PROPOSED CHANGES TO PROPERTY MATTERS UNDER THE FAMILY LAW ACT

An Address by

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INTRODUCTION

I should indicate at the outset that the views expressed by me in this paper should not be taken to represent the official view of the Judges of the Court or the Court itself.

A sub-committee of judges is giving detailed consideration to the issues raised and the implications of the proposals. A submission in this regard may be made in due course, and may or may not reflect some or all of the views expressed in this paper. The Court will, to the best of its ability, assist with the presentation of views concerning the various proposals. I would not expect these views to be unanimous.

It is for this reason that I have centred my attention in this paper on the underpinnings of the proposals.

I am however indebted to my colleague Justice O'Ryan for the following succinct summary of the effect of the proposals contained the Attorney-General's discussion paper. [1]

THE PROPOSALS

Two proposals, being Option 1 and Option 2 have been advanced. In evaluating these proposals it is necessary to understand the key elements of what is being proposed in relation to three areas of financial matters: Property, Superannuation and Financial Agreements.

Option 1

Property

- The property of the parties has to be identified and valued at the date of the hearing.

- Having regard to matters of contribution, the property of the parties is to be divided equally between the parties, there being an assumption that each party made equal contributions.

- This presumption of entitlement may be rebutted if it is established that the contributions were not equal. The key issue concerns the legislative definition of the circumstances in which the presumption may be rebutted, such as: earlier acquired property, special skills etc.

[1] *Property and Family Law - Options for Change*, Attorney-General's Department, 1999.

- The contribution based entitlement may then be further adjusted having regard to s.75 (2) factors.

Financial Agreements

- Parties may enter into an agreement whereby they exclude certain property, such as earlier acquired property or after acquired property, from division in the event of relationship breakdown.

- A party entering into such an agreement must obtain advice as to its legal effect and advise as to its financial effect. The advice as to the legal effect must be from a lawyer and the advice as to its financial effect must be from either a lawyer or financial adviser.

- In the event of relationship breakdown the agreement may be set aside on grounds similar to those presently contained in s.79A. There may be further discretionary grounds based upon change in circumstances and other considerations.

Superannuation

- The Family Court would be given the jurisdiction and power to make orders directly affecting superannuation entitlements.

- Superannuation entitlements both in the accumulation and benefits phase could be divided.

- Parties may enter into an agreement as to how superannuation entitlements are divided and such an agreement may be set aside for the same reasons as financial agreements may be set aside.

Option 2

Property

- All communal property has to be identified and valued at the date of separation.

- As will be seen shortly, certain property may have to be valued at the date of commencement of the relationship and at other points prior to relationship breakdown.

- Property that falls within the description of “communal property” will be divided equally regardless of the contributions made. There is no consideration given to contributions to communal property.

- “Communal property” means property acquired during the relationship or the net increase in the value during the relationship of earlier acquired property. There would have to be a valuation done of such earlier acquired property both at the commencement of the relationship and at the cessation of the relationship to identify the net increase in value of the property.

- Certain categories of property may be excluded from "communal property", namely:

    1. Property acquired by or from gifts or inheritances;
    2. Property acquired from the component of an award for damages referable to compensation for pain and suffering and future economic loss.

- In relation to earlier acquired property that was traded during the relationship and thus became communal property there are three approaches under consideration:

    1. Do nothing and leave it to the agreement of the parties. Thus it would become communal property;
    2. Have ‘tracing provisions’;
    3. Deduct the value of property at the commencement of the relationship from the value of property at the cessation of the relationship. This is called the accounting approach.

- An adjustment may be made to the entitlement to communal property having regard to:

    1. Needs; or
    2. Economic consequences.

- An adjustment on the basis of ‘needs’ would be due to findings on the following matters:

    1. Prospects of the future earning capacity of either of the parties;
    2. Prospects of future employment of either of the parties in the light of the prevailing labour market;

3. The level of skills, training and qualifications of the parties;
4. The opportunities forgone within the marriage; and
5. The ongoing caring responsibilities for any children.

