



Speech by

Hon. M. FOLEY

MEMBER FOR YERONGA

Hansard 23 November 1999

PROPERTY LAW AMENDMENT BILL

Hon. M. J. FOLEY (Yeronga—ALP) (Attorney-General and Minister for Justice and Minister for The Arts) (12.56 p.m.): I move—

"That the Bill be now read a second time."

This Bill is long overdue and it is with very great pleasure that I introduce it today, thus honouring a Labor election promise. It was in 1987 that the High Court said, in the unanimous judgment in *Baumgartner v. Baumgartner* (1987) 164 CLR 137, that rules of equity often recognise that people can acquire rights in property although they may not legally own the property. The High Court held that the de facto husband was unsuccessful in his claim to sole beneficial title over property. All of the justices were of the view that the de facto husband held the house on a constructive trust for both parties, that is, joint ownership, because—

the de facto husband's conduct was unconscionable in that he refused to recognise the de facto wife's interest;

the parties pooled their earnings for the purposes of their joint relationship;

both their financial and non-financial contributions to acquiring the property, furniture and the making of their home together were for the purposes of that joint relationship.

The High Court said that there should be an equality of beneficial ownership at least as a starting point. From that starting point of equality, the court adjusted the entitlements to reflect the different financial contributions made by the parties during the relationship.

The application of the principles set out in *Baumgartner* to specific fact situations has proved to be no easy task. There are a number of important areas that require clarification, for example—

does it cover a claim over all the property of the former de facto spouse or only property to which the claimant has improved or contributed to?;

what conduct can be considered unconscionable?;

the extent to which there needs to be a pooling of resources for the benefit of the joint relationship;

whether the contributions to the joint relationship must relate to property and whether non-financial contributions alone could ever give rise to a successful claim.

The Queensland Law Reform Commission produced a final report—No. 44—in June 1993 on de facto relationships. It also recognised the need for reform in this area. The Law Reform Commission noted that the difficulties that exist without legislation are—

it can be very costly to establish an equitable title, as the de facto spouse did in *Baumgartner*;

there must be the application of intricate and sophisticated principles of equity;

relief must be sought under the law of contract or trusts or doctrines of unjust enrichment or unconscionable conduct, equitable lien estoppel or other—obscure—legal remedies;

this causes injustice to the person whose title equity would recognise if given the opportunity;

there is no predictable outcome and lawyers complain of difficulty advising clients, which results in a tendency to plead a case under every conceivable head of relief, longer court hearings and greater costs;

there is a large range of possible remedies and consequent uncertainty as to which remedy to pursue;

settlement prospects are affected and many parties forgo pursuing just claims.

It is for these reasons that all jurisdictions in Australia, except Queensland and Western Australia, have enacted legislation to cut through some of these difficulties and give better access to the law to the equitable owner. New South Wales has had this remedial legislation since 1984, Victoria since 1987 and the other jurisdictions since the early to mid 1990s. Tasmania introduced a Bill in early November of this year.

It is for these reasons that we are introducing the Property Law Amendment Bill 1999. It will mean that de facto couples can plan their financial future. It will mean that when their relationships break down there can be a just and equitable property distribution. Many people who cannot afford to have their interests recognised because of costs should be able to do so.

The growth in the number of couples living together in de facto relationships has been one of the significant recent changes in the structure of Australian family life. In 1991 9.7% of all Queensland couples were de facto couples. The Queensland figures are 1.3% above the national average.

This legislation will also make the courts accessible to everyone. All three levels of courts—the Supreme, District and Magistrates Courts—are given jurisdiction to hear and determine matters according to their monetary jurisdiction. Under the uniform civil procedure rules the parties can, by consent, confer unlimited monetary jurisdiction on the District and Magistrates Courts. The Supreme Court and District Courts alone will have power to make declarations about the existence or non-existence of a de facto relationship. This is consistent with the equitable jurisdictions of these courts. However, this will not preclude any of the courts, including the Magistrates Courts, from making a finding of fact on the evidence that a de facto relationship exists.

The legislation will apply to de facto relationships in a non-discriminatory way. The term "de facto relationship" is the relationship between two de facto spouses. A "de facto spouse" is either one of two persons, whether of the same or the opposite sex, who are living or have lived together as a couple. Two persons are considered a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other. Two persons are not a couple only because they are co-tenants. A court can make a property adjustment order only if—

the de facto spouses have cohabited for at least 2 years, or

there is a child of the de facto spouses under 18 years of age, or

the applicant has made substantial contributions to the property or financial resources of the de facto spouses or to family welfare and failure to make the order would result in serious injustice to the applicant.

For an adjustment of property interests and determining what is just and equitable, the court must consider both the financial and non-financial contributions made directly or indirectly by the de facto spouses or a child of the de facto spouses to both property and financial resources. People who are planning to enter into a de facto relationship, are in and wish to continue or plan to separate may enter into a binding cohabitation or separation agreement. The parties will be bound by the agreement unless—

it results in serious injustice between the de facto spouses or to a child of the de facto spouses;

if the circumstances have changed since making the agreement and it would be impracticable for it to be enforced; or

if the de facto spouses have revoked a term of the agreement in writing or by conduct.

The Bill also amends the Stamp Act to overcome disadvantages currently faced by de facto couples on transfers of property.

Mr DEPUTY SPEAKER (Mr D'Arcy): Order! I suggest the Minister incorporate the remainder of his speech. We are well over the time set down in the Standing Orders.

Mr FOLEY: I seek leave to incorporate the balance of my speech in Hansard.

Leave granted.

Exemptions from stamp duty are provided for transfers of motor vehicles and the principal place of residence between de facto couples during their relationship. Exemptions are also provided for any instruments that are executed on breakdown of the relationship if made under a court order, including a consent order.

This Bill seeks to do justice in a non-discriminatory way for a group of Queenslanders whose plight has been ignored for too long. It will be, however, of particular importance for women. Many a woman has found herself, on a relationship breakdown, left out in the cold with nothing to show for her many years of domestic contribution to a de facto relationship in which she has toiled and raised children because the house, car and bank accounts are in her de facto spouse's name. It is time for such injustice to be remedied. I commend the Bill to the House.