

South Australia

De Facto Relationships Act 1996

An Act to facilitate the resolution of property disputes arising on the termination of de facto relationships; and for other purposes.

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Legislative history

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *De Facto Relationships Act 1996*.

3—Definitions

In this Act—

certificated agreement—an agreement is a certificated agreement if—

- (a) the agreement contains a provision (the **warranty of asset disclosure**) under which each party warrants that he or she has disclosed all relevant assets to the other; and
- (b) the signature of each party to the agreement is attested by a lawyer's certificate and the certificates are given by different lawyers;

child of de facto partners means—

- (a) a child of which the de facto partners are the natural parents; or
- (b) a child of the female partner whose male partner is presumed to be the father of the child under an Australian law; or
- (c) a child adopted by the partners;

court means—

- (a) the Supreme Court; or
- (b) the District Court; or
- (c) if an application relates to property valued at \$80 000 or less, the Magistrates Court;

de facto partner means a person who lives in a de facto relationship and includes—

- (a) a person who is about to enter a de facto relationship; and
- (b) a person who has lived in a de facto relationship;

de facto relationship means the relationship between a man and a woman, who although not legally married to each other, live together on a genuine domestic basis as husband and wife;

lawyer means a person who is admitted as a barrister and solicitor of the Supreme Court and holds a current practising certificate;

lawyer's certificate means a certificate signed by a lawyer, and endorsed on an agreement, certifying that—

- (a) the lawyer explained the legal implications of the agreement to a party to the agreement, named in the certificate, in the absence of the other party to the agreement; and
- (b) the party gave the lawyer apparently credible assurances that the party was not acting under coercion or undue influence; and
- (c) the party signed the agreement in the lawyer's presence;

property of a person includes—

- (a) a prospective entitlement or benefit under a superannuation or retirement benefit scheme;
- (b) property held under a discretionary trust that could, under the terms of the trust, be vested in the person or applied for the person's benefit;

- (c) property over which the person has a direct or indirect power of disposition and which may be used or applied for the person's benefit;
- (d) any other valuable benefit.

4—Application of this Act

This Act does not apply to a de facto relationship that ended before the commencement of this Act.

Part 2—Cohabitation agreements

5—Cohabitation agreements

- (1) De facto partners may make an agreement (a *cohabitation agreement*) about—
 - (a) the division of property on the termination of the de facto relationship; or
 - (b) other financial matters related to the de facto relationship.
- (2) A cohabitation agreement must be—
 - (a) in writing; and
 - (b) signed by the de facto partners.

6—Cohabitation agreement enforceable under law of contract

A cohabitation agreement is subject to, and enforceable under, the law of contract.

7—Consensual variation or revocation of cohabitation agreement

- (1) A cohabitation agreement may be varied or revoked by a written or oral agreement.
- (2) However, if a cohabitation agreement is a certificated agreement, it may only be varied by a certificated agreement.

8—Power to set aside or vary cohabitation agreement

- (1) If a court is satisfied that the enforcement of a cohabitation agreement would result in serious injustice, the court may set aside or vary the agreement to avoid the injustice.
- (2) A court may exercise its powers under this section—
 - (a) on the court's own initiative; or
 - (b) on the application of either de facto partner.
- (2) However, a court cannot set aside or vary a cohabitation agreement under this section if—
 - (a) the agreement provides for the exclusion of the court's power to set aside or vary the agreement; and
 - (b) the agreement is a certificated agreement.

Part 3—Adjustment of property interests

9—Property adjustment order

- (1) After a de facto relationship ends, either of the de facto partners may apply to a court for the division of property.
- (2) However, an application for the division of property may only be made if—
 - (a) the applicant or respondent is resident in the State when the application is made; and
 - (b) the de facto partners were resident in the State for the whole or a substantial part of the period of the relationship; and
 - (c) the de facto relationship existed for at least three years or there is a child of the de facto partners.
- (3) An application for the division of property must be made within one year after the end of the de facto relationship unless the court, after considering the interests of both de facto partners, is satisfied that extension of this period of limitation is necessary to avoid serious injustice to the applicant.
- (4) An application for the division of property may be made or continued by or against the legal personal representative of a deceased de facto partner.
- (5) However, an application against the legal personal representative of a deceased de facto partner may only relate to property that is undistributed at the date of the application.

10—Power to make orders for division of property

- (1) On an application for the division of property, the court may make orders it considers necessary to divide the property of either or both the de facto partners between them in a way that is just and equitable.
- (2) For example, the court may make orders for—
 - (a) the transfer of property from one de facto partner to the other; or
 - (b) the sale of property and the division of the net proceeds between the de facto partners in proportions decided by the court; or
 - (c) the payment by one de facto partner of a lump sum to the other.

11—Matters for consideration by the court

- (1) In deciding whether to make an order for the division of property under this Part, and if so the terms of the order, the court—
 - (a) must consider the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to—
 - (i) the acquisition, conservation or improvement of property of either or both partners; or
 - (ii) the financial resources of either or both partners; and

- (b) must consider the contributions (including homemaking or parenting contributions) made by either of the de facto partners to the other partner or to children of the partners or either of them; and
 - (c) must have regard to the terms of any relevant cohabitation agreement; and
 - (d) may have regard to other relevant matters.
- (2) If a relevant cohabitation agreement—
- (a) is a certificated agreement; and
 - (b) provides for the exclusion of the court's power to set aside or vary the agreement,

an order for the division of property under this Part must be consistent with the terms of the agreement.