- An adjustment on the basis of 'economic consequences' would be due to findings on the following matters:

    1. The effect on the earning capacity of each spouse arising from responsibilities assumed during the marriage;
    2. The capacity and reasonable prospects of a spouse to obtain education and training including by reason of age and state of health;
    3. The ability of a party to the marriage to relieve any adverse economic impact caused by family violence;
    4. The length of time the parties cohabited; and
    5. Any ongoing parenting responsibility or duty to maintain another person.

Financial Agreements

- Financial Agreements under Option 2 would largely only deal with items of communal property that the parties may want to exclude in the event of cessation of the relationship.

- Such agreements could be set aside for the reasons stated above in respect of Option 1.

Superannuation

Accumulation phase

- Superannuation in the accumulation phase would be divided by agreement or equally. All that would be divided is the value of the superannuation that was accumulated during the relationship.

- How the interest in a defined benefit scheme would be effected is not known.

Benefit phase

- That portion of the entitlement that was attributable to the period of the relationship would be divided by agreement or equally.

REFORM OR CHANGE : WHAT AND WHY?

One of the problems about discussing the reform of matrimonial property legislation is that of identifying what it is that needs to be reformed and why such reform is necessary.

I have commented in the past that there is a tendency for governments of both political persuasions to make change in the area of matrimonial law, and then label it as a reform when on closer examination it is nothing of the kind or not as extensive a reform as claimed. On some occasions it may in fact be regressive. A second problem is that the changes made may have unexpected results and a third is that the rhetoric of reform may create unreal or false expectations.

A good example of these problems is the *Family Law Reform Act* 1995. While that Act did introduce some significant changes to the law, most of those changes could have been introduced by relatively straightforward amendments to the existing legislation. Instead a massive re-write of existing sections was undertaken that by and large produced the same result as that which preceded them, while at the same time introducing the actual changes to the law that were intended, but also produced some unintended consequences.

An unfortunate one of those consequences was an unintended and significant watering down of the reach of the principle that the welfare of a child is paramount. The reformulation which resulted in what is now s 65E, did more than change the previous reference to a child's "welfare" to his or her "best interests".[2] Although the change was not intended to affect the existing law, those responsible for the drafting effectively removed the operation of the principle in so far as it affected issues relating to evidence or procedure, as the majority of the High Court found in the recent decision of Northern Territory of Australia v GPAO and Others.[3] The danger of this occurring was in fact pointed out to representatives of the Attorney General's Department at the time that the Act was drafted but this advice was ignored.

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[2] Section 65E now reads:
*"**In deciding whether to make a particular parenting order** in relation to a child, a court must regard the best interests of the child as the paramount consideration."* (emphasis added).
The previous s 64(1) provided:
*"**In proceedings in relation to** the custody, guardianship or welfare of, or access to, a child:*
a) the court must regard the welfare of the child as the paramount consideration" (emphasis added).

[3] (1999) 24 Fam LR 253. See paras 63-72 per Gleeson CJ and Gummow J, Hayne J agreeing; paras 136 to 139 per Gaudron J; and para 198 per McHugh and Callinan JJ.

In fact, apart from the changes in terminology, I consider that the statute did little more than codify the directions in which the Court had already moved in this area. The approach that was taken in trumpeting that legislation as a major reform of family law in relation to children in turn raised all sorts of false expectations, particularly amongst men as to what the legislation was intended to achieve.

Recent empirical research suggests that this probably contributed to a significant increase in family law litigation over children in relation to relocation and contact cases.[4] That research also suggests that the rhetoric of reform may have affected the approach of some judges and magistrates to such cases and in particular, may have led to an increased incidence of orders for interim contact being made in cases where there were serious allegations of family violence and an increased reluctance to make interim orders permitting spouses to relocate. I suggest that none of these consequences was intended by the legislation which in fact laid greater stress on the effect of violence and particularly the witnessing of violence by children.

