The Family Law Amendment Act 2024: Have the changes to property settlement law missed the mark?

Miranda Kaye,[1] Lisa Young[2] and Michelle Fernando[3]

Abstract

This article outlines the recent changes made to the property adjustment regime in Part VIII (for married couples) and corresponding Part VIIIAB (for de facto couples) of the Family Law Act 1975 (Cth). It focusses on the main changes affecting the court's decision-making process when adjusting the property of separated parties: the 'clarification' of the decision-making pathway, new definitions of economic and financial abuse, express requirements to consider the effect of any family violence, and the inclusion of new 'current and future circumstances' of material wastage, liabilities and housing of children.

In each of these areas we ask whether the aims of the amending legislation – to codify and clarify the common law and to ensure the economic effects of family violence are considered – have been achieved. Particularly, we consider whether and how the application of the legislation may differ from the approach developed by case law, and the potential impacts of this. We acknowledge the improvements these changes will likely make in post-separation decision-making, but we also consider whether the new property regime represents a missed opportunity to effectively clarify decision-making processes, appropriately acknowledge the economic impacts of family violence, and make the legislation easier for self-represented litigants and people negotiating in the shadow of the law to navigate.

Introduction

The *Family Law Amendment Act 2024* (Cth) (Amendment Act) made a number of changes to Parts VIII and VIIIAB of the *Family Law Act 1975* (Cth) (FLA), which deal with property disputes, and other financial issues, between married and de facto couples respectively. These changes commenced on 10 June 2025.

The amendments represent the most significant reforms to the property settlement provisions in the FLA since its enactment. While there have been impactful reforms in relation to aspects such as the inclusion of separated de facto couples, rights of third parties, superannuation and binding financial agreements, this is the first substantial legislative change to the law on how a court reallocates interests in the property of spouses.[4] Indeed, unlike the provisions governing

[1] Associate Professor, Faculty of Law, UTS.
[2] Professor, School of Law and Criminology, Murdoch University.
[3] PhD; Associate Professor in Law, University of South Australia.
[4] For ease of reading, references to 'spouses' or 'parties' in this article includes separated de facto and married parties, unless otherwise stated. Since 2009, the property provisions of the *Family Law Act 1975*

parenting disputes, which were extensively amended in 2006, 2012 and again in 2023, there have been no major amendments to family property laws since the inclusion of separated de facto couples in 2009.

The Amendment Act is the federal government's response to the outcomes of various inquiries recommending changes be made to the laws on property settlement to clarify the decision-making process and to make explicit the relevance of the effects of family violence[5] when dividing property. In particular, some of the amendments aim to address recommendations from the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry *A better family law system to support and protect those affected by family violence*[6] and the Australian Law Reform Commission's (ALRC) report *Family Law for the Future*,[7] and to implement elements of the Government Response to the Joint Select Committee's inquiry on Australia's Family Law System.[8] The government asserts that the Bill 'focuses on ensuring separating couples can better understand the decision-making framework used in family law to resolve their property and financial matters confidently and safely'.[9]

The Explanatory Memorandum to the Amendment Act (Explanatory Memorandum) acknowledges that effective operation of Parts VIII and VIIIIAB of the FLA is critical to the safe and equitable resolution, on just and equitable terms, of the economic consequences of relationship breakdown.[10] However, the exercise of a court's discretion in adjusting property interests between parties has been heavily reliant on common law principles, meaning that aspects of the law were not apparent on the face of the legislation. This was seen to be a particular barrier to accessibility for self-represented litigants and/or people experiencing multiple risk factors, such as family violence, child abuse or mental health issues.[11] One of the aims of the Amendment Act, therefore, is to codify[12] aspects of the common law and provide greater clarity on the face of the law to support users, including by setting out the approach a court is to take when resolving property disputes. It was intended that the new provisions would serve as a useful guide for resolving disputes out of court.[13]

The Explanatory Memorandum also notes the prevalence and seriousness of family violence issues in Australian family law, and refers to research suggesting that parties affected by family violence may struggle to achieve a fair division of property and suffer long-term financial disadvantage.[14] Family violence may also act as a barrier to legal claims if it provides a

(FLA) have applied to separated de facto partners as well as married parties: *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); FLA pt VIIIAB.

[5] In this article we use the term 'family violence' to describe violence and abuse in intimate relationships because it is the term used in the FLA.

[6] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, (2017).

[7] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, Report no. 135, March 2019 ('*Family Law for the Future*').

[8] Australian Government Response to the Inquiry of the Joint Select Committee on Australia's Family Law System, January 2023; Explanatory Memorandum, *Family Law Amendment Bill 2024* (Cth) (Explanatory Memorandum), General Outline, [2].

[9] Explanatory Memorandum, Overview of the Bill, [4].

[10] Ibid, General Outline, [3].

[11] Ibid [3].

[12] Ibid [4]; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 22 August 2024, 6095 (Mark Dreyfus, Attorney-General).

[13] Explanatory Memorandum, General Outline, [4].

[14] Ibid, General Outline, [7], citing *Family Law for the Future* (n 7) 214.

disincentive to women[15] in pursuing a property settlement, putting them at further financial disadvantage.[16] In addition, the 'profound and detrimental' impacts of exposure to family violence on children's well-being are acknowledged, including risks to physical and psychological safety and indirect outcomes such as financial insecurity and housing instability.[17] While a significant line of case law has acknowledged the relevance of family violence in determining property disputes, numerous past inquiries have recommended the FLA be amended to legislatively recognise the impact of family violence as a relevant consideration in property proceedings.[18] Accordingly, the Amendment Act aims to 'clearly signal' in the legislation that the court will consider the economic consequences of family violence in property and spousal maintenance proceedings, and send a strong message to the community in that regard.[19]

This article examines the legislative changes impacting on the court's decision-making process when adjusting the property of separated parties. We discuss whether the Amendment Act has achieved its stated aims of codifying the common law and providing greater clarity 'on the face of the law', particularly in relation to how the economic consequences of family violence will be treated. In the absence of any case law interpreting the provisions, we consider how they are likely to be interpreted, and what inconsistencies or questions of interpretation arise. By reference to case law, reports and research findings, we consider whether the amendments better assist separated couples to 'resolve their property and financial matters confidently and safely', or rather, whether the long-standing problems, particularly in relation to a lack of clarity and the treatment of family violence, will persist. We conclude that, while the Amendment Act is well-intentioned and brings some positive changes to the law, it nonetheless represents a missed opportunity to substantially rethink property law decision-making and make the law clearer for unrepresented parties and more equitable for victims of family violence.

Overview of the property amendments

In relation to property proceedings, the changes made to the FLA by the Amendment Act are:[20]

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[15] We sometimes use gendered language in this article in recognition that women comprise the vast majority of victims of family violence: see Australian Institute of Health and Welfare, https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary#risk. The use of gendered language does not mean we do not recognise that men may also be victims and women perpetrators of violence in heterosexual and same-sex relationships. We also recognise the high rates of violence perpetrated against trans women and men and those who do not identify with the gender binary. There is also debate about the use of the term victim and/or survivor. We mainly use the term victim rather than survivor because we focus on people who are still experiencing violence and engaging with the legal system in response to that violence (see Zoe Rathus et al, "'It's Like Standing on a Beach, Holding Your Children's Hands, and Having a Tsunami Just Coming towards You": Intimate Partner Violence and "Expert" Assessments in Australian Family Law' (2019) 14(4) *Victims & Offenders* 408, 435).

[16] Explanatory Memorandum, General Outline, [7], citing *Family Law for the Future* (n 7) 214.

[17] Ibid [8].

[18] Australian Law Reform Commission, *Equality before the Law: Justice for Women*, ALRC Report 68 (Part 1), 1994 ('*Equality before the Law*'); Family Law Council, 'Letter of Advice: Violence and Property Proceedings', 14 August 2001; ALRC, *Family Violence: Improving Legal Frameworks*, 22 June 2010; House of Representatives Standing Committee on Social Policy and Legal Affairs (n6); *Family Law for the Future* (n 7).

[19] Explanatory Memorandum, General Outline, [9].

[20] In this section we have provided section numbers that relate both to married spouses and de facto spouses. The sections that relate to married spouses are listed first.

1. Section 79 (s 90SM for de facto couples) has been amended in an attempt to clarify the decision-making 'pathway' for courts adjusting parties' interests in their property.
2. The definition of 'family violence' in s 4AB has been amended to more clearly recognise economic and financial abuse as family violence including through the introduction of a new s 4AB(2A) which provides examples of economic and financial abuse.
3. Family violence is now a mandatory relevant consideration in all financial disputes. That is: when considering 'considerations relating to contributions' (s 79(4)(ca)/s 90SM(4)(ca)) and when considering matters 'relating to a party's current and future circumstances' (s 79(5)(a)/s 90SM(5)) when making an order to alter the parties' property interests; and also when considering an award of spousal maintenance (s 75(2)(aa)/s 90SF(3)(aa)).
4. The new list of 'current and future circumstances' relevant to the making of a property order is found in s 79(5)/s 90SM(5), rather than by cross-referencing the spousal maintenance focussed considerations that were found in s 75(2)/s 90SF(3). While largely replicating s 75(2), s 79(5)/s 90SM(5) includes three new factors, in addition to family violence:
    a. The effect of any material wastage;
    b. Any liabilities incurred by the parties; and
    c. The need to provide appropriate housing for children.
5. A new s 79(6)/s 90SM(6) provides a framework for making orders in relation to 'companion animals' in property cases, separately from other property. In short, the court can order that one party have sole ownership of the animal, that it be transferred to another person with their consent, or that it be sold. No orders can be made for shared ownership or shared care. Mandatory relevant considerations (including a catch-all provision) are contained in new s 79(7)/s 90SM(7).
6. The court's powers to more actively manage proceedings via what is known as a Less Adversarial Trial (LAT) has been extended to any kind of family law proceeding, including property and other financial matters (Part XI, Division 4). While the LAT approach applies automatically to proceedings involving children, it will only apply to proceedings that do not involve children at the court's discretion or with the consent of the parties.
7. The parties' duty to disclose all of their relevant financial information and documents from is now set out in FLA, s 71B. There is a new obligation on lawyers and family dispute resolution practitioners to make parties aware of this duty and inform them of the consequences of not complying (s 71B(10)).
8. The types of matters which can be referred for arbitration have been expanded (s 13E(1A)).

