MATRIMONIAL PROPERTY LAW

A DISCUSSION OF THE REFORM OPTIONS

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On 30 March 1999, the Government released a discussion paper on options for reform of matrimonial property. The paper is designed to encourage debate and discussion on the direction of changes for matrimonial property law and to provide a framework for that debate and discussion. Two options have been presented, with a sub option in the second of the two alternatives. They are not the only options nor are they mutually exclusive and those interested may see other combinations which they believe might achieve the objective of fairness in property settlements. But first, we need to examine the case for change.

In the current debate on matrimonial property law reform, it is sometimes said that if the thing is not broken, then don’t fix it. But yet reform in this area continues to be the subject of much debate and is part of the platforms on both sides of politics. So the question is - what is the case for reform? What is the reform agenda and what is so wrong with the current law that is in need of change?

On the status quo side, we need to examine how the current law operates and what it delivers. The current law for the settlement of matrimonial property disputes gives the Court the power to make orders altering the interests of the parties in their property but the Court shall not make an order unless it is just and equitable to do so. The steps taken along the path to make an order under section 79 are firstly to determine the value of the property, secondly to assess contributions and apportion interests in the

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1 This paper was the subject of comment by the Chief Justice on 20 May 1999 and has been revised to deal with some of the criticisms made. I am indebted to the Chief Justice for allowing the modifications to be made.
3 ibid p34
5 Subsections 79(1) and (2) of the Family Law Act 1975. The Court also has power to declare title or rights in property under section 78 but this power is exercised according to ordinary rules of law and equity and is not exercised having regard to the factors set out in subsection 79(4). See Leibrandt v Leibrandt (1976) FLC ¶90-058 for a convenient summary of the equitable and legal principles.
property according to the respective contributions and finally to consider whether to make a further adjustment having regard to the factors set out in subsection 75 (2). In addition, the Court may also make orders in relation to the maintenance of spouses, such orders typically being an income stream for a fixed period or open period but can also be a capital sum⁷. It is of course open to either of the parties to apply for a variation of the existing maintenance orders⁸.

There exists a tension between orders for spousal maintenance and orders adjusting the interests in property because they are both a means for the transfer of money or property between the parties and from the perspective of the parties at least, little distinction may be made between the different orders. This is even more so in those cases where the maintenance is a transfer of a capital sum.

One of the difficulties in family law is the paucity of sound empirical data. To understand what happens under the current law, we have some information about out of court settlements and we are also able to investigate what happens in reported contested settlements. The Australian Institute of Family Studies has investigated the distribution of the share of property⁹ but this is now being studied further in the Australian Divorce Transition Project due for publication in the near future. The following shows the distribution as found by MacDonald.

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⁷ The Court is usually cautious in exercising its power to order maintenance by way of a capital sum. See, for example, the comments in Vautin v Vautin (1998) FLC ¶92-827 at 85.423
⁸ Section 83 of the Family Law Act 1975.
A study of 349 contested judgements from 1990\textsuperscript{10} shows the distribution of property in judge decided cases. This study analysed the factors influencing the distribution and in general terms revealed that where there was an emphasis on contributions, the outcome favoured men but where there was an emphasis on needs, the outcome favoured women. The distribution of property reported in the study shows much the same distribution as the out of Court settlements with the preponderance of settlements in the 40 to 60 range (47.7%).

JUDICIAL SETTLEMENTS

Source: Bordow & Harrison

The empirical data showing the outcomes of settlements is now becoming dated, especially as it can be shown the Court now takes a different approach to the operation of some provisions in Part VIII. However, the Australian Institute of Family Studies in its Australian Divorce Transition Project has more recent data, which also includes information about superannuation.

The following two graphs show the reports of the share of property settlements (n=145), firstly excluding superannuation and then showing its effect when it is included.
SELF-REPORTED OUTCOMES

Source: Dewar, Sheehan & Hughes
Superannuation and Divorce in Australia,
AIFS Working Paper No 18, p25

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The graphs reveal that outcomes in property settlements are much more sensitive to the effect of superannuation. This is not surprising given the growth in participation in superannuation. The Australian Institute of Family Studies report that the mean share to the wife excluding superannuation was 64% which fell to 52% when superannuation was included. This of course assumes that the value of the superannuation was an accurate valuation.

In recent times, attention has been drawn to the concept of the feminisation of poverty with reference being made to the Canadian case of *Moge v Moge; Women's Legal Education and Action Fund, Intervener*\(^\text{11}\). This case and the application of the concept has also attracted attention in Australia\(^\text{12}\) and we have seen in recent times a shift in the Australian jurisprudence on matrimonial property law. The Court is starting to explore where the outer limits of the current law might lay in its efforts to achieve justice and equity in settling the financial relations between the parties.