A reading of the Attorney General's discussion paper as to the reform of property law raises similar concerns. It also contains as assertions of fact, a number of propositions that are either wrong as a matter of law or are of extremely doubtful validity.

DOUBTFUL ASSUMPTIONS

A major error in this regard is the assertion that judges hearing property cases are not required to give reasons and that this in turn has led to an impression that decisions are arbitrary and that it is not clear as to how their discretion has been exercised.[5]

While that may have been true in the early stages of the Court's history the Full Court made it clear in a number of cases including *Horsley and Horsley*,[6] *Merryman and Merryman*[7] and *Davut and Raif*,[8] that a failure by a judge to give full and adequate reasons is an error of law that will

[4] Rhoades, H., Graycar, R. and Harrison, M. *The Family Law Reform Act" Can changing legislation change legal culture, legal practice and community expectations? Interim Report*, The University of Sydney and the Family Court of Australia, April 1999.
[5] See for example paras 1.17, 2.15, *Property and Family Law - Options for Change*, Attorney-General's Department, 1999.
[6] (1991) FLC 92-205.
[7] (1994) FLC 92-497.
[8] (1994) FLC 92-503.

lead to the judgment being set aside. This has been the law at least since those cases were decided and it is disturbing that such an assertion should have appeared in the paper and even more disturbing that it should be used as a basis for a suggestion that a change in the law is needed in this regard or that it is justification for such a change.

Another error is the suggestion in the discussion of Option 2 that the catch-all paragraph s 75(2)(o) plays a significant role in producing uncertainty as to what factors will lead to an adjustment of property interests under that section.[9] This is simply incorrect. Reference to this paragraph is rare and arises only in circumstances where there are present factors that justice requires should be taken into account but do not fit readily into the preceding categories in the sub section. Moreover, the Discussion Paper's criticism is difficult to reconcile with the inclusion of such a factor as a prospective component in Option 1.[10]

A further error is the characterisation of s75(2) as involving an adjustment for "needs" factors. The reference to "future needs" is an erroneous statement of the law. Other factors are required to be taken into account so far as they are relevant. The concept of limitation of Section 75(2) to "future needs" was abandoned approximately 9 years ago.[11] Some of those additional factors include: continuing care of children, standard of living and capacity to earn income, and child support obligations.

The Discussion Paper gives as a justification for change what it says are significant changes in the role of women in the work force since the *Family Law Act* 1975 was introduced. While this is correct as far as it goes, it ignores the fact that women are significantly underpaid compared to men and that they bear the brunt of childcare costs if they are working. Research also suggests that whether they are in the workforce or not, they continue to bear the brunt of the responsibility for household duties and the care of the children.[12] It is simply not good enough to ignore these aspects in a paper of this type.

This brings me to comment that what is lacking from this paper is any empirical research to support the need for change. Such research that is

[9] Paragraph 5.42, *Property and Family Law - Options for Change*, Attorney-General's Department, 1999.
[10] Paragraph 5.17, *Property and Family Law - Options for Change*, Attorney-General's Department, 1999.
[11] *Collins and Collins* (1990) FLC 92-149; and more recently, *Waters and Jurek* (1995) FLC 92-635.
[12] Office of the Status of Women, *Juggling Time*, 1992.

referred to is usually many years out of date.[13] Otherwise, reference is made to several Parliamentary Inquiries and to dissatisfaction that was expressed by certain groups and individuals to those Inquiries.[14] This is a classic example of the application of the "Squeaky Wheel" principle and should not take the place of proper research. One would have thought that if the Government is serious about reform in this area it would at least obtain a solid research basis for change rather than depending on myths and assertions from self interested parties.

In fairness, I must say that the paper by Mr Stephen Bourke of the Attorney General's Department delivered in early May 1999 has considerably advanced the debate beyond that contained in the Discussion Paper and has corrected the misconception about the delivery of reasons for judgment.[15] It is to be hoped that this more closely represents the current position of Government than does the Discussion Paper.