In addition, the Amendment Act made a number of changes to the FLA which do not relate to property.[21] In this article, we focus our discussion on the amendments listed in 1-4 above, which relate to the court's decision-making process when adjusting the property interests of separated spouses. We also consider 5, the new provisions about companion animals, in the context of the new focus on family violence.

[21] These are not discussed in this article, but a summary can be found here: https://www.ag.gov.au/families-and-marriage/publications/family-law-changes-june-2025-information-family-law-professionals.

The decision-making pathway

Prior to the Amendment Act, section 79[22] of the FLA listed a number of factors that a court was required to consider when adjusting interests in property, including the catch-all 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account' (s75(2)(o)), but the section did not provide a decision-making pathway.[23] A body of law developed around the interpretation of s 79, which was articulated by the Full Court of the Family Court of Australia (FCA) in 2003 in *Hickey v Hickey*[24] and became known as the 'four-stage approach':

1. Identify and value the parties' property, liabilities and financial resources as at the date of the hearing
2. Identify and assess the parties' contribution-based entitlements expressed as a percentage of the net value of the asset pool
3. Identify and assess the 'future needs' factors and determine any necessary adjustment to the entitlement based on contributions
4. Consider the outcome that process achieves and then assess whether that outcome it is just and equitable given the circumstances of the case.

In addition, while not referred to in *Hickey*, as early as 1994[25] courts had developed a practice for dealing with the premature dissipation by a party of marital assets: notionally adding them back into the asset pool. Expressed to be a practice appropriate only in 'exceptional circumstances',[26] the legislative route permitting this was s 75(2)(o).

In 2012 the High Court of Australia in *Stanford v Stanford*[27] considered the interpretation of s 79; notably it did not refer to *Hickey* and the question of notionally adding back dissipated assets was not raised on the facts. *Stanford* involved a property settlement in circumstances where the husband and wife had not separated, but the wife lost capacity and entered care (and later died). The wife's daughter, before her mother's death, instituted proceedings as case guardian and continued them after the mother's death. The plurality of the High Court concluded that no alteration of property interests was appropriate in this case and held that s 79 required that, having identified the various interests in property of the parties, the court should consider whether it is just and equitable to make *any* order for property settlement.[28] If the answer is no, then that is the end of the matter and no order will be made. The High Court in *Stanford* and later cases[29] confirmed that in many cases where the parties had separated (in the sense that the

[22] For ease of readability, the remainder of this article will refer to sections in FLA Pt VIII, which applies to married spouses. The equivalent provision for separated de facto spouses can be found in FLA Pt VIIIAB.
[23] See further Patrick Parkinson, 'Why Are Decisions on Family Property so Inconsistent?' (2016) 90 *Australian Law Journal* 498, 511.
[24] (2003) 30 Fam LR 355; (2003) FLC 93-143.
[25] *Townsend and Townsend* [1994] FamCA 144; (1995) FLC 92-569 at [30].
[26] *WBM v RCM* [1998] FamCA 42 at [2.10]; *Cerini & Cerini* [1998] FamCA 143. For a discussion of pre-amendment case law questioning the practice, see *Shinohara & Shinohara* [2025] FedCFamC1A 126 at [97]-[101], where it is noted at [101] that despite this, the practice 'continued unabated'.
[27] (2012) 247 CLR 108; (2012) 293 ALR 70.
[28] Ibid [37]. See further Belinda Fehlberg and Richard Chisholm,' The High Court and Family Law: Financial disputes' (2022) 35 AJFL 217. 238-240; Patrick Parkinson, 'The Constitutional Constraints on Altering Property Rights After Relationship Breakdown' [2024] UQLJ 157.
[29] *Stanford v Stanford* (2012) 247 CLR 108, [42]; *Bevan & Bevan* [2013] FamCAFC 116; FLC 93-545 at [70]. See the critique of a cursory approach to this in Parkinson, 'The Constitutional Constraints on Altering Property Rights After Relationship Breakdown', Ibid 165.

relationship had broken down) and there had been an intermingling of finances and assets, it would usually be just and equitable to alter the parties' interests in their various assets.

Cases following *Stanford* held that *Stanford* supplemented, rather than replaced, the 'four-stage approach'.[30] This meant that, prior to the Amendment Act, courts and parties seeking to use legal principles to settle their property dispute needed to apply the principles in s 79 informed by the four-stage approach outlined in *Hickey* as supplemented by case law, including *Stanford*.

After the Amendment Act, while ss 79(1) and (2) have remained effectively unchanged,[31] a new s 79(3) has been inserted which states:

> (3) In considering what order (if any) should be made under this section in property settlement proceedings, the court:
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> (a) is to identify:
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> (i) the existing legal and equitable rights and interests in any property of the parties to the marriage or either of them; and
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> (ii) the existing liabilities of the parties to the marriage or either of them; and
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> (b) is to take into account (except for the purpose of making an order with respect to the ownership of property that is a companion animal):
>
> (i) the considerations set out in subsection (4) (considerations relating to contributions); and
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> (ii) the considerations set out in subsection (5) (considerations relating to current and future circumstances).

According to the Explanatory Memorandum, s 79(3) '…brings together the existing elements in the FLA which provide the decision-making framework for property settlements for marriages and codifies common law practice for determining property matters.'[32] The Explanatory Memorandum did not refer to the four stage approach or to the practice of notionally adding back assets. Nor did it name the cases providing the legal principles that the Amendment Act sought to codify, but (given the terms of the amendments) we assume those cases were, at least, *Hickey* and *Stanford*.

It is true that s 79(3) reflects several aspects of the common law decision-making pathway, but it does not fully codify the common law and does not provide a complete decision-making framework. We suggest that, when evaluating whether these reforms achieve their stated goals, one must focus on the extent to which the changes aid the self-represented litigant in understanding the law. For example, the requirement in *Stanford* to determine, as a preliminary matter, whether it is just and equitable to make *any* property adjustment,[33] is still not

[30] *Bevan & Bevan* [2013] FamCAFC 116; FLC 93-545 at [71]-[72]. For an example, see *Halstron & Halstron* (2022) FLC 94-086 at [28]-[30].
[31] Section 79(2) specifies that a court must not make an order under s 79 unless satisfied that, in all the circumstances, it is 'just and equitable' to make the order. The Amendment Act changed the word 'shall' to 'must' in that sub-section.
[32] Explanatory Memorandum, Notes on Clauses, [43].
[33] (2012) 247 CLR 108 at [35]-[46].

immediately visible to self-represented parties.[34] If the intention of the Amendment Act was to codify and clarify the common law pathway, then the role of s 79(2) as a preliminary or threshold requirement in the framework, , as established in *Stanford*, should have been made explicit. .[35]

Section 79(3)(a) essentially replicates stage one of the four-stage approach by requiring the court to identify the parties' existing rights and interests in property, and their existing liabilities. The wording of s 79(3)(a) is notable in several respects. First, the use of the word 'existing' is helpful as it codifies common law by making it clear that all *current* assets and liabilities must be taken into account, as opposed to only those that existed at the date of separation. Second, the section usefully requires the court to identify existing liabilities of the parties, which is consistent with *Hickey* and reflects practice. 'Liabilities' is not defined in the Act, however, according to the Explanatory Memorandum the term is to be given its ordinary meaning and may include 'loans made by family and friends'.[36] While there is nothing in the new provision to identify the possibility of a court discounting or ignoring a liability at this stage of the enquiry, the route to this outcome is now via s 79(5)(e); this is discussed below. Further, there is no reference in s 79(3)(a) to identifying the parties' financial resources, which term remains undefined, but which continue to be relevant under ss 79(5)(c) and (d). We believe it would have aided codification and clarity if the term 'financial resources' had been included in s 79(3)(a) with a definition being provided.

Finally, the question of notionally adding back prematurely dissipated marital assets to the property pool is not addressed by the amendments. The first Full Court decision considering s 79(3)(a)(i), *Shinohara & Shinohara*,[37] has held that this sub-section alters the common law position such that notional property cannot be added back to the property pool and should not be included in balance sheets as if it were an asset. Where there is a premature dissipation of a marital asset, then this will need to be dealt with either under the contributions considerations or those relating to current and future circumstances.[38] While it is not possible here to address this decision in detail, we predict there may yet be more said on this by the Full Court.[39] For the purposes of this discussion, we simply note that this result is unlikely to increase clarity for lay users. Notional add-backs was one of the techniques that in fact reduced some of the opacity of the very discretionary approach to property decision making.

The Full Court in *Shinohara* did not comment on other aspects of divergence between s 79(3)(a)(i) and the common law, however, this decision makes clear that, simply because it appears that an amendment is designed to 'codify the common law', it must not be assumed that it does so.

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[34] Nor is the issue of conflation of ss 79(2) and 79(4) discussed in *Stanford* at [40] and in *Bevan & Bevan* [2013] FamCAFC 116; FLC 93-545 at [73] addressed; note the comment at [50] in the Explanatory Memorandum which simply notes 'it is open' to decision makers to consider ss 79(3)(a) and (b) in deciding if it is just and equitable to make any order.

[35] Note the comment at [2] in the Addendum to the Explanatory Memorandum as to s 79(2) infusing the process of application of s 79, and that there is no amendment to make this apparent to non-expert users. The Act as passed retains the role of s79(2) as a foundational principle and a threshold issue.

[36] Explanatory Memorandum, Notes on Clauses, [45].

[37] [2025] FedCFamC1A 126.

[38] Ibid [125].

[39] Hon Michael Kent et al, 'The Mischief Rule and Add-backs: a Critique of Shinohara' (2025) found at < https://familylawyers.com.au/wp-content/uploads/The-Mischief-Rule-and-Add-backs-A-Critique-of-Shinohara.pdf >.

Section 79(3)(b)(i) reflects stage two of the four-stage approach requiring the court to 'take into account' the considerations listed in s 79(4) which relate to the parties' respective contributions and s 79(3)(b)(ii) reflects stage three by requiring the court to consider factors relevant to the parties' current and future circumstances. However, the new provisions neither require the court to assess those contributions as a percentage of the net asset pool nor specify that parties' current and future circumstances are to be considered *after* contributions, to determine whether any adjustment to the parties' contributions-based entitlement is appropriate. Both these aspects are spelled out in *Hickey* and reflect the 'common law' approach adopted by the courts and practitioners.[40] Again, it seems doubtful that the failure to spell this out reflects an intention to abandon this approach. However, other than bringing the list of future needs/current and future circumstances into s 79, which is clearly sensible,[41] it is not apparent how these new sub-sections make clear the decision-making *process*. Indeed, as Patrick Parkinson noted, there are now some 30 factors that the court must consider which he argues is a 'recipe for increased incoherence' given there are no objects to guide the exercise of discretion[42] and no clear legislative pathway.

