PROPERTY MATTERS
ALRC REPORT RECOMMENDATIONS

Jamie Burreket

There are 9 recommendations made by the ALRC in relation to the financial consequences of separation.

Recommendation 11

The *Family Law Act 1975* (Cth) should be amended to:

- specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property.

Recommendation 12

The *Family Law Act 1975* (Cth) should be amended to include a presumption of equality of contributions during the relationship.

Recommendation 13

The *Family Law Act 1975* (Cth) should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

Recommendation 14

The family courts and the Australian Financial Complaints Authority should develop a protocol for dealing with jurisdictional overlap

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with respect to debts of parties to family law proceedings. The protocol should provide that:

- disputes about the enforceability of a debt against one or both parties under the *National Consumer Credit Protection Act 2009* (Cth) are dealt with by the Australian Financial Complaints Authority; and
- disputes about the reallocation of a debt between parties to a family law proceeding are dealt with by the family courts.

Recommendation 15

The Privacy Act 1988 (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) should be amended to provide that when a court has ordered that one party (Party A) be responsible for a joint debt and indemnify the other party (Party B) against any default, credit providers are prohibited from making an adverse credit report against Party B to any credit reporting business as a consequence of the subsequent actions of Party A.

Recommendation 16

The *Family Law Act 1975* (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.

Recommendation 17

The *Family Law Act 1975* (Cth) should be amended to simplify the process for splitting superannuation including:

- developing template superannuation splitting orders for commonly made superannuation splits; and
- when the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services.

Recommendation 18

The *Family Law Act 1975* (Cth) should be amended so that:

- the spousal maintenance provisions and provisions relating to the division of property are dealt with separately under the legislation; and
- access to interim spousal maintenance is enhanced by the use of Registrars to consider urgent applications.

Recommendation 19

The *Family Law Act 1975* (Cth) should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

Recommendation 20

The *Family Law Act 1975* (Cth) should be amended to extend section 69ZX to property settlement proceedings.

This commentary confines itself to the three that are likely to be regarded as the most controversial. Each are unexpected and perhaps even novel. The surprise presentations of these options by the ALRC adds to the feeling that they are not considered solutions and a more detailed analysis suggests that the 'reform' is not intended to be that fundamental at all. The proposals instead 'tinker' at the edges of the problem. But at what cost? They have the capacity, if not remodelled very carefully, to set the law backwards rather than move it forwards. Is it worth it if the reform is only incremental?

Recommendation 12

The *Act* should be amended to include a presumption of equality of contributions during the relationship.

The ALRC proposes a presumption that during the period of a parties 'relationship' their contributions be measured as equal. The presumption could be displaced if and only if one party has wasted assets, deliberately or

unreasonably damaged property, accumulated liabilities for his or her own benefit, received compensation awards for pain and suffering or economic loss which have not been dissipated during the relationship and are otherwise traceable or received inheritances and gifts. The intention is that in the overwhelming majority of separations the presumption will hold.

There is no proposal to remove the adjustment for factors in section 75(2). This requirement will remain albeit the factors to be considered are expressed differently (but allegedly to the same effect). One of the recommendations is to prescribe within the *Act* the steps to final property alteration. The recommendation gives insight into how the new presumed equality of contribution is intended to operate, namely:

> ***Step 1***
> *Ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;*

> ***Step 2***
> *Presume equality of contributions unless a statutory exception applies; and*

> ***Step 3***
> *Determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including the caring responsibilities for any children of the relationship, the income earning capacity of each of the parties, the age and state of health of the parties and the effect of any adjustment on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.*

The reform, if adopted, might conclude a debate which has raged for some time in the Family Court of Australia about the measurement of contribution in cases where there has been what was once erroneously called 'special' or 'entrepreneurial' contributions. Traditionally that discussion has represented a tension between on one hand the concept of marriage as a partnership in which all contributions are equal and on the other hand the requirement to measure all the contributions each party made. To date it is the latter approach which the legislation prefers, as has been endorsed by the High Court of Australia in *Mallet*. This is a simple expression of a much more complicated issue. The real dilemma relates to how pursuant to the existing legislation competing contributions of different type ought to be measured. The reform may attempt to resolve this uncertainty – avoiding any qualitative or quantitative measure of what each party actually did in the relationship presuming each party to have made equal contributions. Or the reform may just shift the starting point for the very same debate, and do so in an environment where there might be a clean slate for judicial interpretation of an entirely new piece of legislation.