He nevertheless repeats the assertions contained in the Discussion Paper in relation to change in the socioeconomic profile in the community since 1975, but does not appear to give sufficient weight to the fact that the Court has taken considerable steps to adapt the existing law to those changes.[16] Nor does he satisfactorily address the question as to how and in what manner the broad structure of the existing law has failed to cope with such changes. He does refer to deficiencies in the existing law in relation to the issue of disparity in earning capacity, with which I agree, and the difficulties that arise from the dual use of s 75(2) for the purposes of both spousal maintenance and discretionary matters to be taken in to account in making an order under s79(4), with which I also agree

However these are not matters that go to the heart of the legislation and can readily be cured by an appropriate drafting exercise.[17]

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[13] McDonald, P. [Ed.] *Settling Up : Property and Income Distribution on Divorce in Australia*, Prentice Hall of Australia, Melbourne, 1986. See also Funder, K., Harrison, M. and Weston, R. *Settling Down : Pathways of Parents After Divorce*, Australian Institute of Family Studies, Melbourne, 1993.

[14] Parliament of Australia Joint Select Committee on the Family Law Act *Family Law in Australia;* Parliament of Australia, 1980; Joint Select Committee on the Family Law Act, *The Family Law Act - Aspects of its Operation and Interpretation*, Parliament of Australia, 1992.

[15] Bourke, S. *Matrimonial Property Law, A Discussion of the Reform Options* Attorney General's Department, 1 May 1999.

[16] See Moore, C. *Current issues in property practice - s.75(2) and "Sweep Up"* at www.familycourt.gov.au/papers/index,html under the category "Property Settlement and Superannuation".

[17] A similar view appears in Strickland, S. 'Property Law: A New Era', *3rd Annual Family Law Intensive*, Family Law Section, Law Council of Australia, 1999, p. 2.2.17.

His second argument for change is an interesting one, relating as it does to a concept that the law should be so clear that parties should be able to order their affairs without the need for reference to a legal practitioner. While this aim may be laudable, it is not one that seems to have motivated our Parliamentarians in relation to other areas of the law.

However this may be, I would agree that there is virtue in simplicity and certainty, provided that it produces a system that does justice between the parties. Experience has taught that the more certain and simple the system is, the more difficult it is to achieve fairness and justice between the parties. This is because persons' circumstances vary so widely and a system that does not cater for those variations is likely to produce arbitrary and unfair results.

Probably the best local example of this is the Child Support Scheme. There is no doubt about the simplicity of the formula and yet there is probably no single piece of legislation that has produced as much community concern and complaint as it has done. Such an approach also ignores the manifest power imbalances that so often are present amongst separating couples.

Experience in New Zealand does not suggest that a more certain system of matrimonial property law necessarily produces a just system and there has been much criticism in that country of its arbitrary effect and the injustice it produces, particularly to women.[18]

Mr. Bourke's third argument relies, as does the Discussion Paper upon expressed community dissatisfaction, but he fairly concedes that this is likely to occur in any family law system. However, he says that whether or not to change the system is a matter for the Government of the day. I would strongly differ from this view. It is a matter for the Parliament to change the law and not the Government as the Government has so recently been reminded in the Senate.

If there is an intention to change the law, then it is extremely important that Parliament and the public have a full appreciation of what is contemplated and its likely effect. Any change to the law governing the resolution of financial matters after marriage breakdown has profound consequences for a community's social and economic fabric, particularly the well-being of the children within it. It is just not good enough to say

[18] O'Dwyer, M. 'More than Money and Bricks and Mortar' cited in Strickland, S. 'Property Law: A New Era', *3rd Annual Family Law Intensive*, Family Law Section, Law Council of Australia, 1999.

that the Government wants to change the law and that is the end of the matter.

In support of this argument of government prerogative, he makes the unsubstantiated assertion that non-judicial dispute resolution in financial matters has lagged behind non-judicial resolution in children's matters.[19] I question this assertion. The Court has had a long-standing and successful conciliation service for property disputes and introduced mediation services which deal with both children's and financial matters without being funded to do so in the teeth of opposition from Government. It proposed the introduction of Court-annexed arbitration services in 1995 and repeated that proposal when this Government came to power in 1996 without success. If there are any deficiencies in this area the responsibility lies with successive Governments.