In sum, s 79(3) does not accurately reflect or codify the decision-making pathway and does not offer much clarity to self-represented litigants navigating the legislation, or to parties negotiating in the shadow of the law. However, we think it is safe to assume that courts will not change their existing approach and will read the new provisions in the light of *Stanford* and the established 'four-stage approach' in *Hickey*. This would be in keeping with the purpose of the Amendment Act, which was to codify (and not change) the existing law in this respect.

A new focus on family violence in property proceedings

Research demonstrates that 'the financial impact on many survivors [of family violence] is profound, undermining their economic security and ability to leave abusive relationships. Survivors often suffer long-term economic consequences, including poor credit, housing issues, unemployment and precarious work, few to no assets, poverty and homelessness.'[43] Compounding this, Australian research has clearly shown that a history of family violence in the relationship has correlated with poorer financial outcomes for women in Australian family law matters, which in turn has had long-term consequences for those women and their children.[44]

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[40] For a recent example, see *Petrellis & Petrellis* [2023] FedCFamC1A 104. Note *Jabour & Jabour* [2019] FamCAFC 78 adopts this stepped process, notwithstanding the court stating that there should be a 'holistic' assessment of contributions (at [134]).

[41] Patrick Parkinson, 'Applying the s 75(2) Factors to the Division of Family Property: A Principled Approach' (2014) 4 Family Law Review 77, 78 citing Fogarty J in *In the Marriage of Waters and Jurek* (1995) 126 FLR 311.

[42] Parkinson, 'The Constitutional Constraints on Altering Property Rights After Relationship Breakdown' (n 28) 177. See further: Parkinson, 'Why are Decision on Family Property so Inconsistent? (n 23); Lisa Young and Jo Goodie, 'Is There a Need for More Certainty in Discretionary Decision-Making in Australian Family Property Law?' 32 *Australian Journal of Family Law* 162.

[43] Deanne Sowter and Jennifer Koshan, '"Weaponizing" The Tort of Family Violence? Myths, Stereotypes, Lawyers' Ethics and Access to Justice' (2024) 40 *The Windsor Yearbook of Access to Justice* 311, 318.

[44] Rae Kaspiew et al, *Domestic and Family Violence and Parenting Mixed Method Insights into Impact and Support Needs: Final Report* (ANROWS, 2017) <https://anrows.org.au/node/1392>; Belinda Fehlberg and Christine Millward, 'Family Violence and Financial Outcomes after Parental Separation' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for*

The Amendment Act brings family violence to the foreground in property division proceedings. In particular, the amendments aim to recognise the economic consequences of family violence[45] by improving the courts' ability to consider those adverse consequences when altering the parties' property interests. Moreover, there is an expanded definition of 'family violence' to more comprehensively include economic and financial abuse. This is particularly important given that family law processes and professionals have recently been identified as an 'auxiliary through which financial abuse [is actually] facilitated'.[46]

The amendments have the potential to impact a significant proportion of property cases. In 2022, the Deputy Chief Justice of the Federal Circuit Court and Family Court of Australia (the FCFCOA) reported that a risk analysis of property matters revealed 68.4% of property division applications contained allegations of family violence.[47] It seems likely this figure may increase with the expanded focus and recognition of economic and financial abuse as a form of family violence given that research assumes 'higher rates of economic abuse vis-à-vis physical abuse'.[48]

The Amendment Act has made family violence central to property proceedings in five main ways which will be discussed below:

- Changes to the definition of family violence
- Express reference to family violence when considering parties' contributions
- Express reference to family violence when considering the parties' current and future financial circumstances
- Express reference to family violence in the spousal maintenance considerations
- Consideration of family violence when applying new provisions about companion animals

This reflects an intention that a consideration of family violence should permeate all stages of assessment of a matter to determine what justice and equity requires as between the parties.

Expansion and 'clarification' of economic and financial abuse in the definition of family violence

Section 4AB(1) of the FLA provides that family violence 'means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the

Australia (AIFS, 2014) 235; Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(1) *Australian Journal of Family Law* 1; Lixia Qu and Ruth Weston, 'Financial Journeys of Australian Parents after Separation – Transitions into and out of Poverty' (2021) 56(1) *Australian Journal of Social Issues* 54.

[45] Explanatory Memorandum, Overview of the Bill, [79]-[80].

[46] Adrienne Byrt et al, 'Mapping Intimate Partner Financial Abuse Across Public and Private Systems' (2025) 60 (June) *Australian Journal of Social Issues* 1, 6 <http://onlinelibrary.wiley.com/doi/abs/10.1002/ajs4.70044>.

[47] Deputy Chief Justice Robert McClelland, 'Update from the Federal Circuit and Family Court of Australia' (Conference Paper, The Law Society of NSW Specialist Accreditation Conference, 4 August 2022).

[48] Adrienne Byrt and Kay Cook, 'Mapping Gendered Economic Abuse Across the Relationship Lifecourse: A Qualitative Meta-Ethnography' [2025] *Journal of Family Violence* (online first: https://doi-org.ezproxy.lib.uts.edu.au/10.1007/s10896-025-00872-7).

family member to be fearful.' The section then provides examples of behaviour that may constitute family violence. Prior to the Amendment Act, sub-section 4AB(2) provided two short examples of economic or financial abuse which did 'not adequately cover the range of tactics that constitute economic and financial abuse'.[49] Those were: unreasonably denying a family member financial autonomy (s 4AB(2)(g)) and unreasonably withholding necessary financial support from a dependant family member or their child (s 4AB(2)(h)). The Amendment Act has removed both, substituting them with new s 4AB(2)(g) which reads simply 'economic or financial abuse' and introduces a new, non-exhaustive, s 4AB(2A), which offers examples of economic or financial abuse.[50] The new list of examples reads as follows:

> (2A) For the purposes of paragraph (2)(g), examples of behaviour that might constitute economic or financial abuse of a family member include (but are not limited to) the following:
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> (a) unreasonably denying the family member the financial autonomy that the family member would otherwise have had, such as by:
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> (i) forcibly controlling the family member's money or assets, including superannuation; or
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> (ii) sabotaging the family member's employment or income or potential employment or income; or
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> (iii) forcing the family member to take on a financial or legal liability, or status; or
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> (iv) forcibly or without the family member's knowledge, accumulating debt in the family member's name;
>
> (b) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child (including at a time when the family member is entirely or predominantly dependent on the person for financial support);
>
> (c) coercing a family member (including by use of threats, physical abuse or emotional or psychological abuse):
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> (i) to give or seek money, assets or other items as dowry; or
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> (ii) to do or agree to things in connection with a practice of dowry;
>
> (d) hiding or falsely denying things done or agreed to by the family member, including hiding or falsely denying the receipt of money, assets or other items, in connection with a practice of dowry.

Until recently, 'economic abuse has been conceptualised as a form of emotional abuse'.[51] However, the concept is now recognised as a form of power and control in and of itself. Economic abuse has been defined as a deliberate pattern of control which interferes with the abuser's

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[49] Jan Breckenridge et al, *Legal Responses to Economic and Financial Abuse in the Context of Intimate Partner Violence* (Report, GVRN - UNSW, 1 June 2023) 47 <http://hdl.handle.net/1959.4/unsworks_85319>.

[50] This is rather convoluted drafting. As Patrick Parkinson observed, s 4AB(2A) provides 'examples of an example': 'The Problem in Expanding the Definition of Family Violence' *LinkedIn* 8 June 2025 <https://www.linkedin.com/pulse/problem-expanding-definition-family-violence-patrick-parkinson-am-nemkc>.

[51] Nicola Sharp-Jeffs, 'Understanding the Economics of Abuse: An Assessment of the Economic Abuse Definition within the Domestic Abuse Bill' [2021] (1) *Journal of Gender-Based Violence* 163, 164.

partner's ability to acquire use and maintain economic resources.[52] Economic abuse is likely to be experienced along with other forms of family violence and is particularly likely to impact women's finances, employment and accommodation:

> *Perpetrators will physically restrain their partners, hide their keys or travel cards, sabotage their appointments, leave them stranded with children, and inflict injuries to make them unable to attend their workplace or university.*[53]

Financial abuse is part of economic abuse and focuses on tactics of economic abuse that pertain to money, including debt, credit, and financial wellbeing. The terms 'economic abuse' and 'financial abuse' are often used interchangeably in research[54] and this is the case for the changes made by the Amendment Act in that the FLA as amended does not distinguish between the two terms, or categorise the various examples provided.

Research on the nature and consequences of economic abuse 'reveal its insidious and multifaceted nature, with abusive behaviors spanning the relationship life course and continuing long after a relationship has ended'.[55] Moreover, this kind of abuse is common. It has been found that of victims accessing support services 'approximately 76 to 99% reported experiencing economic abuse'.[56] Research has recently demonstrated the high cost of family violence to women's employment and education and concluded that:

> *It is no accident that employment and education – the pathway to higher income – are targeted by perpetrators as a prime means of depleting or even destroying women's ability to be financially self-sufficient.*[57]

Economic abuse makes leaving a relationship very difficult. However, even if barriers to leaving economically abusive relationships can be overcome, and the relationship ends, the lasting effects of economic abuse are keenly felt.[58] Women may live in poverty, or struggle to access safe housing or employment.[59] Therefore, when women can leave, it is important for the family

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[52] Judy L Postmus et al, 'Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review' (2020) 21(2) *Trauma, Violence, & Abuse* 261, 262.

[53] Anne Summers, Thomas Shortridge and Kristen Sobeck, *The Cost of Domestic Violence to Women's Employment and Education* (University of Technology Sydney, 2025) 17. See further: Emma McNicol, Kate Fitz-Gibbon and Sally Brewer, *From Workplace Sabotage to Embedded Supports: Examining the Impact of Domestic and Family Violence across Australian Workplaces* (Monash University, 2022).

[54] Nicola Sharp-Jeffs, 'Understanding the Economics of Abuse: An Assessment of the Economic Abuse Definition within the Domestic Abuse Bill' [2021] (1) *Journal of Gender-Based Violence* 163, 165.

