests with respect to the real property of one or both of the de facto partners.

(2) An application may be made whether or not any other application for any remedy or relief has been or may be made under this Act or any other Act or any other law.”.

**Conditions for making of order—living within State, etc.**

“280. A court may make an order under this Division only if it is satisfied—

(a) that one or both of the de facto partners lived in Victoria on the day on which the application was made; and

(b) that—

(i) both partners have lived together in Victoria for at least one third of the period of their relationship; or

(ii) substantial contributions of the kind referred to in section 285 (1) (a) or (b) have been made in Victoria by the partner making the application.”.

**Conditions for making of order—length of relationship, etc.**

“281. (1) A court may only make an order under this Division if it is satisfied that the de facto partners have lived together in a de facto relationship for a period of at least 2 years, except as provided by sub-section (2).

- (2) A court may make an order if it is satisfied—
- (a) that there is a child of the de facto partners; or
  - (b) that failure to make the order would result in serious injustice to the de facto partner who applied for the order and that partner—
- (i) has made substantial contributions of the kind referred to in section 285 (1) (a) or (b) for which the partner would otherwise not be adequately compensated if the order were not made; or
  - (ii) has the care and control of a child of the other de facto partner.”.

**Time limit for making applications.**

“282. (1) If de facto partners have ended their de facto relationship, an application to a court for an order under this Division must be made within 2 years after the day on which the relationship ended.

(2) A court may grant leave to a de facto partner to apply for an order at any time after the end of the period referred to in sub-section (1) if the court is satisfied that greater hardship would be caused to the partner applying if that leave were not granted than would be caused to the other partner if that leave were granted.”.

**Relevant facts and circumstances.**

“283. If a court is satisfied about the matters specified in section 280 (a) and (b), it may make or refuse to make an order because of facts and circumstances even if those facts and circumstances, or some of them, occurred before the commencement of the *Property Law (Amendment) Act 1987* or outside Victoria.”.

**Duty of court to end financial relationships.**

“284. So far as is practicable a court must make orders that will end the financial relationships between the de facto partners and avoid further proceedings between them.”.

**Order for adjustment.**

“285. (1) A court may make an order adjusting the interests of the de facto partners in the real property of one or both of them that seems just and equitable to it having regard to—

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- 5           (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property or to the financial resources of one or both of the partners; and
- 10          (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following:
- (i) A child of the partners;
- (ii) A child accepted by one or both of the partners into their household, whether or not the child is a child of either of the partners.

15          (2) A court may make the order whether or not it has declared the title or rights of a de facto partner in respect of the real property.”.

**Adjournment of application—likelihood of significant change in circumstances.**

20          “286. (1) A court may adjourn an application by a de facto partner for an order to adjust interests with respect to the real property of one or both of the de facto partners, if the court is of the opinion—

25          (a) that there is likely to be significant change in the financial circumstances of one or both of the partners and that it is reasonable to adjourn the proceedings having regard to the time when that change is likely to take place; and

              (b) that an order that the court could make with respect to the property if that significant change in financial circumstances occurs is more likely to do justice between the partners than an order that the court could make immediately.

30          (2) The court may adjourn the application—

              (a) at the request of either partner; and

              (b) until any time, before the end of a period specified by the court, that the partner requesting the adjournment applies for the application to be determined.

35          (3) Before a court adjourns an application it may make any order that it considers appropriate with respect to the property.

40          (4) In forming an opinion as to whether there is likely to be significant change in the financial circumstances of one or both of the de facto partners a court may have regard to any change in the financial circumstances of a partner that may occur because of a financial resource of one or both of the partners being vested in or used for the purposes of one or both of the partners.