DEFICIENCIES IN THE PRESENT LAW

There are deficiencies in the present law, but my view is that they would be better corrected by well thought out amendments rather than a grandiose and dangerous program of reform, based upon little more than assertion. Many of these assertions appear to emanate from men's groups, who are hardly objective in this debate. They have nevertheless succeeded in this country I suggest, as they have in countries like Canada and the USA, in diverting the debate away from the achievement of best practice into attempts at political appeasement of their demands.

1. Superannuation

This is an obvious area for reform and it is a problem that has plagued the law of matrimonial property since before the introduction of the *Family Law Act* 1975. I am pleased to see that the Government appears to have moved away from its original proposal for an equal division of this entitlement but does intend to pass legislation to make it divisible property for the purposes of the Act. [20] I also note that this is reiterated in Mr Bourke's paper.[21]

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[19] Bourke, S. *Matrimonial Property Law, A Discussion of the Reform Options,* Attorney General's Department, 1 May 1999, p. 9.
[20] Senator Newman, *Hansard*, Senate, 20 April 1999, p. 3392.
[21] Bourke, S. *Matrimonial Property Law, A Discussion of the Reform Options,* Attorney General's Department, 1 May 1999, p. 15.

Apart from the comment that I make subsequently about this being introduced in tandem with the ability to make binding agreements, which is a proposal that I strongly oppose, I regard this as an essential reform.

2. Separating Spousal Maintenance Provisions and the Provisions for the Exercise of Discretion to Make Adjustments to Property Interests for Needs and Other Factors.

This is again a sensible proposal that should be implemented.

I would however, be strongly opposed to the deletion of the present s75(2)(o) that allows the court to take into account "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account" from either set of provisions. I stress the importance of this because, although it is rarely used, it stifles dispute about whether a case falls or does not fall into the other categories set out in s75(2) and does enable the court to do justice when the fact situation falls into one of the more unusual categories that is not covered by the rest of the section. Amongst other things, it enables the court to take into account a history of family violence as a s75(2) factor if it has not otherwise done so under s79(4).

3. Family Violence and Matrimonial Torts

Missing from both the Discussion Paper and Mr Bourke's paper is any serious discussion of this question. This is surprising given the evidence of the high level of family violence in Australian marriages, [22] and the developing jurisprudence surrounding the area in property claims and cross vested claims for damages for assault.[23]

I submit that it is essential that this issue be faced in the context of any changes to property law. The current law is far from clear and has developed from decisions of the court in the absence of any legislative direction. It appears that violence may be taken into account in considering a person's contribution as a homemaker and parent, or in determining the issue of whether it had a detrimental effect on the other partner's contribution as a homemaker and parent. There is a dispute in the reported cases as to whether this should only apply in exceptional circumstances.[24] It is clear that violence may be taken into account as a s75(2) factor where it can be shown that the effects of the conduct in

[22] Brown, S. 'Just a Domestic' *The 8th National Family Law Conference - The Challenge of Change - Conference Handbook Hobart 1998,* Television Education Network, 1998.
[23] Morgan, S. *Domestic Torts - Fertile Fields or Shifting Sands* Leo Cussen Institute, May 1997.
[24] *Kennon and Kennon* (1997) FLC 92-757.

question have had a demonstrable effect upon the victim's capacity to earn income. Probably, it may also be taken into account as a s 75(2)(o) consideration - a "fact and circumstance which, in the opinion of the court, the justice of the case requires to be taken into account".

If it is taken into account on the question of contribution it presumably should not be counted again as a s75(2) factor if it amounts to double counting.

