

## matrimonial property law reform

It concerns two brothers; Mr Ewing, on whom the estate is entailed, is venal and wicked, whereas Mr Bobby Ewing, as is customary with younger sons, is all goodness. Both have had the misfortune to contract unsuitable marriages, but one's sympathy is tempered on discovering that they have made these same marriages several times. Indeed, it seems to be a truth universally acknowledged in these parts that a married woman in possession of a husband of good fortune must be in need of a divorce.

Jane Austen on *Pallas*  
from the *New Statesman* Weekend  
Competition

*report tabled.* The ALRC's long awaited matrimonial property report was tabled in the federal parliament by the Attorney-General, the Honorable Lionel Bowen MP on 16 September 1987. The Report is the culmination of four years work by the ALRC and presents a comprehensive review of the operation of Part VIII of the Family Law Act, both legally and empirically.

*joint select committee.* The reference arose from a recommendation made by federal parliamentary joint select committee on the Family Law Act 1975. In August 1980 that Committee's Report noted that many submissions to the committee had expressed dissatisfaction with the provisions of the Family Law Act affecting the reallocation of property on divorce. The Committee was particularly attracted to the view that the institution of marriage would benefit if the law prescribed explicitly the property rights of spouses arising from their marriage and recommended that the ALRC undertake a full study of matrimonial property law.

*empirical work.* The ALRC's recommendations were based on lengthy and detailed research projects.

- *family court survey.* With the co-operation of the Family Court, the ALRC conducted a survey of property proceedings in all registries.
- *survey of divorced people.* In conjunction with the Australian Institute of Family Studies and the Family Court, the ALRC undertook a study of property income arrangements between spouses during marriage, the respective economic circumstances of husbands, wives and children after separation and divorce. This project was based on a detailed survey of a large sample of divorced people.

The scope of this research program was unprecedented both in Australia and overseas. In addition, the laws of a number of other overseas jurisdictions were carefully studied.

*the need for new legislation.* The ALRC report identifies some serious shortcomings in the present Family Law Act.

*greater clarity and consistency needed.* The present Act is so vague, and generates so many different approaches, that it causes excessive uncertainty and confusion.

*inappropriate emphasis on contributions.* The emphasis of the present Family Law Act on assessing the contributions of the spouses to property and welfare of the family is impractical and inappropriate.

*superannuation.* The ALRC found that prospective superannuation benefits were often not taken into account in an appropriate and consistent way.

*basic principles.* The major recommendations of the ALRC were based on three principles. The first confirms the equal status of the spouses in marriage. The second principle restricts the focus of matrimonial property law to the economic commitment undertaken on marriage, that is, the nurture of children, the management of the household and the acquisition of management of income and property. The ALRC report particularly notes that notions of fault unrelated to these three aspects should be excluded from consideration in property matters. Finally, the report stresses that the object of the division of property on separation or divorce is a just distribution: the parties' wealth should be rearranged so as to distribute as fairly as possible the economic hardship inevitably arising from the breakdown of marriage.

*recommendations.* The major recommendations of the ALRC for reform of the Family Law Act are twofold.

- *no fixed entitlement system.* The ALRC rejected a strict fixed entitlement system, under which the parties are only entitled to a specified proportion of the property available for re-allocation.
- *structured discretion.* Instead of this, the ALRC recommended that the discretion system for re-allocation of property on marriage breakdown should be restructured into a legislatively prescribed series of steps, requiring the court to ascertain and value the property, apply a rule of equal sharing to the value of the property, vary the shares on specified grounds, and make orders to give effect to the shares so arrived at.

*variation of shares.* While the ALRC recommends a rule of equal sharing in the value of the property as the starting point in the reallocation of property, the court would be able to depart from that 50/50 split only on one of two broad grounds.

*economic history of marriage.* The first ground of variation related to the economic history of the marriage relationship. A variation could be made to take account of

- a substantially greater contribution to the marriage by one party
- actions of the parties in relation to property or childcare after separation
- that one party has the benefit of financial resources built up during the marriage
- that one party has brought property into the marriage.

*post separation circumstances.* After following that step, under the ALRC's recommendations, the court would be able to adjust the parties' shares further, to take account of any disparity between the standards of living reasonably attainable by the parties wholly or partly attributable to

- a parties responsibility for the future care of the children of the marriage
- a party's income-earning capacity having been affected by the marriage.

*special payment.* An additional power is given to the court to order a lump sum to be paid in excess of value

of the property where the court is satisfied that it is necessary to achieve justice.

*maintenance.* While the ALRC does not suggest any substantive change to the operation of the spousal maintenance provisions of the Act, apart from decreasing the emphasis on so-called 'clean break' principle, the recommendations are carefully drafted so as to be able to fit in with the final form of the government's proposed legislation to reform the law affecting the assessment and collection of child maintenance (see [1986] *Reform* 170).