              (5) Nothing in this section—

- (a) limits the power of the court to grant an adjournment in relation to any proceedings before it; or
  - (b) requires the court to adjourn any application in any particular circumstances; or
  - (c) limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of one or both of the partners.”.
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#### **Adjournment of application—proceedings in the Family Court.**

“287. (1) If proceedings in relation to the property of one or both of the de facto partners are commenced in the Family Court of Australia at any time before a court has made a final order to adjust interests with respect to the real property of one or both of the partners the court may adjourn its hearing.

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(2) If the hearing of the application has been adjourned, the applicant for the order may apply to the court for the hearing to proceed if the proceedings in the Family Court are delayed.

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(3) Nothing in this section limits the power of the court to grant or refuse an adjournment in relation to any proceedings before it.”.

#### **Deferment of order.**

“288. If a court is of the opinion that a de facto partner is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order under section 285 the court may defer the operation of the order until the date or the occurrence of the event specified in the order.”.

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#### **Effect of death of party on application.**

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“289. (1) If either party to the application dies before an application under section 285 is determined, the application may be continued by or against, the legal personal representative of the deceased party.

- (2) A court may make an order if it is of the opinion—
- (a) that it would have adjusted interests in respect of real property if the deceased party had not died; and
  - (b) that, notwithstanding the death of the deceased party, it is still appropriate to adjust those interests.
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(3) The order may be enforced on behalf of, or against the estate of the deceased party.”.

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#### **Effect of death of party on order.**

“290. If a party to an application under section 285 dies after an order is made against the party, the order may be enforced against the estate of the deceased party.”.

**Division 3—General****Powers of a court.**

291. (1) A court, in exercising its powers under Division 2, may do any one or more of the following:

- 5           (a) Order the transfer of real property;
- 10          (b) Order the sale of real property and the distribution of the proceeds of sale in any proportions that the court thinks fit;
- 15          (c) Order that any necessary deed or instrument be executed and that documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
- 20          (d) Order payment of a lump sum, whether in one amount or by instalments;
- 25          (e) Order that payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;
- 30          (f) Appoint or remove trustees;
- 35          (g) Make an order or grant an injunction—  
                 (i) for the protection of or otherwise relating to the real property of one or both of the parties to an application; or  
                 (ii) to aid enforcement of any other order made in respect of an application;  
                 or both;
- 40          (h) Impose terms and conditions;
- 45          (i) Make an order by consent;
- 50          (j) Make any other order or grant any other injunction to do justice.
- (2) A court may, in relation to an application under Division 2—  
30          (a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and  
35          (b) make any order or grant any remedy or relief under Division 2 in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.
- (3) This section does not take away any other power of the court under this or any other Act or any other law.”.

**Execution of instruments by order of a court.**

“292. (1) If—

- (a) a person has refused or neglected to comply with an order directing the person to execute a deed or instrument; or
- (b) for any other reason, a court thinks it necessary to exercise the powers conferred on it under this sub-section—

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do everything necessary to give validity and operation to the deed or instrument.

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(2) The execution of the deed or instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.”.

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**Orders and injunctions in the absence of a party.**

“293. (1) In the case of urgency, a court in the absence of a party may make an order or grant an injunction for either or both of the purposes specified in section 291 (1) (g).

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(2) An application under this section may be made orally or in writing or in any form the court considers appropriate.

(3) If an application under this section is not made in writing, the court must not make an order or grant an injunction unless it considers that it is necessary to do so because of the extreme urgency of the case.

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(4) The court may give any directions with respect to the filing, serving and further hearing of a written application.

(5) An order or injunction must be expressed to operate or apply only until a specified time or the further order of the court.

(6) The court may give directions with respect to—

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- (a) the service of the order or injunction and any other documents it thinks fit; and
- (b) the hearing of an application for a further order.”.

**Variation and setting aside of orders.**

“294. If, on the application of a person in respect of whom an order under section 285 has been made, a court is satisfied that—

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- (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance; or

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or

5 (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order—

10 the court may vary the order or set the order aside and, if it thinks fit, make a substitute order in accordance with Division 2.”.