Additional complications ensue when there is a cross vested claim for damages for assault arising out of the same circumstances, as has become common in recent times. If the High Court strikes down the cross vesting scheme the situation becomes even more complicated. We may well have the spectacle of simultaneous proceedings relating to the same incidents being pursued in the Family Court and State and Territory Courts with different fact findings being made about the same matters and parties being twice compensated. This prospect is already real when the Family Court transfers such claims to the State and Territory Courts as it has done on occasion.

In my view, any reform in this area positively requires the legislature to address these problems and provide some direction. It is disappointing in the extreme that the Government has not faced these issues in its Discussion Paper.

There is a need for reform of the whole area of matrimonial torts. It presumably would be within the constitutional power of the Parliament and should proceed hand in hand with any changes to the property legislation for the reasons stated.

In addition, the remedy of damages for assault is only available in relation to specific instances of assault.[25] While this may be suitable where there are clear and specific incidents, it becomes a cumbersome process where there is a long and continuous history of various types of family violence. Further, difficulties often arise in these cases because of the operation of State limitations of actions legislation in that the incidents complained of may well predate the break up of the marriage and be statute barred. Also, it is obviously unsuitable for these proceedings to be conducted in separate courts.

[25] *Kennon and Kennon* (1997) FLC 92-757; *Addison and Addison*, not yet reported, judgment delivered 23 November 1998 per Nicholson CJ.

A possible approach might be to confer jurisdiction on the Family Court in respect of these claims and to devise a method whereby double dipping is to be avoided in connection with a property claim. At the same time, the nature of the conduct giving rise to a claim could be redefined to overcome the difficulties associated with common law proceedings for assault and the effect of limitation of actions legislation be avoided. Another alternative would be to abolish the common law remedy and define the way in which the victims could be compensated in property proceedings.

It is perhaps worth noting that Option 2 would appear to preclude any consideration of this issue except in a very limited way. The Discussion Paper suggests that the Court could be required to consider "any adverse impact caused by family violence" which results in economic hardship.[26] This is a very limited provision indeed and would give rise to great difficulty in establishing causation in many cases.[27]

4. Taking into Account the Economic Consequences of Marriage Breakdown

As I have already indicated, I am in broad agreement with the suggestion that this should be spelled out, preferably in whatever replaces s 75(2). I do so upon the basis that I understand that what is meant is that a court may take into account matters such as lost opportunity costs as a result of the marriage.

5. Ensuring that proper arrangements are made for minor and dependent children of the marriage.

I consider that consideration should be given to the introduction of this as a separate factor to be taken into account under s 75(2).

FINANCIAL AGREEMENTS

The Attorney General has already announced that it is the Government's intention to enable parties to enter into financial agreements that will effectively oust the jurisdiction of courts to make orders inconsistent with those agreements.

[26] Paragraph 5.45 *Property and Family Law - Options for Change,* Attorney-General's Department, 1999.
[27] *Property and Family Law - Options for Change,* Attorney-General's Department, 1999, p.42.

Such agreements may be made before, during and after marriage or relationship breakdown.

While I understand these proposals have the support of the Law Council of Australia, I think that members of Parliament and the public should be made aware of the sweeping nature of the changes that these proposals will make to the existing law and some of the pitfalls involved.

It is perhaps worth summarising the existing law.

First a premarital agreement has no legal effect although the court may have regard to it as expressing the intention of the parties at the time that it was made and perhaps giving some useful indication as to the nature and value of the assets that they have brought into the relationship.

Secondly, similar considerations apply to an agreement made during the relationship or after it has terminated unless they are made the subject of a consent order or are approved under s 87 of the Act. In practice the vast majority of arrangements are made the subject of a consent order. In the case of a consent order the Court must be satisfied in accordance with s79(2) that "in all the circumstances it is just and equitable to make the order". In the case of an order approving an agreement under s87, the Court must be satisfied that the provisions of the agreement with respect to financial matters are proper.

It is thus clear that there is a very real protection contained in the legislation against unconscionable or unfair conduct. Once final orders are made, they can only be set aside if one or more of the matters contained in s79A is established, which include a miscarriage of justice by reason of fraud, duress, suppression of evidence , the giving of false evidence or ***any other circumstance***. (emphasis added).