[55] Byrt and Cook (n 48).

[56] Laura Johnson et al, 'Examining the Impact of Economic Abuse on Survivors of Intimate Partner Violence: A Scoping Review' (2022) 22(1) *BMC Public Health* 1, citing Adrienne E Adams et al, 'Development of the Scale of Economic Abuse' (2008) 14(5) *Violence Against Women* 563; Adrienne E Adams, Marisa L Beeble and Katie A Gregory, 'Evidence of the Construct Validity of the Scale of Economic Abuse' (2015) 30(3) *Violence and Victims* 363; Judy L Postmus et al, 'Understanding Economic Abuse in the Lives of Survivors' (2012) 27(3) *Journal of Interpersonal Violence* 411; Amanda M Stylianou, Judy L Postmus and Sarah McMahon, 'Measuring Abusive Behaviors' (2013) 28(16) *Journal of Interpersonal Violence* 3186.[57] Summers, Shortridge and Sobeck (n 53) 13.

[57] Summers, Shortridge and Sobeck (n 53) 13.

[58] Byrt and Cook (n 48).

[59] Johnson et al (n 56); Kathryn J Spearman et al, 'Post-Separation Abuse: A Literature Review Connecting Tactics to Harm' (2023) 21(2) *Journal of Family Trauma, Child Custody & Child Development* 1; Amanda M Stylianou, 'Economic Abuse Experiences and Depressive Symptoms among Victims of Intimate Partner Violence' (2018) 33(6) *Journal of Family Violence* 381; Anne Summers, *The Choice: Violence or Poverty* (University of Technology Sydney, 2022).

law system to consider the possible lasting effects of economic abuse and ensure that the family law system itself is not used to further that abuse.[60]

The amendments recognise the emerging understandings of non-physical forms of family violence and are an important acknowledgement that 'economic abuse (including tactics of coercive control) and the financial impacts of [intimate partner violence] are interrelated and mutually reinforcing'.[61] While the examples are lengthy, making the whole of s4AB very long, we anticipate this will bring greater clarity to the definition of family violence[62] and increased identification of its presence. After all, family violence is now a mandatory consideration in all financial proceedings. The more nuanced examples of what might constitute economic abuse should increase clarity for lawyers and self-represented litigants in assessing whether family violence is an issue in the matter.

One notable new example of behaviour which might be economic or financial abuse is behaviour around dowry abuse (ss 4AB(2A)(c) and (d)) which had previously been recognised as an example of family violence in the Victorian *Family Violence Protection Act 2008* (Vic), s 5. This example is based on a recommendation by the Senate Committee report into the practice of dowry and incidence of dowry abuse in Australia.[63] Because data collection is limited,[64] it is uncertain how prevalent dowry-related family violence is in Australia, although it is considered substantial.[65] Dowry abuse can be a particularly insidious form of financial abuse if perpetrators exploit their wives' visa vulnerability in demanding dowry.[66] However, it is important that the focus for family

[60] Byrt and Cook (n48); Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology & Criminal Justice* 84; Ayesha Scott, 'Post-Separation Financial Abuse, the Money Taboo and the Family Justice System: Perspectives from Aotearoa New Zealand' in Mavis Maclean and Rachel Treloar (eds), *Research Handbook on Family Justice Systems* (Edward Elgar Publishing, 2023.
[61] Sowter and Koshan (n 43) 317.[62] We note the recent decision of *Pickford & Pickford* [2024] FedCFamC1A 249 in which the Full Court of the FCFCOA was divided about whether 'family violence' in s4AB(1) requires that the conduct controls or causes fear. While the majority opinion was that this was not required, given other judicial statements it may yet be reconsidered (see for example *Leventis & Leventi*s [2024] FedFamC1A 141 at [15]).[63] Senate Legal and Constitutional Affairs References Committee, *Practice of Dowry and the Incidence of Dowry Abuse in Australia* (Commonwealth of Australia, February 2019) vi. This report discusses the difficulties faced by parties to divorce proceedings in recovering dowry payment at 41-45.
[62] We note the recent decision of *Pickford & Pickford* [2024] FedCFamC1A 249 in which the Full Court of the FCFCOA was divided about whether 'family violence' in s4AB(1) requires that the conduct controls or causes fear. While the majority opinion was that this was not required, given other judicial statements it may yet be reconsidered (see for example *Leventis & Leventi*s [2024] FedFamC1A 141 at [15]).[63] Senate Legal and Constitutional Affairs References Committee, *Practice of Dowry and the Incidence of Dowry Abuse in Australia* (Commonwealth of Australia, February 2019) vi. This report discusses the difficulties faced by parties to divorce proceedings in recovering dowry payment at 41-45.
[63] Senate Legal and Constitutional Affairs References Committee, *Practice of Dowry and the Incidence of Dowry Abuse in Australia* (Commonwealth of Australia, February 2019) vi. This report discusses the difficulties faced by parties to divorce proceedings in recovering dowry payment at 41-45.
[64] Ibid 63.
[65] Supriya Singh and Jasvinder Sidhu, 'Coercive Control of Money, Dowry and Remittances among Indian Migrant Women in Australia' (2020) 12(1) *South Asian Diaspora* 35, 45 citing Manjula O'Connor, 'Dowry-related Domestic Violence and Complex Posttraumatic Stress Disorder: A Case Report.' (2017) 25 (4) *Australasian Psychiatry*: 351–353.
[66] Sundari Anitha, Harshita Yalamarty and Anupama Roy, 'Changing nature and emerging patterns of domestic violence in global contexts: Dowry abuse and the transnational abandonment of wives in India' (2018) 69 *Women's Studies International Forum* 67-75.

courts is on the 'broader patterns of coercion, control and economic abuse' rather than any suggestion that 'cultural and religious practices are abusive prima facie'.[67]

Practitioners should be aware when advising on the payment of child support or interim spousal maintenance applications that an example of behaviour which could be family violence is 'unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child' (s 4AB (2A)(b)).

Another important example in the expanded s 4AB is the recognition that denying a family member financial autonomy includes forcing them to 'take on a financial or legal liability or status' (s 4AB(2A)(a)(iii)) or 'forcibly or without the family member's knowledge, accumulating debt in the family member's name' (s 4AB(2A)(a)(iv)). These examples are precisely worded but, given they are non-exhaustive, we argue they should not limit recognition of the numerous circumstances in which a debt or liability may be generated through behaviour that constitutes family violence but which might not quite fall within the wording.[68] It is important to note that this, and other examples of financial abuse, may well inform decision-making in relation to the new current and future circumstances consideration dealing with the nature of, and circumstances surrounding, liabilities (s 79(5)(e)) which is discussed below.

Finally, it is important to note these amendments to the definition of family violence apply not only to property division matters, but wherever family violence is mentioned in the FLA. Thus, these amendments will also, where relevant, be considered when determining the best interests of the child in parenting matters (for example ss 60CC(2)(a) and 60CC(2A)).

The requirement to consider the effect of family violence on parties' contributions

When considering the parties' respective contributions under s 79(3)(b)(i), the Amendment Act requires the court to consider family violence with the introduction of a new consideration in s 79(4)(ca):

> (ca) the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c) [which are the financial contributions, contributions to acquisition, conservation or improvement of property and contributions to the welfare of the family];

Prior to this amendment, there was no reference to family violence in the factors the court must consider in relation to property settlements. However, courts developed a 'vague'[69] and 'relatively strict' [70] judicial test, to permit an argument for how family violence might be relevant

[67] Marie Segrave et al, Submission no. 15 to Senate Standing Committee on Legal & Constitutional Affairs, *The Practice of Dowry and the Incidence of Dowry Abuse in Australia* (17 August 2018) 5.
[68] Angela Littwin, 'Coerced Debt: The Role of Consumer Credit in Domestic Violence Essay' (2012) 100(4) *California Law Review* 951, 986–997; Adrienne E Adams, Angela Littwin and McKenzie Javorka, 'The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence' (2020) 26(11) *Violence Against Women* 1324.
[69] Patricia Easteal, Lisa Young and Anna Carline, 'Domestic Violence, Property and Family Law in Australia' (2018) 32(2) *International Journal of Law, Policy and the Family* 204, 214.
[70] Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper* (No 86, 2018) [3.111].

to the assessment of the victim spouse's contributions. In the FCA Full Court case of *Kennon v Kennon*,[71] Fogarty and Lindenmayer JJ in *obiter dicta* set out a novel doctrine or principle that:

> *[W]here there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79.*[72]

Later decisions have been keen to emphasise that the words in *Kennon* 'are not a statute – immutable and unvarying'.[73] Such decisions, whilst lacking clarity and consistency, removed many of the constraints and 'softened some of the harshness of the original application of the principles identified in *Kennon*':[74]

- Their Honours in *Kennon* said the principle should only be applied to a 'narrow band' of cases', but later decisions have suggested that 'it is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles';[75]
- '[A] "course of conduct" was no longer a prerequisite for considering whether the nature and extent of contributions has been made more arduous' – a single event could have this effect;[76]
- 'Significant adverse impact' upon contributions could be read to mean 'discernible effect'[77] and that impact could be inferred;[78]
- Courts slowly recognised, albeit with some reluctance, that the principle could apply to cases of non-physical violence;[79]
- Post-separation violence could be considered.[80]

Despite the widening of the situations in which a *Kennon* argument could be made, the consideration of violence has often been excluded in cases where victims are unrepresented[81] and there is 'evidence that even lawyers [were] not sufficiently attuned to the opportunity to make a *Kennon* claim'.[82] Research also showed that the effect of a successful argument 'on the ratio of