The recommendation is silent in relation to initial contributions. Presumably, the existing discretion to measure initial contributions to the relationship in an unequal manner remains intact. This is an assumption made despite the complete lack of any reference to the need to assess initial contributions in *Step 2* of the process set out above. Despite the omission in *Step 2* the continuation of the existing discretion to measure initial contributions make sense. Any process which ignored altogether the substantially greater initial contributions would be inherently unfair.

It follows that in cases where there have been unequal initial contributions there will remain continuing uncertainty (as exists already) about the weight those initial contributions will receive. However, it is likely that the proposed reform will make the approach to the assessment of initial contributions even more uncertain than presently exists and even more confusing to the wider public. The reform provides no guidance on how the assessment of initial contributions interacts with the assessment of contributions made during the relationship. There will need to be entirely new jurisprudence – with limited reference to that which already existed, if at all. The present concept of weighing initial contributions against countervailing contributions that have been in the relationship subsequently would either have no place in the exercise of discretion or open the gate to measurement of contribution during a relationship (something the proposed reform seeks to avoid).

For an example of the uncertainty that will arise, consider the initial contribution of assets which 'keep on giving'; a property which derives rental income or a business which generates profit. Is the subsequent income generated from wealth introduced into the relationship to be taken into account in the assessment of initial contributions? If so, do you deduct from that income an amount referable to the personal exertions made by the party during the relationship? Imagine a property-developing spouse who introduced $250 million into the relationship, reinvested that wealth in a new development and netted $400 million for his or her efforts – what part of the $150 million in net profit is attributable to initial contributions and what part to contributions made during the period of the parties relationship? Or a corner store owner who introduced a business worth $1 million, worked in the business for the next 20 years and netted a further $3 million in income and then sold it for $5 million at separation. How, do you determine what contribution falls into the assessment of initial contributions and what contribution is part of the presumed equality?

The first principal benefit which the recommendation is perceived to bring is that in removing the need for a Court to assess the quality of the contribution each party has made during the relationship there will be a consequent efficiency in the administration of justice. An alternate view might be that if the reform achieves that outcome, those achievements in judicial efficiency will be overwhelmed by the inefficiency that will arise from the disassociated assessment of initial contributions.

The second principal benefit is that the approach to property alteration will be clearer and more easily understood by the general public. An alternate view might be that the most significant matters of uncertainty and misunderstanding in the general public about the approach to property settlement rest not in the assessment of contributions during cohabitation but instead to the assessment of initial contributions, the treatment of inheritances and the adjustment for matters presently contained in section 75(2). None of those matters are the subject of any meaningful reform. Moreover, what certainty there presently exists on the matters that have arisen through 45 years of careful jurisprudence will be thrown away. Any assumption that the former jurisprudence can easily slot into the new approach needs to be viewed with significant caution.

Recommendation 13

The *Act* should be amended to provide that the relevant date to ascertain the value of the parties' rights, interests, and liabilities in any property is the date of separation, unless the interests of justice require otherwise.

Courts (and those negotiating outcomes in the shadow of what a Court would likely do) presently take the wealth of the parties as they find them at the time property settlement is to be determined. This is never the date of separation but rather months if not years later. The recommendation seeks to change this assessment of the wealth of the parties to the date of separation.

The arguments in favour of the change are:

- there would be no need for complicated 'add back' arguments;
- personal investment decisions made post separation by a party would be to that parties own benefit or disadvantage;
- the rationale for the alteration of property derives from circumstances of the party's actual cohabitation (and not what follows post separation).

The ALRC gives a simple example of the sale post separation of a joint residence and the subsequent separate purchase by each party of their own residence. One of the new residences increases in value, the other remains constant. Under the proposed recommendation the party who made the shrewd investment in the home which has increased in value would retain that benefit. If only this example was representative of most family law cases. It is not.

It is difficult to see how conceptually a division of wealth based on a balance sheet at separation is to be implemented months or years later. Take for example the scenario described above by the ALRC and assume the adjustment of the joint residence was intended to be 50%. How would a Court achieve this if the parties in fact owned the property in unequal proportions and received and invested the proceeds in those unequal proportions in their own respective names prior to property settlement – would the adjustment payment be based on value at separation, at sale, inflated by the increase

in value of the poor performing new residence or the increase in value of the rich performing new residence?

What if the asset being divided is an enterprise that has goodwill based on profit which exceeds the notional market based remuneration of one party who operates the business? If in an 18 month period post separation, while the parties negotiated their property alteration, for largely nominal effort (but significant risk) the business owner listed the business as part of an IPO which returned substantially greater value than would have been the case at the date of separation – does all that increase sit on one party's ledger to the exclusion of the other? What if the same business maintained the same value but in the intervening period the business owner extracted 18 months of profit prior to property alteration – how is that taken into account?