The Government's proposal will sweep this protection away. It will mean that earlier acquired property can be quarantined and that the parties can agree prior to the marriage as to the disposition of whatever property they acquire during the course of the marriage.

I note from Mr Bourke's paper that it is envisaged that parties have to be separately advised about the effects of the agreement and that a legal adviser will need to advise them as to its legal effect and a legal adviser or a financial adviser as to its financial effect. [28] One would have to be

[28] Bourke, S. *Matrimonial Property Law, A Discussion of the Reform Options,* Attorney General's Department 1 May 1999, pp. 13-14.

doubtful, however, about the extent of the protection that this involves. Many lawyers are not expert in family law and the same is even more likely to be the case in relation to financial advisers, whoever they may be.

It does not appear from Mr Bourke's paper that the categories for setting aside such an agreement on the basis of a miscarriage of justice are likely to be as wide as they currently are under s79A. However I am pleased to see that he envisages that such an agreement can be set aside if it can be established that there has been a significant change in the circumstances including the responsibility for the care, welfare and development of a child of the marriage and the child or the applicant would suffer hardship if the agreement was not set aside. Such a provision would be absolutely essential.

In relation to premarital agreements, the great difficulty about them is that the bargaining power may not be equal, and in many cases the parties may not have the same degree of objectivity as would a party considering entering into a commercial transaction. I do not believe that an agreement to marry should be construed as nothing more than another commercial contract, nor should ordinary commercial considerations govern such an agreement. Not least of the difficulties is that a premarital agreement is an open ended contract that may extend for fifty years or more and it is impossible for the parties to envisage what may happen over that period.

It seems unlikely that many couples will avail themselves of the option of entering into an agreement during the marriage while their relationship remains a happy one. In the case of violent or abusive marriages there may be extreme pressure to enter into such an agreement and I doubt that the provision for independent advice is likely to overcome such pressure. At the same time, proof of duress in such cases is notoriously difficult.

As to the post-relationship situation, the argument may gain some strength. The argument most frequently advanced in support of these agreements is that they enable people entering into second and subsequent marriages to protect their assets from the first. While this has some validity, I consider that the disadvantages outweigh the advantages.

Looking at the issue overall, I believe that the knowledge that the agreement reached will be scrutinised by the Court does act as a substantial deterrent to unreasonable behaviour. However, one thing that I am confident about is that the measure will not reduce litigation in the area and will in all probability increase it. There will be countless arguments about: the meaning of contracts, whether there was full

disclosure at the time that they were made, whether or not this constituted fraud, and whether there has been a change of circumstances since the agreement was made.

I expect that the measure will place further pressure on already crowded court lists and that the community will derive little benefit from it.

THE DISCUSSION PAPER OPTIONS

I do not propose to undertake a detailed examination of the options in the context of this address. However there are certain matters of principle that need to be addressed, the most important of which being the Discussion Paper's apparent emphasis upon equal sharing of marital assets. While that may appear to be attractive at first sight, the notion that marriage is an equal partnership does not necessarily translate itself into an equal division of assets. Research has demonstrated that such equal divisions do not necessarily compensate for the financial breakdown of marriage.[29]

In many cases such an approach may do a significant injustice to one of the parties, usually the one with the responsibility for the care of the children. Also, the superior economic position of males against females in our society, and their increased capacity to earn at a higher level subsequent to the relationship ending, would usually mean that an equal division would favour them over their former female partner.