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[71] (1997) 22 Fam LR 1; (1997) FLC 92-757.
[72] (1997) 22 Fam LR 1, 24.
[73] *Martell v Martell* [2023] FedCFamC1A71 at [20].
[74] Ibid [27].
[75] *Spagnardi & Spagnardi* [2003] FamCA 905 at [46]*; Martell & Martell* [2023] FedCFamC1A71 at [22], [24]-[26].
[76] *Scaletta & Scaletta* [2024] FedCFamC1A 87 at [49] – [52].
[77] *Keating & Keating* [2019] FamCAFC 84 at [35] – [36]; *Martell & Martell* [2023] FedCFamC1A71 at [25]
[78] *Spagnardi & Spagnardi* [2003] FamCA 905 at [42]-[45]; *Benson & Drury* [2020] FamCAFC 303; FLC 93-998 at [49].
[79] For example, see: *Jacoda & Mancie* [2019] Cth FCCA 3279; *Jacot & Jacot* [2021] FedCFamC2F 632; *Sweet & Sweet* [2022] Cth FedCFamC2F 676.
[80] *Baranski and Baranski* (2012) 259 FLR 122 at [257]; *Keating & Keating* [2019] FamCAFC 84 at [33].
[81] Miranda Kaye, 'Family Violence and Family Law Property Division: How Can the System Be Improved?' [2023] *Alternative Law Journal* 35.
[82] Jill Howieson, et al, *Family Property Disputes Involving Family Violence: A Pilot Research Project* (Report for Law society of WA Public Purpose Trust, 2018) 46. See also Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1; Easteal, Young and Carline (n 69).

property received [was] minor'.[83] Over time, numerous reports and inquiries have recommended that the FLA be amended to specifically recognise family violence as a factor in property proceedings.[84] Notably, the ALRC said:

> *The precise way in which the test was framed has made it difficult for later courts to apply… [it] is difficult to articulate the jurisprudential basis of the test. Further, as there is no legislative recognition of the relevance of family violence to the division of property, unrepresented litigants are in a different position to those who have sought legal advice and have been made aware of the possibility of running a 'Kennon' case*.[85]

Various models for law reform to better recognise family violence in property proceedings have been suggested over many years.[86] The ALRC recommended the FLA should be amended to include a statutory tort of family violence.[87] However the federal government rejected this approach in favour, it appears, of a consideration based on a *'Kennon* argument' where the onus is on the alleged victim of family violence to show the effect of the violence on their ability to make contributions, as opposed to introducing a concept of negative contributions or considering compensation for wrongdoing.[88]

The legislative recognition that family violence is relevant to property division is very important. While the amendment is not a substantial reform, the express reference to family violence will ensure lawyers consider the presence, and relevance, of family violence when taking instructions from, and advising, clients and also assess the evidence of family violence before rejecting or minimising the allegations.[89] Self-represented litigants at least have a greater chance of appreciating that family violence may be relevant to a claim, even if they are unsure how to ensure their evidence is probative.[90] The same is true in the case of parties negotiating in the shadow of the law, although some women may not wish to raise family violence in property settlement negotiations either due to fear or because it could jeopardise an early settlement. It has been

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[83] Women's Legal Service Victoria, *Small Claims, Large Battles : Achieving Economic Equality in the Family Law System* (March 2018) 34; See further: Easteal, Young and Carline (n 69); Easteal, Warden and Young (n 82); *Family Law for the Future* (n 7) [6.86].

[84] *Equality before the Law* (n 18) [9.49], Rec 9.6; Family Law Council, *Violence and the Family Law Act: Financial remedies*, Discussion Paper, 1998, [5.1]-[5.13]; Australian Government Response to the Inquiry of the Joint Select Committee on Australia's Family Law System (n 8), rec 23; Women's Legal Service Victoria, *Small Claims, Large Battles: Achieving economic equality in the family law system*, 2018, Melbourne, Australia, rec 10.

[85] *Family Law for the Future* (n 7) [1.39].

[86] Ibid; Easteal, Warden and Young (n 82) 24–28; House of Representatives Standing Committee on Social Policy and Legal Affairs (n 6) rec 13.

[87] *Family Law for the Future* (n 7) Rec 19.

[88] Given that s79 did not make any mention of family violence, the catch-all s 75(2)(o) was relied upon when making adjustments under *Kennon*.

[89] Patrick Parkinson, Atlanta Webster and Judy Cashmore, 'Lawyers' Interviews with Clients About Family Violence' (2010) 33(3) *UNSW Law Journal* 929; Jane Wangmann et al, 'What Is "Good" Domestic Violence Lawyering?: Views from Specialist Legal Services in Australia' (2023) 37(1) *International Journal of Law, Policy and the Family* ebac034; Kate Seear and Becky Batagol, 'The Safety of Victim-Survivors Is an Ethical Matter: Negotiating Violence in the Civil Protection Order Context' in Greg Byrne and Jacqui Horan (eds), *Sexual Assault Trials: Challenges and Innovations* (Lexis Nexis, 2025) 93 citing Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2021 rule 17.1.

[90] Jane Wangmann, Tracey Booth and Miranda Kaye, 'No Straight Lines': Self-Represented Litigants in Family Law Proceedings Involving Allegations about Family Violence (Research Report, ANROWS, 2020) 72-83 https://www.anrows.org.au/publication/no-straight-lines-self-represented-litigants-in-family-law-proceedingsinvolving-allegations-about-family-violence/.

suggested that '[w]omen may be prepared to make compromises in relation to their rights to property, including abandoning all claims, which they would not make in relation to parenting matters'.[91]

Some aspects of the *Kennon* argument (as expanded) are present in the new sub-section:

- The focus in the sub-section remains on the effect of the family violence upon the ability of a party to make contributions, not simply whether violence has occurred;
- Nothing in the sub-section imports any test of exceptionality, provided the 'effect' of the violence on the contribution is discernible;[92];
- The words 'any family violence' make it clear that a single instance of family violence that impacts contributions can be sufficient to be considered;
- Due to the expanded definition of family violence in s 4AB, it is clear that courts must consider non-physical violence in relation to contributions;
- Despite the Explanatory Memorandum stating that the court must consider the '*economic* impact of the family violence as part of the assessment of contributions',[93] the subsection is not limited in this way and specifically refers to s 79(4)(c) (family welfare contributions), so the effect of family violence on welfare or homemaker contributions that are hard to quantify in economic terms should continue to be considered by the courts; and
- As the sub-section refers to contributions generally, it will include those made post-separation.

However, whether this is a codification of *Kennon* in its entirety is unclear. The original dicta in *Kennon* asked courts to consider taking into account family violence that had a significant adverse impact upon a party's contributions *or* that made their contributions significantly more arduous.[94] From our reading of the cases, it would appear that invariably *Kennon* arguments have been made on the basis that a victim's contributions are made more arduous.[95] Section 79(4)(ca) makes no reference to contributions being made more arduous, simply referring to the 'effect' of the family violence on the victim's *ability to make* contributions. While the section may have been intended to encapsulate *any* effect that family violence has on a party's ability to make contributions (that is, whether by reducing the capacity to make contributions or by making it more difficult to make such contributions), this is not immediately apparent from reading the provision. It is to be hoped that courts interpret the section to cover both possible 'limbs' of the *Kennon* principle, including considering contributions being made more arduous. If that is not the case, then this would seriously limit the application of this sub-section and present a risk for victims, as they could in effect only argue family violence in circumstances where they accept they have made diminished contributions. Indeed, Patrick Parkinson has suggested that the utility of this sub-section will be as a shield for victims, where perpetrators

[91] Kaye (n 81) 33.
[92] *Martell v Martell* [2023] FedCFamC1A71 [24] - [25].
[93] Explanatory Memorandum, Notes on Clauses, [60] [emphasis added].
[94] While the original statement in *Kennon* might seem to suggest there is only one limb, due to the words 'or put the other way', later cases have confirmed these are two separate limbs: see for example *Benson & Drury* [2020] FamCAFC 303; FLC 93-998 at [18].
[95] For example, of the five cases that were identified in an Austlii search of FCFCOA cases in 2025 using the search terms 'kennon' and 'family violence', all relied on this argument: *Blayne & Blayne* [2025] FedCFamC2F 413; *Dajani & Dajani* [2025] FedCFamC1A 28; *Musa & Waheed* [2025] FedCFamC2F 215; *Rapallino & Dekker* [2025] FedCFamC1A 18; and *Geiger & Geiger* [2025] FedCFamC2F 34.

argue that their victim has made less than equal contributions.[96] This surely could not have been the intent of the amendment.

It is clear that a victim of violence is still required to demonstrate a link between the violence and how it impacted upon their contributions - described in *Keating & Keating* as an 'evidentiary nexus'.[97] The Law Council noted that 'many Kennon claims fail as a result of the lack of admissible evidence that establishes the impact of family violence on contributions'.[98] This can be a particularly difficult hurdle for self-represented litigants. Many claims made by lawyers are unsuccessful because they are not supported by admissible evidence.[99] Given that self-represented litigants struggle to provide and document probative evidence of violence,[100] they are even less likely than lawyers to make successful claims.[101]

There is also some uncertainty about whether the common law position that a court may infer, in the absence of express evidence, that family violence has made a party's contributions more arduous, still applies. The new section is silent on this matter. This poses further difficulties for self-represented litigants who will not be aware of this or what is required for a court to draw such an inference.

The requirement for an 'evidentiary nexus' has resulted in situations where a court is satisfied that family violence has occurred, but the judge, sometimes employing 'unfortunate rhetoric',[102] finds no evidence that the violence made the contributions more onerous or had a significant adverse impact on contributions.[103] Some victims who have been able to continue to function despite violence have failed to establish a *Kennon* claim. For example, in *Bridges & Bridges*:

> *The evidence also shows that within the context of the family violence the mother has been able to improve her financial position: she has undertaken study, obtained employment and continued to be the main financial contributor. It is difficult for the Court to infer that the family violence had a significant adverse impact on her contributions*.[104]

However, the Full Court of the FCA (as it then was) has made it clear that the mere fact a victim of violence has managed to continue with work, study and make contributions is not an inevitable bar to a finding that the violence has made those contributions more arduous.[105] This is surely correct and is the reason for the two limbs of *Kennon*. The notion that a resilient victim of violence has not had a more difficult task in making their contributions defies common sense

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[96] Patrick Parkinson, Submission to Australian Government on Exposure Draft: Family Law Amendment Bill (No.2) 2023, October 2023. This was Parkinson's submission in relation to the Exposure Draft, however, the final provision remained the same.
[97] *Keating & Keating* [2019] FamCAFC 84 at [39].
[98] Law Council of Australia, Submission to Australian Government on Exposure Draft: Family Law Amendment Bill (No.2) 2023, November 2023 at [136].
[99] House of Representatives Standing Committee on Social Policy and Legal Affairs, (n 6), 166.[100] Wangmann, Booth and Kaye (n 90), 72-83.
[100] Wangmann, Booth and Kaye (n 90), 72-83.
[101] Belinda Fehlberg and Miranda Kaye, Answers to Questions on Notice to Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Family Law Amendment Bill 2024*, 18 October 2024.
[102] Miranda Kaye, Submission No 27 to Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Family Law Amendment Bill 2024*, 5.
[103] See also the cases discussed in Fehlberg and Kaye (n 101).
[104] [2019] FCCA 683 at [62]; see also *Kalgreen* & Kalgreen [2023] FedCFamC2F 225.
[105] See the circumstances in *Benson & Drury* [2020] FamCAFC 303; FLC 93-998.

and provides justification for the ability to infer the effect in appropriate cases. Given the inconsistency in case outcomes, it would have assisted if the combined intent of the sub-section and the Explanatory Memorandum were clearer.