There are two strands of this jurisprudence to mention. First, there is now much greater attention given to the role of s 75 (2) factors\(^\text{13}\). The Full Court went to some trouble in *Clauson and Clauson*\(^\text{14}\) to state the role of s 75 (2) factors and the important distinction between a property claim and a maintenance claim. Significantly, the Court was critical of the “narrow band of operation for s 75 (2) factors” and went on to say:

> There is, we think, at times a tendency to assess s. 75(2) factors in percentage terms without considering its real impact, and we think there is legitimacy in the views expressed in more recent times that the Court has tended to operate in this area within artificially delineated boundaries. That is, it appears almost to be inevitable that the s. 75(2) factors will be assessed in a range between 10% and 20%. A number of cases will justify an assessment outside these

\(^{13}\) *Waters v Jurek* (1995) FLC ¶92-635. See also Michael Watt QC (as he then was), *The Shifting Centre of Gravity in Property Awards: The Focus on Section 75 (2) Factors*, Proceedings of the 8th National Family Law Conference, Hobart, 1998, 297 - 311.
\(^{14}\) (1995) FLC ¶92-595
parameters and in any event it is the real impact in money terms which is ultimately the critical issue.\textsuperscript{15}

Other cases now follow this lead. With this new found operation of the s 75 (2) factors, the court is now achieving outcomes which are quite different than in the earlier days of the operation of the \textit{Family Law Act 1975}.

The second matter to mention in the context of the development of matrimonial property law jurisprudence is the link between clean break and spousal maintenance. The earlier case law suggested that the emphasis and weight accorded to clean break meant that spousal maintenance orders were very much temporary in nature, designed to assist the economically weaker party to re-establish themselves and should not be used for any long term support unless absolutely necessary\textsuperscript{16}. In more recent times, however, the Court seems to be according less weight to the clean break principle and is increasingly prepared to accept and tolerate that the financial relations between the parties cannot be so easily severed, especially in the light of the emerging body of knowledge on the effect of the respective earning capacities of the parties due to the marriage\textsuperscript{17}.

The trends in jurisprudence are evident. The Court does not give the same weight to a clean break as it had in its early days, it is increasingly conscious of socioeconomic research showing the economic situation of the parties after relationship breakdown and it is searching its legislative armory with perhaps a new vigour to see what it can achieve in the light of changes in society. So why do anything?

The arguments for change can be put making three essential points. First, the provision governing property settlements were enacted in essentially their current form over twenty years ago and it may be argued that it is time to assess whether they

\begin{footnotesize}
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\item \textsuperscript{15} (1995) FLC ¶92-595 at 81,911.
\item \textsuperscript{16} \textit{Tuck and Tuck} (1981) FLC ¶91-021 at 76,222.
\item \textsuperscript{17} \textit{Mitchell and Mitchell} (1995) FLC ¶92-601 and see also Bailey-Harris \textit{loc cit} although Bailey Harris suggests it is perhaps too early to be confident of a shift in jurisprudence on this point. See 12 \textit{Australian Journal of Family Law}, 3 - 18 at 7.
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continue to serve the needs of the community. The socioeconomic profile of the community has changed since 1975 and although a thorough canvassing of these complexities is beyond the scope of this paper, a brief reference to the more important should be made. There is an emerging body of research on the economic effects of marriage and its breakdown and the role of superannuation is recognised as becoming increasingly important. There are differential effects depending on the age of the parties and the relative value of the superannuation compared to other assets. The child support scheme and its effects on household income is also important as well as the housing needs and the ability to engage in paid work after separation having regard to the responsibilities for children. It is also now recognised that earning capacity is a very valuable asset which may have been built during the marriage but its valuation remains problematic.

In Waters v Jurek and other cases such as Clauson, the Court has highlighted the issue of the respective earning capacities of the parties:

> It has long been recognised that in most cases the most valuable asset which a party can take out of the marriage is a substantial, reliable income earning capacity: see Best and Best (1993) FLC ¶92418 at 80,295.

The treatment of earning capacity under the current law, however, is earning capacity in a number of contexts. First, earning capacity in relation to property settlements is expressed in terms of the effect of the proposed property order on earning capacity of either party. It is not expressed in terms of any disparity in earning capacity which may be attributable to the economic consequences of the marriage. But that is consistent with the current statutory language. The second way in which earning capacity is mentioned is in S 79(4)(d) of the Family Law Act 1975.

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The results due later this year from the Australian Divorce Transition Project conducted by the Australian Institute of Family Studies will be a critical factor in testing the distribution of property settlements. Dewar J, Sheehan, G and Hughes J, *Superannuation and Divorce in Australia*, Australian Family Briefing, Australian Institute of Family Studies, 1999.


the earning capacity of the maintenance applicant would be increased by enabling that party to undertake a course of education or training or to establish themselves in a business or otherwise earn an adequate income. Thirdly, section 75 (2) (b), while not expressed in terms of earning capacity deals with “income, property and financial resources”. Finally, section 75 (2) (o) 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”.

