conservation legislation and under legislation relating to the commercial regulation of fisheries. Further guidelines to enable Aboriginal people to have access to non-Aboriginal land for the purposes of traditional hunting.

legislation. It is recommended that these proposals, with two exceptions (those relating to local justice mechanisms and to traditional hunting and fishing principles) be implemented by Commonwealth legislation which does not exclude the concurrent operation of State or Territory legislation which complies with the recommendations.

other factors. The Commission's report also discusses in detail other factors impinging on the recognition of Aboriginal customary laws including common law recognition, the settled/conquered colony debate, questions of discrimination, equality and pluralism, ways in which basic human rights may be ensured, and questions of Commonwealth constitutional power.

extensive research. The Report is based on detailed research into Australian law and its operation and into the law and practice of many overseas countries including Canada, United States, Papua New Guinea, New Zealand, other Pacific and African countries. The Commission consulted with Aboriginal countries and organisations throughout Australia and with judges, magistrates, lawyers, police, anthropologists, linguists, historians and government authorities. Some 15 Research Papers, 3 Discussion Papers and 9 Field Reports were produced.

the report. The Commission's report consists of both a Summary Report and a Full Report. The latter consists of two volumes including proposed draft legislation. Copies may be obtained from Australian Government Publishing Service bookshops around Australia. (See advertisement on back page of this issue).

matrimonial property — new developments

The law regulating the spouses' property relations is fundamentally an index of social relations between the sexes.

Kevin Gray

The continuing world-wide upheaval in relationships between the sexes in the home and in the workforce produces a flow of legal and political developments affecting family law, which press for attention even as the Commission's work on its reference on Matrimonial Property reaches its closing stages.

Recent Australian developments bear upon some inter-related policy issues:

- is there appropriate scope for judicial discretion in the adjustment of spouses' property upon the breakdown of a marriage?
- In adjusting property, how should the future needs of the spouses and their children be balanced against the spouses' respective contributions during the marriage?
- How should responsibility for the support of needy members of the family be allocated between other members of the family and the taxpaying public?

the norbis case — discretions and guidelines. In *Norbis v Norbis* [1986] FLC 91 – 712, decided on 30 April 1986, the High Court, for the first time since *Mallet's case* (1984) 58 ALJR 248, confronted the quandary that is endemic to the wide discretionary jurisdiction to adjust spouses' property under s79 of the Family Law Act. As Brennan J put it, 'An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process'.

rules and presumptions. In *Mallet's case* the High Court held that a judge's discretion under s79 could not be fettered by rules or presumptions unauthorised by the Act. A ma-

jority of the Court disapproved of decisions of the Full Court of the Family Court which had spoken of equality as a convenient starting point in assessing contributions, at least in relation to domestic assets in a long marriage; such an approach was held to be an unwarranted constraint upon the evaluation of the spouses' respective contributions according to the evidence in each case. Deane J, dissenting, considered that the Family Court Judges had, for the sake of consistency, derived a guideline from their 'unrivalled experience' which involved 'no more than the articulation of a step on the path to conclusion in the exercise of a discretion', rather than a misconceived proposition of law.

a global view. In *Norbis*, a Full Court of the Family Court had, prior to the High Court's decision in *Mallet*, upheld an appeal on the ground that the trial judge had erred in assessing the parties' contributions on an asset-by-asset basis; the Court held that the proper course was to 'fix an overall proportion on a global view of the totality of the assets to be divided'. The Court varied the trial judge's order by increasing the wife's share of assets worth $1,040,000 by $29,500 – a variation of only 2.84%.

appeal. The High Court unanimously – and, after *Mallet*, predictably – upheld the husband's appeal. The Act did not require the employment of any particular method of reasoning, so long as the factors specified in s79 were taken into account. But their Honours expressed varying views on the appropriate way to reconcile the preservation of the wide discretionary jurisdiction with the inexorable pressures for consistency in its exercise.

Wilson and Dawson JJ (in a joint judgment) considered that it was impossible to do more than follow the traditional case-by-case approach of the common law, gleaning guidance for each case from the accumulated wisdom of past cases, rather than attempting to formulate abstract principles or guidelines designed to constrain judicial discretion within a predetermined framework. 'There is no reason to think that the traditional approach, when applied in the family law area, leads to arbitrary and capricious decision-making or that it leads to longer and more complex trials.'