However, we would argue that the main problem with the approach taken in the Amendment Act is the very appropriateness of assessing family violence as a factor relevant to the contributions a party makes in a relationship. The ALRC has noted that '[t]he process of accounting for family violence through the lens of contributions may appear contrived when compared with an approach that focuses on compensating for the harm caused'.[106] Belinda Fehlberg and Lisa Sarmas have suggested that compensation should be for 'pain and suffering and economic loss as a result of a history of family violence during the marriage [or de facto relationship]'.[107] Patrick Parkinson has written, '[t]he issue of family violence needs to be addressed without disguising it as being about contribution or future needs and without creating a problematic basis for the assessment of quantum. The issue is one of compensation for wrongdoing'".[108]

The comments of Altobelli FM (as he then was) in the case of *Kozovski v Kozovski*[109], noting the artificiality and inappropriateness of assessing family violence as a contributions factor, continue to be relevant after the Amendment Act:

> *My real concern, however, is as to the artificiality of a Kennon-type adjustment, whatever the percentage is. Having regard to the nature of the violence suffered by the Wife during a long marriage it is clear that neither 10 percent or any other figure could possibly be characterised as compensatory because no amount could compensate her for what she experienced at the hands of the Husband. … But clearly the adjustment that the Full Court contemplated in its decision in Kennon was not meant to be compensatory, but more in the nature of perhaps symbolic recognition of the extraordinary efforts of one spouse in persisting with contribution in the face of enormous and unjustified adversity. One cannot help but think that much greater thought needs to be given to the very rationale of a Kennon-type adjustment, and whether there might be a better, more transparent, and fairer method for dealing with issues of conduct in the course of financial matters in the Family Law Courts.*[110]

It is unfortunate that 'much greater thought' has not been given to the amendment in s79(4)(ca). In any event, it will be very hard for courts and researchers to monitor the impact of the amendment to see if there are improvements for victims of family violence. There is no reason to suggest that the practice of assessing all contributions holistically will change, making it extremely difficult to isolate what percentage adjustment is due to the family violence considerations.[111]

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[106] *Family Law for the Future* (n 7) at [6.88] (emphasis added).
[107] Belinda Fehlberg and Lisa Sarmas, 'Australian Family Property Law: "Just and Equitable" Outcomes?' (2018) 32(1) *Australian Journal of Family Law* 81, 100.
[108] Patrick Parkinson, 'Unfinished Business: Reforming the law of property division' (2000)14(4) *Australian Family Lawyer* 1, 4.
[109] [2009] FMCAfam 1014.
[110] Ibid [77].
[111] *Benson & Drury* [2020] FamCAFC 303; FLC 93-998 FLC 93-998 at [35]; *Gadhavi & Gadhavi* [2023] FedCFamC1A 117. Indeed, the Explanatory Memorandum, Notes on Clauses, [60] assumes that this holistic assessment will continue.

The requirement to consider family violence when assessing parties' current and future circumstances

Family violence is now listed first in the current and future circumstances to be considered under s 79(5)(a). It is symbolically important and appropriate to have this new sub-section at the start of this list. The sub-section requires the court to consider:

> the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;

It is arguable that this new legislative requirement does not effect any substantive legal change. Both historically, and under the new provision, judicial officers can take into account, in this stage of the pathway, the effect of family violence on a party's current and future circumstances. For example, a court can consider a party's reduced ability to work due to the effect of family violence[112] or of high associated medical costs or disabilities making it more difficult to care for children.[113] However, given the new provision makes it clear that courts must consider the effect of family violence generally, and not just in relation to the other considerations in the sub-section, it is possible courts will interpret this sub-section to require that they take much fuller account of the needs of the victim caused by the family violence. Given the increased recognition of both economic abuse in the Amendment Act and the economic costs of family violence generally, we are hopeful judges will be emboldened to use this sub-section to consider the *real* costs of an abusive relationship to a victim of violence and use their discretion to achieve genuinely just and equitable outcomes.

Prior to the Amendment Act, the Full Court of the FCFCOA held in *Boulton* that it was possible to consider family violence at both contributions and future needs stages.[114] The Amendment Act makes it clear this is now mandatory.[115] In *Pantoja* the Full Court held that if violence was considered at both stages, the trial judge must explain the 'predictive prospective factor[s]' that are anticipated to impact the victim.[116] We predict this requirement will remain under the amended provisions.

The requirement to consider family violence in spousal maintenance applications

A new factor has been inserted into the mandatory considerations list (or 'shopping list')[117] when the court is exercising jurisdiction under s74 for spousal maintenance applications. The list is otherwise unchanged. Section 75(2)(aa) requires the court to consider:

> the effect of any family violence to which one party has subjected or exposed the other party, including on any of the matters mentioned elsewhere in this subsection;

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[112] *Houghton & Houghton* [2019] FamCA 498.
[113] *Coad & Coad* [2011] FamCA 622.
[114] *Boulton & Boulton* (2024) FLC 94-202 at [61].
[115] Explanatory Memorandum, Notes on Clauses, [61].
[116] *Pantoja & Pantoja* [2025] FedCFamC1A 104 at [71].
[117] Grant Riethmuller and Robin Smith 'Spousal Maintenance: Is it Time to Roast this Old Chestnut?', (Paper, 13th National Family Law Conference, Adelaide, 7 April 2008) 5.

The interpretation of this factor is likely to be similar to that of s 79(5)(a) which requires the court to consider the effect of violence on a party's 'current and future circumstances.' In an appropriate case the full impact of the violence in the relationship could be considered when determining if the party is unable to support themselves or has the capacity to pay maintenance to the other party. However, ongoing spousal maintenance orders are rare[118] and the 'principles underpinning spousal maintenance are poorly developed'[119] so it is difficult to foretell the impact of this new consideration, and it might be some time before there is relevant caselaw.

It is important to note that in addition to being relevant to an assessment of contributions and to the assessment of a party's current and future circumstances, the same family violence conduct might be relevant to an application for spousal maintenance.[120]

The requirement to consider family violence when making decisions in relation to companion animals

Australia has one of the highest rates of pet ownership in the world; 61% of households live with a companion animal or pet and around 80% of households with a pet have children.[121] Previously, the FLA did not distinguish pets from other forms of property in family law matters. The Amendment Act introduced changes regarding pets, referred to in the FLA as 'companion animals'.[122] Under s 79(6) the court may now order that one party, or a person joined as a party, is to have ownership of the companion animal, that the animal be transferred to another person, or that it be sold. Importantly, the amendments do not allow a court to make shared caring arrangements for pets.[123] The considerations that the court must take into account appear in a non-hierarchical, non-exhaustive, list of eight factors (s 79(7)). Most of these factors clearly relate to the animal itself, such as how the animal was acquired, who owns or possesses the animal, the extent to which each party has cared for the animal, the attachment of a party or child to the animal as well as cruelty or abuse by a party towards the animal. Interestingly, the court is also required to consider any family violence to which one party has subjected or exposed the other party, even if that family violence is unrelated to the pet.[124]

The definition of family violence in s4AB already included 'intentionally causing death or injury to an animal' as an example of family violence. Research demonstrates that perpetrators use threats of violence towards pets as a form of power and control over their partners and children.[125] Research in New South Wales found that 81% of domestic and family violence and community workers reported that victims have disclosed their current or previous partner had threatened to harm or kill their pet, and 55% reported their current or previous partner had

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[118] *Review of the Family Law System: Discussion Paper* (n 70) at [3.163].
[119] Riethmuller and Smith (n 117) 47.
[120] Explanatory Memorandum, Notes on Clauses, [31].
[121] Animal Medicines Australia, *Pets in Australia: a national survey of pets and people* (2022). Available at: animalmedicinesaustralia.org.au/report/pets-in-australia-a-national-survey-of-pets-and-people-2
[122] Defined in FLA s 4(1).
[123] Cf. Marion C Willetts, 'An Exploratory Investigation of Companion Animal Custody Disputes Following Divorce' (2021) 62(1) *Journal of Divorce & Remarriage* 1; Deborah Rook, 'Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law' (2014) 28(2) *International Journal of Law, Policy and the Family* 177.
[124] FLA s 79(7)(d).
[125] Amy J Fitzgerald et al, 'Animal Maltreatment in the Context of Intimate Partner Violence: A Manifestation of Power and Control?' (2019) 25(15) *Violence Against Women* 1806.

actually killed the pet.[126] Indeed, it has been suggested that perpetrators who abuse animals use controlling behaviours and forms of violence towards their partners that are 'significantly more dangerous, of greater severity and more varied in nature compared with those [family violence] perpetrators who do not abuse animals'.[127]

Although not all disputes that relate to companion animals involve family violence allegations, the Explanatory Memorandum makes it clear that the companion animal amendments should be seen as part of the greater recognition of the non-physical forms of family violence in the Amendment Act.[128] This acknowledges the link between animal abuse and family violence and of how the safety and wellbeing of pets and those experiencing family violence are deeply interconnected.[129] Pets can provide emotional support for victims of family violence, including children.[130] Such bonds may impact upon whether a victim chooses to leave or delays leaving a violent relationship.[131] Perpetrators can 'use the ownership of animals to keep their partner from leaving a relationship or use possession of the animal as leverage to get them to return'.[132]

Recent Canadian research surveying family lawyers found that 89% of participants reported 'potential or suspected animal cruelty in their cases'.[133] However, a third of participants had never heard about the link between animal maltreatment and family violence before taking part in the survey.[134] The Australian amendments will ensure that lawyers, judges and family dispute resolution practitioners are sensitive to that link. It is to be hoped that the changes improve outcomes for those experiencing family violence and their pets, helping them to stay together and maintain their safety.[135]

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[126] Monique Dam and Christine McCaskill, *Animals and people experiencing domestic and family violence: How their safety and wellbeing are interconnected* (Report, DVNSW, 2020) <https://anrows.intersearch.com.au/anrowsjspui/bitstream/1/20701/1/Nov-DVNSW-Report-on-Animals-and-People-Experiencing-Domestic-and-Family-Violence.pdf>.