*marriage contracts.* An innovation which the ALRC proposes is the introduction of a system of marriage contracts. In line with suggestions by the Family Law Council, the ALRC recommends that the court should give primacy to agreements entered into either before or during the marriage by the spouses as to property disposition on breakdown unless to do so will cause substantial injustice. Particular safeguards are suggested in relation to spousal maintenance and child maintenance provisions in such agreements. The suggested regime would replace s 86 of the Family Law Act while the policy behind s 87 would largely remain intact.

*reaction to the report.* Reaction to the recommendations in the Report was generally favourable. For example, the *Australian* (18 September 1987) said:

The Australian Law Reform Commission has made a number of highly desirable recommendations in the report on matrimonial property . . . As anyone familiar with the administration of matrimonial law is well aware, the division of family property on break-up of a marriage is often the most painful and acrimonious aspect of legal separation

proceedings and divorce, and can provoke such bitterness that any lingering hope of reconciliation is lost and reasonable negotiations about the future of dependent children of the marriage can be made impossible.

*taking the romance out of marriage.* Not all press reaction was in this vein. The *Albury Border Morning Mail* (19 September 1987) acknowledged that

The Commission may be well intentioned in its wish to make division of property after marital breakdown less stressful and expensive.

But it castigated the marriage contract recommendations, calling them 'a new twist to marriage' and suggesting that marriage contracts of this kind made in advance, by their very nature, will undermine the marriage contract to be made at the altar.

This approach to a long-standing problem comes from none other body than the Australian Law Reform Commission which has already secured for itself a reputation for aiding and abetting the destruction of Australian society by presenting all manner of soft options for uncommitted couples.

Harsh words indeed — especially as it was the New South Wales Law Reform Commission which produced the 1984 report on de facto relationships. The *Australian* however was less vehement, saying that

It would be unfortunate if public attention were to be concentrated on the Commission and its suggestion of matrimonial contracts to the exclusion of the other important matters with which it has dealt. Nonetheless, it is this recommendation that is the most radical and that, despite its superficial attractiveness, is the most dangerous to the institution of marriage . . .

Citing changing economic circumstances and financial fortunes as matters which could easily make such a marriage contract unjust, the *Australian* urged that the situations in which such contracts would be needed would be exceptional and they would more likely lead to family friction.

Perhaps the last word should be given to Senator Durack, a member of the Opposition, who said in the Senate:

The Law Reform Commission's report on matrimonial property is of major significance . . . The Law Reform Commission has given this matter deep consideration. . . . Its most interesting and probably most important recommendation is that the parties, ahead of the breakup of a marriage, should be able to enter into contracts for the division of property in the event of a breakup occurring. That would be a major change in public policy if adopted by the Parliament. . . . We should not rule it out on the basis of past public policy or moral attitudes. It seems to me that a lot of the problems that have arisen in the division of property between the parties could be resolved if those parties had entered into some property sharing arrangements. Whether those arrangements are based simply on the possibility of separation or are entered into simply to have a better arrangement as to matrimonial property is beside the point. This central recommendation of the Commission makes a substantial contribution to solving this problem. . . . I express my concern that this matter should be given close consideration and not rejected out of hand, as it may well be.

\* \* \*

## debt recovery

Annual income twenty pounds, annual expenditure nineteen nineteen six, result happiness. Annual income twenty

pounds, annual expenditure twenty pounds ought and six, result misery.

Charles Dickens, *David Copperfield*

*report tabled.* *Debt Recovery and Insolvency*, a major report of the ALRC, was tabled in the Commonwealth Parliament on 21 October 1987. The report deals with the procedures in courts of summary jurisdiction for debt recovery, in particular the 'default' procedure which allows a judgment to be entered in default of appearance.

*context for the report.* The report is the second in the reference on consumers in debt. In the first report (ALRC 6) the ALRC made a number of recommendations designed to enable insolvent debtors to avoid bankruptcy by entering into appropriate arrangements with their creditors. It called for the establishment of a regular payment of debts program which was specifically designed as an alternative to bankruptcy. A debtors assistance office was also envisaged by the ALRC to help debtors with debt counselling and with the formulation of repayment plans for the regular payment of debts program. Although the Government indicated on 3 June 1984 that it proposed to implement the substance of this report, legislation has not yet been introduced into the federal parliament to do so.

The context in which debt recovery procedures are used is outlined in the report in some detail. The growth of the credit society has led to increasing reliance on debt recovery procedures as the amounts outstanding on various forms of credit, particularly consumer credit, increase. For example, by June 1985, 4.4 million bankcards were on issue — an increase of 56% over the previous five years. In that year, advances outstanding on all forms of bank