But Mason and Deane JJ (in a joint judgment) and Brennan J considered that 'the only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion' was to be found in the development by the Full Court of guidelines as to the manner in which the complex of discretionary assessments and judgments involved in this jurisdiction was to be made. Such guidelines would not be binding, but an unexplained failure by a trial judge to apply a guideline might indicate that the judge's discretion had miscarried.

where to now? Although the latter three judges encourage development of guidelines by the Full Court of the Family Court, they do not chart a clear course for the Family Court to follow:

- Mason and Deane JJ envisaged that there may be situations in which an appellate court's guidance would have the force of a binding legal rule. They did not elaborate on this proposition or its relationship to the decision in *Mallet*. Brennan J disagreed, emphasising that 'the width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise'.
- No clear concept of a 'guideline' emerges. In *Mallet*, Deane J alone regarded 'equality as a starting point' as a permissible guideline. In *Norbis*, Mason and Deane JJ considered that the Full Court of the Family Court could, if it chose, prescribe the global approach as a guideline to be applied 'in most cases'. But Brennan J regarded

the global approach as only 'a procedure for determining the exercise of discretion'. It was not a guideline affecting the order that should be made. He contemplated the development of guidelines which would identify factors which, together with those prescribed by s 79(4), should usually be taken into account, and indicate their relative importance. He acknowledged that such guidelines could only be developed cautiously; they must be expressed in very general terms because of the diversity of cases to which they must apply, and because they must accommodate a range of standards and values accepted within the community.

The *Norbis* decision prompts renewed consideration of the issue that has become central to the Commission's reference. Having determined upon separate property rather than community property during marriage and a discretionary jurisdiction for property allocation on divorce rather than a regime based on fixed entitlements, a further choice arises. If the aim is to achieve a better balance between flexibility and consistency within a discretionary framework, should we retain the present legislation and rely on accumulating experience to produce guidelines through the case law and higher, more uniform standards of professional practice? Or should the legislation be revised in order to clarify the objectives and principles of the discretionary framework, and to regulate the process of assembling and assessing the relative weight of the factors that should be taken into account in negotiated settlements or judicial decisions?

a new legislative scheme? In favour of retaining the present legislation, it might be argued that any constraint upon the wide discretionary jurisdiction will bring less finely-tuned justice, more complex legislation and new uncertainties; but there are compelling arguments for attempting to develop a new legislative scheme:

- The formulation of guidelines involves value judgments about the nature of the marital relationship which are more appropriately made by the legislature than the judiciary.
- If there are substantial shortcomings in the present law, they are better tackled through a comprehensive legislative revision than through the haphazard and protracted process of proposing and refining guidelines, as opportunities arise, in appellate courts. (The uncertainties of the process are illustrated by the somewhat discordant guidance provided to the Family Court by the High Court in the *Norbis* case).
- Legislative guidelines are more accessible, they can more readily serve an educative purpose, and they are more likely to be consistently applied, than guidelines which can only be derived by experienced legal practitioners from an accumulation of judicial decisions. This point has particular force in family law, with its immense volume of cases dealt with in and out of court, almost always involving parties experiencing their only encounter with this aspect of the legal system, most of whom lack the benefit of specialised legal advice.

In short, the social ramifications of family law and its administration are so pervasive that, if a need for change is established, it ought to be met immediately through legislation rather than through the gradualism of the common law process.

child maintenance — a new deal? Various forces are mustering for the first full-scale effort to establish an effective national child maintenance system, the lack of which has been a scandalous deficiency in the administration of justice and the social welfare system.

In 1983 a report prepared by officers of the Family Law Branch of the Attorney-

General's Department proposed the establishment of a new agency to be responsible for collection and enforcement of maintenance. The Family Law Council supported the proposal in principle; but its research led to a report late in 1985 which considered broader questions of the assessment of maintenance and the relationship between maintenance and social security as sources of support for single parent families. These concerns were also reflected in a private Member's Bill introduced by Senator Durack early this year which proposed amendments to the Family Law Act which would:

- require a court in assessing spousal or child maintenance to ignore the applicant's eligibility for a social security pension or benefit;
- require a court to give the needs of spouses and children 'such priority ... over responsibilities or commitments assumed since the marriage as is just and reasonable in all the circumstances'; and
- revive imprisonment as a punishment for maintenance defaulters.