[127] Lyla Coorey and Carl Coorey-Ewings, 'Animal Victims of Domestic and Family Violence: Raising Youth Awareness' (2018) 7(1) *Animal Studies Journal* 1, 8. See also, Betty Jo Barrett et al, 'Animal Maltreatment as a Risk Marker of More Frequent and Severe Forms of Intimate Partner Violence' (2020) 35(23-34) *Journal of Interpersonal Violence* 5131.

[128] Explanatory Memorandum, Overview of the Bill, [22].

[129] Dam and McCaskill (n 126).

[130] Jane EM Callaghan et al, 'Part of the Family: Children's Experiences with Their Companion Animals in the Context of Domestic Violence and Abuse' [2023] *Journal of Family Violence* 1.

[131] Betty Jo Barrett et al, 'Animal Maltreatment as a Risk Marker of More Frequent and Severe Forms of Intimate Partner Violence' (2020) 35(23–24) *Journal of Interpersonal Violence* 5131; Frank R Ascione et al, 'Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women' (2007) 13(4) *Violence Against Women* 354.

[132] Amy Fitzgerald et al, 'Intersecting Abuse of People and Animals in Practice: Implications of the Connection between Intimate Partner Violence and Animal Abuse for Family Justice Professionals' (2025) 36(1) *Canadian Journal of Family Law* 1, 61.

[133] Ibid 18.

[134] Ibid 20.

[135] Jasmine Montgomery, Zhanming Liang and Janice Lloyd, 'A Scoping Review of Forced Separation Between People and Their Companion Animals' (2024) 37(2) *Anthrozoös* 245.

Other new factors in considering each party's 'current and future circumstances'

There are three new mandatory considerations in s79(5) in addition to the express reference to the effect of family violence. These are the effect of wastage, liabilities, and the care and housing needs of children and they are each discussed below.

However, there is another aspect of the drafting of s79(5) which, although possibly inadvertent, may be significant. As noted above, the prior incorporation of the s 75(2) factors into s 79 included s 75(2)(o) – the 'catch-all' - which required the court to take into account 'any fact or circumstance' they considered was necessary to do justice in the particular case. It is this sub-section which has been relied upon by courts to consider a variety of matters, including family violence (eg *Kennon*) and wastage. The case law has never limited the operation of this sub-section to 'future needs' factors; the only limitation is that the factors must be 'of a broadly financial nature'.[136] By 'cutting and pasting' the old s 75(2) into s 79(5), the 'catch-all' sub-section (s 79(5)(v)) is now placed in a list of considerations that are stated to relate solely to 'current and future circumstances'.[137] This would appear to limit the scope of the 'catch-all' as it suggests it can only be applied to matters relating to 'current and future circumstances' and not to contributions or other considerations.[138] We touch on this issue below in relation to wastage, however, the implications of this change could prove to be broader if it means that a particular 'fact or circumstance' which could be previously taken into account under s 75(2)(o) can no longer be taken into account because it does not relate to 'current and future circumstances'.

The effect of any material wastage

Sub-section 79(5)(d) requires the court to consider:

> the effect of any material wastage, caused intentionally or recklessly by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them;

Since the passage of the FLA, Australian family law has rejected both importing fault into property settlements[139] and the idea that a party can make a 'negative contribution'.[140] However, the courts have had to grapple with how to address economic misconduct by a party. In 1981, in *Kowaliw v Kowaliw*, Baker J laid down what became an accepted principle:

> *... financial losses incurred by parties or either of them in the course of a marriage ..., should be shared by them (although not necessarily equally) except in the following circumstances:*

[136] *Soblusky and Soblusky* (1976) FLC 90-124 at [75].
[137] Note s 79(5)(v) must be read in conjunction with s 79(3)(b)(ii).
[138] This was noted by Women's Legal Services Australia, Submission No 27 to Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Family Law Amendment Bill 2024*, 11 October 2024 at [54].
[139] *Soblusky and Soblusky* (1976) FLC 90-124 at [75]; although cf Helen Rhoades, 'Equality, Needs, and Bad Behaviour: The 'Other' Decision-Making Approaches in Australian Matrimonial Property Cases' (2005) 19(2) *International Journal of Law, Policy and the Family* 194 -205.
[140] *Antmann and Antmann* [1980] FamCA 64; (1980) FLC 90-908 at [32].

> *(a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or*
>
> *(b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.*[141]

This was one of the very rare 'legitimate guidelines' applying to property settlements.[142] The effect of it being a legitimate guideline was that, if conduct fell within the parameters, a court had to adopt this approach (that is, the loss should not be shared), unless a justification was provided as to why that approach should not be adopted in the particular circumstances of the case.[143]

The introduction of new s 79(5)(d) makes explicit that the 'effect' of 'material' wastage is a consideration in determining a property settlement. So, the wastage must have had an impact, presumably on the asset pool/financial resources of the parties, and that impact must be more than trivial. The Explanatory Memorandum says this sub-section is 'not intended…[to]…displace existing case law concerning the treatment of wastage'.[144] This statement may have been partly in response to at least one submission[145] that expressed concern that the original version of this section in the Draft Exposure Bill did not reflect the parameters set out in *Kowaliw*. On its face, s 79(5)(d) appears to codify *Kowaliw*, however, some aspects of the sub-section create uncertainty.

First, it has been included in the list of 'current and future circumstances' considerations, rather than in the contributions factors as was the case in the Exposure Draft. The rationale for this choice is unclear. The Full Court of the FCA had held that where it was found a party's economic behaviour met the test in *Kowaliw*, the wastage could be considered in any of the first three steps of the pathway, however the usual approach was to address it under one of the first two stages.[146] Most commonly, the wastage would be taken into account at the second stage,[147] through an adjustment in the assessment of the parties' contributions, via the 'catch-all' provision in s 75(2)(o).[148] Alternatively, in a limited set of circumstances,[149] the loss could be notionally added-back to the asset pool, at the first stage; the loss could then be treated as being in the hands of the party who caused the wastage, and so part of their share of the property, effectively causing them to bear the loss sustained. Notwithstanding the legislature's expressed intention to codify the common law, the recent Full Court decision of *Shinohara* (mentioned above) held that the introduction of s 79(3)(a)(i) eliminates the option of a notional

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[141] *Kowaliw v Kowaliw* [1981] FamCA 70; (1981) FLC ¶91-092 at [10].
[142] *Browne v Green* (1999) 25 Fam LR 482; (1999) FLC ¶92-873 at [49].
[143] For further discussion of legitimate guidelines, see Lisa Young, Stephanie Powell and Rachel Pocock, 'Legitimate Guidelines, Parenting Disputes and the Case of 'Coercive' Relocation Orders' (2019) 33 *Australian Journal of Family Law* 51.
[144] Explanatory Memorandum, Notes on Clauses, [85].
[145] See Law Council of Australia (n 98) [173].
[146] *Polonius & York* [2010] FamCAFC 228 at [89]; note the Full Court preceded reference to the 'future needs' step with 'perhaps', recognising it was not the common way to deal with wastage.
[147] See for example *Browne v Greene* (1999) 25 Fam LR 482; (1999) FLC ¶92-873; *Mayne & Mayne* [2011] FamCAFC 192 at [86]; *Crandall & Crandall* [2009] FamCAFC 120.
[148] *Mayne & Mayne* [2011] FamCAFC 192.
[149] Townsend and Townsend [1994] FamCA 144; C & C [1998] FamCA 143 at [46].

add-back of property, leaving those matters that were previously dealt with as add-backs to be considered under the contributions *or* current and future circumstances considerations.[150] The Full Court in *Shinohara* is not clear on whether placing *Kowaliw* in s 79(5) will limit the response to wastage (which was not an issue in the case) to an adjustment *after* consideration of contributions. Given that the bulk of weighting of a distribution of assets normally takes place at the assessment of contributions stage, this could lead to a reduction in the weight given to issues of wastage. Much will depend on how the superior courts approach the flexibility of the combined operation of the various sub-sections.

Second, whereas *Kowaliw* spelled out that relevant wastage should generally result in a loss/debt not being shared, s 79(5)(d) is not explicit on this point. Given the clear intent on this point expressed in the Explanatory Memorandum, no doubt courts will read this sub-section as directing them to continue as before in this regard (subject to any limitations arising from the placement of this sub-section referred to above).

Third, *Kowaliw* and later cases generally only applied to 'relationship assets' or funds generated from assets or businesses to which the other party had made a contribution or had an actual legal entitlement.[151] The consequence of this was that parties were generally free to expend their post-separation income and assets acquired with that income after separation.[152] However, s 79(5)(d) applies to wastage of *any* property or financial resources of the parties, whenever acquired. Even though it is unlikely that the court will change its practice in relation to the use of post-separation income, it appears to be open for it do so on the wording of s79(5)(d).

Fourth, unlike *Kowaliw*, s 79(5)(d) includes a reference to conduct that wastes a *financial resource*. As mentioned above, s 79(3)(a)(i) does not require the court to identify financial resources and there is no definition of 'financial resource'. While it is beyond the scope of this article to address this point in detail, this may have been included in s 79(5)(d) to capture economic misbehaviour involving trusts. However, it is also possible to imagine situations where a party's decision to refuse financial support from a third party/entity might be argued to fall within the new sub-section. This would be a significant departure from *Kowaliw* and have the potential to further complicate and extend litigation.

Fifth, *Kowaliw* applied to situations where loss resulted from intentional, reckless, negligent or wanton actions. The new sub-section only refers to the cause of the wastage being intentional or reckless. While the reference to negligent actions is not included, we would suggest that the chosen wording reflects the common law application of *Kowaliw*[153] and is simpler for self-represented litigants to understand.

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[150] In relation to the utility of notional add-backs, note Federal Magistrate Judy Ryan, 'Enlarging the Asset Pool – Adding back notional assets' [2006] *FedJSchol* 1, where it is posited in the conclusion that a just and equitable outcome may not result from taking asset dissipation into account in a general way and applying contribution and future needs factors to a depleted asset pool.