One of the most significant arguments in favour of the existing timing of property alteration had been the balancing of parenting contributions post separation.

A primary parent's contributions post separation would often be balanced against the non-primary parent's economic pursuits. That could not occur under the proposed reform. Indeed there is no mechanism at all to balance any inequality in post separation contributions and the benefits or disadvantages that flow economically to one party or the other. If there are children being cared for post separation then presumably that can now be taken up in section 75(2).

One certain outcome of the reform will be the need to determine a precise date of separation. The significance of that determination is likely to be a highly charged issue given the financial consequences that will flow. At its most extreme it might be imaged a raft of section 90RD like trials simply to determine dates of separation in cases where the only matter in issue is the date at which the balance sheet is struck.

In the interest of eradicating contentious problems like add backs, the reform necessarily sets up many more different but equally contentious, if not more contentious problems for the Court to contend with.

Recommendation 20

The *Act* should be amended to include a statutory tort of family violence that would provide remedies consistent with existing common law remedies.

The discussion paper which preceded the ALRC Report squarely raised the interaction between financial remedies in the *Family Law Act 1975* (Cth) and family violence. It discussed the idea of including family violence as a factor that a Court would mandatorily consider in making a determination of final property alteration. In doing this the discussion paper conceded the present 'no fault regime' that permeates financial relief under the *Act* and the unsuccessful inroads *Kennon* has made to factoring violence into the property alteration landscape. The discussion paper raised the concept of codifying in statute the *Kennon* approach.

Instead, the ALRC has recommended the establishment of a commonwealth statutory tort of 'family violence'. The recommendation comprises two separate reforms. The first is more a matter of form than substance. Claims for economic compensation are traditionally prosecuted in the state civil system. Now, that work would be done in the federal system, likely at the same time as property alteration and parenting matters are determined. There are obvious efficiencies that would arise. For many persons effected by violence there are significant economic and emotional challenges associated with prosecuting these type of claims. Some of the obstacles would be removed. The benefit might most easily be accessed where there are parenting proceedings where family violence is already a matter in issue in any event. However, the structural benefits will not be without challenges. Torts are prosecuted differently to most family law relief. There is a body of experience in the assessment of damages that sits in other Courts which would be unavailable to future litigants. The already strained resources of the Family Courts will be further burdened by trials which are traditionally lengthy, include competing expert evidence, supported by detailed pleadings and lengthy evidentiary challenges.

The second aspect of the reform is very much one of substance. Traditionally, the common law tort for economic compensation arose from assault and battery. A complainant could sue for damage from one or a series of assaults. The statutory tort being proposed by the ALRC is much broader and aptly described as a tort

of family violence. It might focus on a particular event but also it might be a 'course of conduct' and necessarily would consider better the particular cumulative and long term impact of family violence where the perpetrator and the victim coexist in the confines of a close personal relationship. The common law tort as presently articulated is much narrower than that which is now proposed. One wonders if the common law tort might have got there in the end, but how long would it take for Judge made law to evolve to that point.

William Sloan has also noted that the ALRC has not addressed one particular issue in relation to Family Violence.

What has the ALRC said "no" to?

Apart from considering what the ALRC has recommended, it is also informative to identify matters the ALRC has considered but not recommended: effectively, matters the ALRC has said "no" to.

One example in this category is widening the definition of "family violence" in the *Family Law Act 1975* (Cth). Although a proposal to widen the definition was put forward in the Discussion Paper, by the time of the Final Report the ALRC concluded

> *"… the longer a list of examples becomes, the more likely it is to be assumed that something not on the list is deliberately excluded" and went on to adopt what the Chief Justice of the Federal Court recently said: "Attempts to define whole concepts concerning human experiential relationships are generally doomed."*[1]

The effect of the position reached by the ALRC is to reject the alignment of the definition in the *Family Law Act 1975* (Cth) with expanded definitions now contained within various pieces of legislation at state level.[2] There is no attempt in the Final Report to consider whether the same conduct might be found to constitute "family violence" under state legislation, but at the same time fail to constitute "family violence" for the purposes of the Commonwealth legislation.

1 Final Report [10.33].
2 See, for example, Law Reform Commission of Western Australia Final Report following Project No. 104: Enhancing Family and Domestic Violence Laws, particularly at pages 38-51.