12—Duty of court to resolve all outstanding questions

In proceedings under this Part, the court must (as far as practicable) finally resolve questions about the division of property between the de facto partners and avoid further proceedings between them.

13—Small claims

- (1) If the aggregate amount claimed by the applicant on an application under this Part is \$6 000 or less, the application is a minor statutory proceeding¹.
- (2) To ascertain the amount claimed by an applicant on an application under this Part, all monetary amounts and the value of interests in property claimed must be aggregated.

Note—

- 1 A *minor statutory proceeding* includes a proceeding declared by statute to be a minor statutory proceeding. (See definition of *minor statutory proceeding* in section 3(1) of the *Magistrates Court Act 1991*.) The characterisation of a proceeding as a minor statutory proceeding means that (subject to certain rules stated in section 3 of the *Magistrates Court Act 1991*) the proceeding is to be dealt with under the special rules for minor civil actions prescribed in Division 2 of Part 5 of the *Magistrates Court Act 1991*.

Part 4—Miscellaneous

14—Transactions to defeat claims

- (1) If a court is satisfied that a transaction has been entered into to defeat, or has the effect of defeating, an order, or an anticipated order, for the division of property, the court may set aside the transaction and give consequential orders and directions.
- (2) A court may grant an injunction to restrain a person from entering into a transaction that might defeat an order, or an anticipated order, for the division of property.
- (3) In exercising its powers under this section, the court must have regard to all interests in the property to which the proceedings relate.

14A—Restriction on publication of proceedings

- (1) A person must not publish, by radio, television, newspaper or in any other way—
 - (a) a report of a proceeding, or part of a proceeding, under this Act that identifies or could tend to identify—

- (i) a party to the proceeding; or
 - (ii) a witness in the proceeding; or
 - (iii) a person who is related to, or associated with, a party to the proceedings or a witness in the proceeding, or is, or is alleged to be, in any other way concerned in the matter to which the proceeding relates; or
- (b) a list of proceedings under this Act identified by reference to the names of the parties to the proceedings.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) Subsection (1) does not apply in relation to—
- (a) the communication, to persons concerned in proceedings in a court or tribunal established under a law of the Commonwealth or a State or Territory, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or
 - (b) the communication of any pleading, transcript of evidence or other document to—
 - (i) a body that is responsible for disciplining members of the legal profession; or
 - (ii) a person concerned in disciplinary proceedings against a member of the legal profession before such a body; or
 - (c) the communication, to a body that grants legal aid, of any pleading, transcript of evidence or other document for the purpose of facilitating the making of a decision as to whether legal aid should be granted, continued or provided in a particular case; or
 - (d) the publishing of a report or notice in accordance with the direction of a court or tribunal established under a law of the Commonwealth or a State or Territory; or
 - (e) the publishing, under the authority of a court hearing proceedings under this Act, of a list of those proceedings identified by reference to the names of the parties to the proceedings; or
 - (f) the publishing of a report in a publication that—
 - (i) is genuinely intended primarily for use by the members of a profession; and
 - (ii) is a separate volume or part of a series of law reports or other publication of a technical nature; or
 - (g) the publishing of a report—
 - (i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or
 - (ii) to an individual who is a party to any proceedings under this Act, in connection with the conduct of those proceedings; or

- (iii) to a person who is a student, in connection with the studies of that person.
- (3) An offence against this section is an indictable offence.
- (4) Proceedings for an offence against this section must not be commenced except by, or with the written consent of, the Director of Public Prosecutions.

15—Protection of purchaser in good faith, for value and without notice of claim

An order or injunction under this Act cannot prejudice the interests of a person who acquires an interest in property of a de facto partner in good faith, for value, and without notice that the property may be the subject of an application under this Act.

16—Non-exclusivity of remedies

This Act does not exclude other forms of remedy or relief.

17—Regulations

The Governor may make regulations for the purposes of this Act.

Legislative history

Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1996	51	<i>De Facto Relationships Act 1996</i>	1.8.1996	16.12.1996 (<i>Gazette</i> 28.11.1996 p1744)
2001	69	<i>Statutes Amendment (Courts and Judicial Administration) Act 2001</i>	6.12.2001	Pt 5 (ss 9—11)—3.2.2002 (<i>Gazette</i> 24.1.2002 p346)
2004	23	<i>Statutes Amendment (Courts) Act 2004</i>	8.7.2004	Pt 4 (s 7)—1.9.2004 (<i>Gazette</i> 26.8.2004 p3402)
2006	43	<i>Statutes Amendment (Domestic Partners) Act 2006</i>	14.12.2006	Pt 26 (ss 72—86)—1.6.2007 (<i>Gazette</i> 26.4.2007 p1352)

Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Pt 1		
<i>s 2</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	<i>1.9.2004</i>
s 3		
court	amended by 69/2001 s 9	3.2.2002
Pt 3		
s 13		
s 13(1)	amended by 69/2001 s 10	3.2.2002
Pt 4		
s 14A	inserted by 23/2004 s 7	1.9.2004

Transitional etc provisions associated with Act or amendments

Statutes Amendment (Courts and Judicial Administration) Act 2001

11—Transitional provision

The amendments made to the principal Act by this Part—

- (a) do not apply in respect of proceedings commenced before the commencement of this Part (and those proceedings may continue as if this Act had not been enacted); and
- (b) apply in respect of proceedings commenced after the commencement of this Part (including proceedings in respect of a claim arising before the commencement of this Part).

Historical versions

Reprint No 1—3.2.2002