[151] *Chorn & Hopkins* [2004] FamCA 633 [54] – [64]; see also *Beklar & Beklar* [2013] FamCA 327 at [142]. For an example of a case in which the court considered whether pre-separation contributions were made to funds received post-separation see *Dyson & Eggers* [2019] FamCA 511.

[152] *Shimizu & Tanner* [2011] FamCA 271 [76].

[153] See for example *Browne v Green* (1999) 25 Fam LR 482; (1999) FLC ¶92-873 at [29]; the Full Court did not challenge the trial Judge's comment that negligence has its ordinary meaning in this context.

Finally, some submissions on this change called for a definition of, and examples of, 'wastage'.[154] While on the one hand unrepresented parties may have benefited from some guidance, conversely inclusion of examples may have promoted unsavoury and strategic arguments over relationship financial behaviour.[155]

In sum, while aspects of wastage arguments have been made explicit and visible on the face of the legislation, there is still room for argument about various aspects of the operation of the new sub-section and aspects of the common law remain hidden from non-expert users.

Any liabilities incurred by the parties

Another new consideration when assessing the parties' 'current and future circumstances' is sub-section 79(5)(e):

> any liabilities incurred by either of the parties to the marriage or both of them, including the nature of the liabilities and the circumstances relating to them;

As noted above, s 79(3)(a)(ii) requires the court to identify 'existing liabilities of the parties'. This, together with identifying the parties' assets, has historically been part of the first step in a property settlement.[156] While there has never been any statutory or common law requirement that parties share their liabilities equally, the usual approach of deducting the value of the parties' liabilities when determining the value of the asset pool had this effect.[157] However, a different approach might be adopted, as the treatment of a liability was 'dependent upon the nature of the liability, the circumstances surrounding the liability and the dictates of justice and equity shaped by each.'[158]

The Explanatory Memorandum states that s 79(5)(e) is designed to maintain the common law position and 'to send a clear signal' to all FLA users that consideration should be given to 'whether the liability should be included in the asset pool [and so split equally], or…be apportioned to one party only, or split between the parties in some other way.'[159] In other words, the intent is to codify the common law by clarifying that it is not always the case that liabilities are equally shared. The circumstances that may give rise to an unequal sharing of liabilities will be varied. For example, in some instances this sub-section may operate together with s 79(5)(d), resulting in the party that caused the wastage being left to bear the full debt.

Sub-section 79(5)(e) may also operate in conjunction with s 79(5)(a), as a response to family violence. In particular, it seems likely the consideration of the 'circumstances relating' to the liability will invite consideration of economic abuse, making it more likely that a victim of economic abuse will not be responsible for the liability. For example, where it is found that a party has subjected the other party to economic/financial abuse in the form of forcing the victim to take on a legal liability (see the example in s 4AB(2A)(a)(iii)), that liability will affect the

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[154] Women's Legal Services Australia, (n 135) at [57]; Fitzroy Legal Service, Submission No 14 to Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Family Law Amendment Bill 2024*, 5.
[155] Even a seemingly obvious example such as 'excessive gambling', provided as an example in the Explanatory Memorandum, Notes on Clauses, [82] is much more nuanced where gambling is caused by addiction or a mental health disorder: see *Crampton & Crampton* [2006] FamCA 528; (2006) FLC 93-269.
[156] See eg *Fitzmaurice & Woolridge* [2020] FamCAFC 64 at [20].
[157] *In the Marriage of Prince* [1984] FamCA 7.
[158] Rodgers & Rodgers (No. 2) [2016] FamCAFC 104 at [40]. See discussion in Anthony Dickey, 'A Question of Priorities: Wives or Unsecured Creditors?' (1992) 6 *Australian Journal of Family Law* 229.
[159] Explanatory Memorandum, Notes on Clauses, [90].

victim's current/future circumstances, and so orders can be made to redress that adverse effect.

Notwithstanding that this new sub-section may codify the common law and promote enhanced judicial recognition of the consequences of economic abuse, it seems optimistic to assume it will 'send a clear signal' to self-represented litigants and those negotiating without lawyers as to the various ways in which a court might treat various liabilities.

The need to provide appropriate housing for children of the relationship

Children's best interests have never explicitly featured as a consideration in the financial provisions of the FLA. This is in stark contrast to the equivalent legislation in England and Wales which requires courts to give *first consideration* to the welfare of children.[160] Indeed, the needs of children have never been directly considered under s 79, although in combination, ss 75(2)(c) and (d) required consideration of a party's care responsibilities for minor children of the relationship and a parent's financial commitments arising from that care, when considering 'future needs'.

New ss 79(5)(f) and (g) replace those two sub-sections and are substantially the same save for the following addition in s 79(5)(f):

> the extent to which either party to the marriage has the care of a child of the marriage who has not attained the age of 18 years*, including the need of either party to provide appropriate housing for such a child* (emphasis added);[161]

As with the prior formulation, the new section contains no reference to the best interests of any child involved, nor is there any stated preference for home ownership versus renting, and except where a parent has no contact with their children, this consideration will usually be relevant to both parents. However, under both the old and new formulation, there is scope for argument about the need for stability, particularly in the highly problematic rental market in much of Australia.[162]

The Explanatory Memorandum again states this amendment is consistent with the common law and says it implements art. 3(2) of the United Nations Convention on the Rights of the Child, 'by ensuring that in property proceedings the family law courts can take into account the obligation and duties of parents to provide housing to ensure the wellbeing of dependent children.'[163] Notably, there is no reference in this context to the economic disadvantage that typically women and the children in their care face on separation. We share the hope expressed by Fehlberg and Sarmas that this amendment will encourage the focus to be on the home in which the child/ren spend the most time.[164] There is also no mention of family violence in this

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[160] *Matrimonial Causes Act 1973* (England and Wales) s 25(1),provides that '[i]t shall be the duty of the court in deciding whether to exercise its powers [to make property settlement orders] and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen'.

[161] Section 75(2)(c) has been amended in the same terms, the italicised words reflecting the addition made by the Amendment Act.

[162] Senate Community Affairs References Committee, *The Worsening Rental Crisis in Australia: Final Report*, December 2023. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Worseningrentalcrisis.

[163] Explanatory Memorandum, Statement of Compatibility with Human Rights, [33].

[164] Fehlberg and Sarmas (n 107) 99.

context,[165] however, the Amendment Act's new focus on family violence in financial disputes bodes well for decision-makers to take fuller account of the broader financial consequences of family violence in determining what is just and equitable, including in relation to the housing needs of children of victims of violence.

While we consider this amendment to be an improvement, we nonetheless question whether there is a possibility for unintended consequences arising out of the precise wording adopted. For example:

- does a carer parent 'need' some adjustment for housing if someone else (eg a new partner or that person's parent) is providing housing? We would suggest that it may be dangerous for a court to assume that because a carer parent presently benefits from accommodation provided by a third party, they have no independent need to be able to provide appropriate accommodation for the children in the future; and
- does the reference to 'appropriate housing for…a child' invite unsavoury investigations into the precise nature of accommodation a carer parent is seeking to secure, and whether what is proposed is 'appropriate'?

Conclusion

Belinda Fehlberg and Lisa Sarmas have observed that in practice, financial settlements are largely impacted by factors outside those enumerated in the legislation, whether or not family law professionals and processes are accessed.[166] The broad discretion in the property division provisions remains, so it may be that for many separated couples, the legislative changes will have little impact on outcomes. However, predicting how the Amendment Act will change decision-making is fraught and, as *Shinohara* has already evidenced, a general expressed intent by the legislature to codify the common law does not automatically translate into business as usual.

Whilst acknowledging that many victims of family violence may avoid applying for property division due to lack of legal aid and the high financial costs of family law proceedings,[167] a huge positive of the Amendment Act is that it puts the need to consider the effects of family violence 'front and centre'. Deputy Chief Justice Robert McClelland has predicted that 'the cultural effect will be significant'.[168] A court is now required to consider how family violence in a relationship may have impacted upon a party's contributions during a relationship, their current and future circumstances, their need for spousal maintenance (or ability to pay spousal maintenance) and their ownership of any pets. We are hopeful that this new focus on family violence will empower judges to be bold in their decision-making and include meaningful consequences of family violence in determining property settlement outcomes.

Another positive addition to the FLA is that the court must now specifically consider the housing needs of children when determining the adjustment of parties' property. While we would prefer to see the best interests of children being considered in property proceedings, this provision

[165] See, for example, the discussion of the risk of homelessness for women and children escaping family violence in Fitzroy Legal Service (n 154) 6.
[166] Fehlberg and Sarmas (n 107) 86.
[167] Breckenridge et al (n 49) 27; Kaye (n 81).
[168] Tom McIlroy, 'Judge warns: abuse your spouse, lose your house' *The Australian Financial Review* 24 February 2025.

emphasises an important component of children's wellbeing, which assumes particular significance in Australia's current housing market.

However, we believe that the Amendment Act represents a missed opportunity to focus on providing 'material and economic security' for parties[169] and ensure fairer outcomes for separating couples and their families. Empirical evidence clearly and consistently demonstrates that women and children are at an economic disadvantage after separation.[170] Given this knowledge, it is puzzling that the Australian government chose to entrench that disadvantage by making legislative changes aimed at codifying and clarifying the common law approach.

Even when assessing whether those modest aims of the Amendment Act have been met, we note that while the new amendments have offered some clarification of the court's decision-making process when adjusting the property interests of parties, it has not codified or fully clarified the property decision-making framework. While aspects of common law principles from cases such as *Hickey, Stanford, Kennon* and *Kowaliw* can clearly be seen in the amended s 79, and the legislation is not inconsistent with these principles, it is not correct to say that the principles have been embedded into the legislation. Many questions of interpretation remain, meaning problems remain for self-represented litigants and parties negotiating in the shadow of the law, despite the Amendment Act's intention to make the law clearer for these groups.

[169] Fehlberg and Sarmas (n 107), 142.

[170] As noted by the ARLC in *Family Law for the Future* (n 7) at [6.21]. See further research discussed in: Fehlberg and Sarmas, (n 107); Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 Federal Law Review 367, 391-2; Barbara Broadway et al, *From Partnered to Single: Financial Security Over a Lifetime*, Melbourne Institute: Applied Economic & Social Research, The University of Melbourne, 2022 https://melbourneinstitute.unimelb.edu.au/research/reports/breaking-down-barriers/research-report-pages/report-5.