[redacted]

Factors affecting settlement of family provision claims

FP1 We consider that the use of the term "domestic partner" has been abused in our situation. From a legal aspect it appears to be a real show stopper with Courts and solicitors becoming very concerned about the correct interpretation. By a plaintiff lying or exaggerating the situation where a couple are living together for a short period of time the door is open for all encompassing claims against the estate of the deceased with relative impunity relating to any costs.

We firmly believe a strict interpretation of the term "domestic partner" needs to be defined within the Act in a similar way as the Wills Act demands that a minimum period of two years of living together are required before a claim to become the Administrator of a deceased will succeed.

Time limits and extension of time

FP2 On the surface the six month application period seems reasonable, however in our circumstances it was simply used as a time to draw out the formal lodging by the application to cause the most hurt to the family. The Commission may wish to consider the emotional effect of time limitations when used as a weapon by an applicant.

Opportunistic claims

FP3 It is our view that the current law will entertain any claim however unfounded and opportunistic in an attempt to ensure that no one misses out. We understand that in the past well deserving individuals have been badly treated after long term relationships that the law did not recognize. I personally remember a case over 35 years ago where a woman was left virtually destitute after having lived with a very wealthy man for over ten years but was not named in his Will as an oversight.

FP4 Whilst Section 97(7) of the Probate Act may permit a Court to allocate costs against unsuccessful applicants my enquiries are that this very rarely happens. In our particular case the applicant was an undischarged bankrupt when the Caveat was placed on the our application for Administration of the Estate. The costs order that has followed from that unsuccessful action will likely cause the applicant to file for bankruptcy again.

FP5 Again, in our brief investigation Courts are very reluctant to summarily dismiss claims. It seems that in an attempt to be "fair" the Courts impose very heavy and unnecessary cost burdens on the parties.

Excessive costs

FP6 There is little doubt that in our case costs orders will have a very dramatic effect on the Estate. Costs have already exceeded $50,000 and we are at the beginning of a Part 4 application. If the case proceeds the costs to the estate from our side alone will exceed $150,000 and if costs are awarded against the Estate from the applicant's side the Estate will be all but wiped out.

[redacted]

Transactions during the deceased person's lifetime that reduce the size of their estate

FP7 NA

FP8 NA

Reviewing the purpose of family provision laws

FP9 NA

FP10 NA

Limiting eligibility to make a family provision application

FP11 We are very much in favour of the national Committee's proposed approach regarding eligibility to apply for family provision.

FP12 We believe that this eligibility test would be helpful as used in New South Wales.

FP13 We believe that the current categories are adequate.

FP14 We believe that dependence should be limited to financial dependents. How otherwise could a suitable critea be established when solely pecuniary matters need to be resolved.

FP15 We believe that dependence during the deceased's lifetime should be an important test.

FP16 We believe that the demonstration of financial need is also very important.

Amending costs rules and principles

FP17 We believe that if there were a legislative presumption that unsuccessful applicants would not receive their costs out of the Estate would discourage opportunistic and non-genuine claims. We are also mindful that some solicitors are prepared to undertake claims on the basis of receiving a large proportion of the settlement if the claim is successful. Whilst we do not understand how this can be discouraged we do believe that if solicitors enter such an accommodation they should be required to disclose this arrangement at the commencement of any claim.

FP18 **(a)** We have no problem with the proposition that an unsuccessful should bear the burden of the costs for both parties. We are also mindful that legal costs are never fully recovered due to the complex calculation of the bills and the taxing rules applied against the costs. It is very unlikely that either party, if successful, would recover more that 60% of the actual legal costs.

(b) We have no problem with the proposition that an applicant bears the burden of their own costs. This would give the Court the flexibility to determine where the costs burden should lie.

FP19 NA

FP20 NA

FP21 NA