It might be said that the concept of equality of sharing is a rebuttable presumption where these factors can be taken into account, but this may be difficult to convey to members of the public. I have already commented upon the increased expectations engendered by the *Family Law Reform Act* 1995 in relation to children's matters. Anecdotal evidence suggests that something similar was beginning to develop after the announcement of the concept of equal sharing contained in the Family Law Reform Bill (No 2). As I understand it, many men and quite a number of women believed that "She will only be entitled to half the house when this Act goes through". [30] The fact is, of course, that it is extremely rare for all of the factors to be so evenly balanced as to call for an equal division of property. The less the amount involved the more likely it is that the primary caregiver of the children will be entitled to a

[29] McDonald, P. [Ed.], *Settling Up : Property and Income Distribution on Divorce in Australia*, Prentice Hall of Australia, Melbourne, 1986.
[30] Strickland, S. 'Property Law: A New Era' *3rd Annual Family Law Intensive*, Family Law Section, Law Council of Australia, 1999.

greater share of the meagre property available. I believe that women in particular are likely to suffer injustice as a result of this approach.

Apart from the injustice involved in misleading people into signing away their rights in a mistaken belief as to the effect of the legislation, I believe that there is also a real danger that there will be an increase in litigation similar to that experienced in relation to the *Family Law Reform Act* 1995. This is because an expectation will have been created amongst men in favour of an equal division and provided discretionary factors are retained, lawyers will inevitably advise their female clients not to agree to such a division. Therefore a similar situation will arise as has arisen in relation to the *Family Law Reform Act* 1995. Since the Government has evinced no intention of equipping the Court to cope with such a development the potential consequences are serious.

While I regard Option 1 as the least worst alternative, I therefore cannot support it. I have to admit that this represents a change of view on my part, but experience with the *Family Law Reform Act* and the expectations engendered by the 1995 Bill to amend property provisions in the Act have caused me to rethink my earlier approach.

I had previously thought that a presumption of equal contribution might remove some of the tedious detail involved in property litigation where people go through every minor action of their lives together in order to establish a superior contribution. On reflection, I think that it is likely that they will still do so in order to rebut the presumption.

The "community of property" approach contained in Option 2, in my view, is so unrealistic as to be unthinkable. It is gender-biased in favour of men and a reversion to the marital regimes of the 18th and 19th centuries.

Since communal property amenable to distribution is referable to “the period of cohabitation/marriage”, there is great scope for the party with day to day responsibility for children, usually the wife, to be significantly disadvantaged in the ability to acquire assets subsequent to separation/dissolution of marriage. Under current property law, that differential reality can be taken into account when making orders; this would not be possible under Option 2.

This option shifts the emphasis of a dispute to the nature and value of the pool of divisible property without any socially useful “reform” benefit. It would make valuation matters a fertile and lucrative field of litigation,

especially where pre-relationship property has been modified or augmented in value during the course of the relationship.

Over any moderately lengthy relationship it will be necessary to value the assets at its commencement and at its end. Valuations of assets such as a family business are notoriously difficult at the best of times and the difficulty will be even greater when it is necessary to also value it at a point years earlier.

The sort of injustice associated with this proposal is not difficult to imagine, An example would be where the assets held by the wealthier party have in fact decreased during the relationship and no additional assets have been acquired. A wife for example, may have kept a business alive while the husband acts in a way that either involves no contribution by himself or a negative contribution to the value of the business. She receives no recognition of her contribution under this proposal when the relationship comes to an end.

Criticisms are sometimes made of the existing system that the valuation of contributions is an attempt to compare two things that cannot logically be compared, i.e. contributions as a homemaker and parent as against economic contributions. However the homemaker parent aspect was introduced into the legislation to counter the pure economic contribution assessment, which social reality dictated as inevitably favouring the male. It enables substantial justice to be done in individual cases and provides an appropriate balancing factor. Option 2 effectively throws out the baby with the bathwater when it attempts to overcome this factor.

Finally there is a view that it overlooks what has been regarded as a tenet of western marriage, in that the parties bring to the relationship a concept of sharing and do not traditionally count up and seek to isolate their personal wealth at its commencement as this proposal does.

In conclusion, the final point I would make about both proposals is that it is unrealistic to expect that either will reduce the current small percentage of disputes which end up requiring judicial determination. Each option has the capacity to introduce greater predictability but if such certainty is at the cost of justice, then Australians will pay dearly for so-called "reform".

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