It now appears that the government, building on the Family Law Council's report, is planning to announce in the August budget a new child maintenance scheme. *The Age* (24 May 1986) reported that the Minister of Social Security (Mr Howe) had said that the scheme was still being developed but that maintenance might be assessed administratively according to an income-based formula, and collected by automatic withholding at the source of income. The formula might be based on a fixed percentage of an absent parent's gross income according to the number of children in the family, as in some schemes being introduced in the United States. The terms of any property settlement might be taken into account. The government is responding both to the affront to the administration of justice represented by widespread non-compliance with maintenance obligations, and the need to curb social security expenditure — in a speech on 22 May, the Minister for Finance (Senator Walsh) said that the cost of the supporting parent's benefit had been growing at 9% per year in real terms.

a new dimension. This initiative adds another dimension to the Commission's review of matrimonial property law. The vast social and economic ramifications of the government's proposals make it necessary to ensure that the Commission's recommendations are compatible with any new child maintenance scheme. The surveys conducted for the reference show that in Australia, as in other jurisdictions with a discretionary system, the future needs of the custodial parent and the child strongly influence the re-allocation of property (whether as a factor independent of maintenance or in substitution for maintenance). Some see this as an advantage of the discretionary system over a fixed entitlements regime. But it can also be argued that an increased share of property of modest value is often an inadequate substitute for maintenance; it is regarded as an acceptable arrangement only because of the lack of effective enforcement of maintenance orders and the attractions of a 'clean break' from the former spouse. A child maintenance scheme of the kind that has been foreshadowed could cause great changes in property arrangements and lead to a different distribution between family members of the economic hardship that generally ensues from marital breakdown.

recent overseas developments. The Commission's reference has counterparts in several overseas jurisdictions, as the radical changes in divorce law of the 1970s undergo reappraisal. Some examples:

- Scotland. The Family Law (Scotland) Act 1985 is a comprehensive revision of the Scottish law of maintenance and property adjustment on divorce. It implements the recommendations of the Scottish Law Commission's *Report on Aliment and Financial Provision* (Scot Law Com No67, 1981). The Scottish Commission's recommendations on

property rights during marriage were formulated in its *Report on Matrimonial Property* (Scot Law Com No86, 1984). The views expressed in these Reports are closer than any other recent overseas review to those that have been formed by this Commission.

- Ontario. The Family Law Act 1986 repeals the Family Law Reform Act 1978, which had provided for the equal division on separation or divorce of 'family assets' – the home and domestic assets – while placing restrictions upon the sharing of other property. The restrictions attracted wide criticism, especially in relation to superannuation and business assets. (See Discussion Paper No22, paras108 – 110). The 1986 Act introduces a system of deferred community of property, broadly similar to New Zealand's Matrimonial Property Act 1976, with a basic rule of equal sharing of the home and all property acquired by the efforts of the parties during the marriage.
- Other Canadian Provinces. The Law Reform Commissions of British Columbia (in October 1985) and Saskatchewan (in September 1984) have published comprehensive reviews of the matrimonial property legislation introduced in those Provinces in the 1970s, with proposals for reform. Their counterparts in Alberta and Manitoba have published reports on division of pension benefits upon marriage breakdown (Alberta, May 1985) and spousal property rights during marriage (Manitoba, December 1985).

All of this valuable comparative material provides a reminder that the controversy over financial and property arrangements on marital breakdown is not peculiar to Australia, and stems from more complex causes than the details of the Family Law Act and its administration. The problems confronting us are being experienced in all comparable legal systems.

bell resources and bhp

'Will you walk a little faster?' said a whiting to a snail.
'There's a porpoise close behind us, and he's treading on my tail.
See how eagerly the lobsters and the turtles all advance,
They are waiting on the shingle – will you come and join the dance?'

Lewis Carroll, 'The Lobster Quadrille' from *Alice in Wonderland*

Ever since Mr Robert Holmes a Court's company Wigmores Limited launched its take-over bid for BHP in 1983, the battle for the Big Australian has provided a bonanza not only for the legal advisers of the protagonists but also for all those interested in those areas of the law which can broadly be classified as business law. As 1986 has proceeded, the audacious tenacity of the man from the West and the defensive tactics of the incumbent board of BHP have raised legal issues ranging from administrative law (for example, the powers of the National Companies and Securities Commission to hold public hearings) to the byzantine details of our take-overs code.

Four particular legal aspects of the battle for BHP will be examined here:

- the regulation of partial bids for a company;
- the role of litigation in take-overs;
- the mergers provision of the Trade Practices Act; and
- taxation questions raised by funding of corporate take-overs.

take-over legislation. The bid for BHP by Bell Resources highlighted moves to amend the national companies legislation so as to outlaw pro rata partial take-over bids.

A partial bid is one made for part only of the capital of a company. The partial bid may be either

- a proportional bid whereby offers are made for a specified proportion of