#### **Transactions to defeat claims.**

‘295. (1) In this section “**disposition**” includes a sale and a gift.

15 (2) On an application for an order under Division 2 a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application or which, irrespective of intention, is likely to defeat any such order.

20 (3) The court may, without limiting section 291, order that any real property dealt with by an instrument or disposition referred to in sub-section (2) may be taken in execution or used or applied in, or charged with the payment of any sums payable under an order adjusting interests with respect to the real property of one or both of the parties or for costs as the court directs, or that the proceeds of a sale must be paid into court to abide its order.

25 (4) The court may order a party or a person acting in collusion with a party to pay the costs of any other party or of a purchaser in good faith or other person interested of and incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.’.

#### **Interests of other parties.**

35 “296. (1) In the exercise of its powers under Division 2 or 3, a court must have regard to the interests of, and must make any order proper for the protection of, a purchaser in good faith or other person interested.

(2) A court may order that a person be given notice of the proceedings or be made a party to the proceedings on the application

of the person or if it appears to the court that the person may be affected by an order under Division 2 or 3.”.

#### **Division 4—Jurisdiction**

##### **Courts having jurisdiction under this Part.**

“297. A person may apply to—

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- (a) the Supreme Court; or
- (b) the County Court; or
- (c) a Magistrates’ Court—

for an order or relief under this Part.”.

##### **Transfer of proceedings.**

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“298. (1) If proceedings are instituted in a court with respect to an interest in real property of a value in excess of the court’s jurisdictional limit, the court must transfer the proceedings to a court where the value is within the jurisdictional limit unless the parties agree to the first court hearing and determining the proceedings.

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(2) A court may transfer the proceedings under sub-section (1) of its own motion, even if the parties agree to the court hearing and determining the proceedings.

(3) Before transferring proceedings, the court may make any orders it considers necessary pending the disposal of the proceedings by the court to which the proceedings are transferred.

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(4) If proceedings are transferred to another court, that court must proceed as if the proceedings had been originally instituted in that court.

(5) Without prejudice to the duty of a court to comply with this section, failure by the court to comply does not invalidate any order of the court in the proceedings.”.

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##### **Suspension and transfer of proceedings.**

“299. If court proceedings are pending that have been instituted under this Part by or in relation to a person and it appears to the court that other proceedings instituted under this Part by or in relation to the same person are pending in another court having jurisdiction under this Part, the firstmentioned court—

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(a) may suspend the proceedings pending before it for such time as it thinks fit; or

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(b) may dismiss the proceedings.”.

**Courts to act in aid of each other.**

“300. The Supreme Court and the County Court and Magistrates’ Courts must act in aid of and be auxiliary to each other in all matters under this Part.”.

**5 Division 5—Miscellaneous**

**Enforcement of other orders, etc.**

“301. (1) If a court having jurisdiction under this Part is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Part (not being an order for the payment of money), the court may—

- (a) order the person to pay a penalty not exceeding 20 penalty units; and
- (b) require the person to enter into a bond, with or without sureties, for any reasonable amount the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such bond or until the end of 3 months, whichever first occurs; and
- (c) order the person to give to the court any documents the court thinks fit; and
- (d) make any other orders that the court considers necessary to enforce compliance with the order or injunction.

25 (2) Nothing in sub-section (1) affects the power of a court to punish a person for contempt of court.

30 (3) If an act or omission referred to in sub-section (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.

(4) For the purposes of section 5 of the *Crown Proceedings Act* 1958 a bond entered into pursuant to this section is to be treated as a recognizance.”.

**Regulations.**

35 (1) The Governor in Council may make regulations, for or with respect to any matter or thing required or permitted by this Part to be prescribed or necessary to be prescribed to give effect to this Part.

(2) A regulation may—

- (a) be general or may be restricted in operation as to time, place, persons or circumstances; and
- (b) apply differently according to different factors of a specified kind.”.