The presentation of the legislative policy in these terms does not present a transparent and clear statement about how the economic differences between the parties should be considered by the court. For example, in Waters and Jurek\(^{24}\), the parties were practising psychiatrists and had both worked through the course of the marriage. There was a disparity in the income and it seems there was evidence of a disparity in the earning capacities of the parties. The Court discussed its ability to make adjustments because of the disparity and the important question of the reasons why any adjustment should be made. In allowing the appeal in part, the Court confirmed its ability to use the s 75 (2) factors to make adjustments in favour of the economically weaker party. This adjustment was made on the basis that a property order must in all the circumstances be just and equitable recognising “the different roles which the parties played during the marriage”\(^{25}\).

The question in any reform or change process is whether the legislative policy is expressed clearly or whether the legislation should more clearly express parliamentary intent. Fogarty J in Waters and Jurek quoted Wilson J in Mallet and said:

> The connection between the s, 75(2) factors and a just and equitable property order is more difficult since the criteria are expressed very broadly and are fundamentally prospective in their operation. The provision does not invite a process of social engineering (Clauson and Clauson) (1995) FLC¶92-595 at 81,912). In Mallet, supra at FLC p 79,127; CLR 638Wilson J said that:-

\(^{24}\) (1995) FLC ¶92-635.  
\(^{25}\) (1995) FLC ¶92-635 at p 82,379
“The objective of the section is not to equalize the financial strengths of the parties. It is to empower the court, following a dissolution of a marriage, to effect a redistribution of the property of the parties if it be just and equitable to do so…”

Secondly, we know that the Court itself settles 5% of cases. But what of the rest? There are those who have filed and are represented and these cases are said to settle it the “shadow of the Court”. This means that with the advice of practitioners the parties will achieve an outcome that the Court is most likely to order. But there is also a third group. They are people who, for a host of reasons, may choose to settle their affairs without the advice of a practitioner and perhaps without filing any documentation. These reasons include the fact that the parties think they can do a better job by themselves and they wish to avoid the professional fees and other transaction costs and divide their assets entirely between themselves. This is of course their right, family law being a private matter between the parties, save those cases where there is a greater public interest in the state becoming involved. But the question becomes how should this group be informed about the choices available to them including reaching finality at law. Should we have a family law system which is only accessible through a practitioner or should we seek to inform so parties have the choice to settle themselves or settle their affairs through a legal adviser? There will of course be some who will always need professional advice and assistance because the power imbalance in the relationship is such that they will not be able to bargain for a fair settlement on their own behalf.

Thirdly, there is of course a degree of dissatisfaction with any family law system and a number of submissions to the Parliamentary Joint Select Committee were representative of that dissatisfaction. In any family law system, there will be different opinions about what is trying to be achieved. Nonetheless, whether there is universal agreement or not about the family law system and its ability to serve the needs of the community, in our parliamentary democracy, it is the role of Parliament to amend the

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26 In Settling Up, Australian Institute of Family Studies (1986) it was estimated that approximately 1 in 6 respondents were in this category but such agreements are susceptible to being re-opened because they do not have legal finality.
law against what it perceives to be the prevailing view in the community having regard to the platform of the political party that was elected to govern. The courts cannot adopt a role which is rightly a parliamentary role under the terms of the Constitution. If the Government of the day perceives that the family law system is not achieving the objectives which Parliament has determined or indeed that there is a need to revise the objectives that the system is meant to achieve, it is the prerogative of Executive Government to present its proposals to Parliament.

It has been the policy of successive governments to make available to the community a range of means to achieve a quicker and more equitable means of settlement. Non-judicial dispute resolution in property matters will be expanded in the near future by the introduction of arbitration in property matters. The family law system must be accessible to all and if research and community views show it is not meeting the needs of parties generally, then the case in favour of reform becomes much stronger.

In summary, the arguments in favour of change centre around transparency, clarity and the need for a coherent framework for the settlement of property matters. Like many issues in this area, some will place greater weight on the factors for change while others will not be convinced that change will be of benefit. Where change is made, there are salutary lessons emerging from the research into the effects of Part VII.

Let me now turn to the substance of the options contained in the Government’s discussion paper.

This paper aims to assist in the discussion of the options by setting out what they might look like in a legislative form. This will not be an attempt to draft legislation but to highlight the key points that would be contained in legislation. In this way, it is

27 Matrimonial property law reform in some form has been part of the platform of the Liberal Party when it went to the electorate in both 1996 and 1998.

28 The Attorney-General recently announced that it will be moving to amend the Family Law Act to introduce arbitration for property disputes.
hoped to increase understanding of the implications of the different options and so to make for a more informed debate.

**Option 1 - Separate Property**

This option retains the philosophy which underpins the existing law. Each party owns their property separately but in the event of a breakdown in the relationship, the Court has power to adjust those interests and such other powers as are necessary to ensure the interests in property can be transferred between the parties. There would, therefore, be provisions along the lines of subsection 79(1) giving the Court power to adjust the interest that each party has in the property and a provision stating that the Court shall not make an order unless it is just and equitable to make the order.

In summary form, one might envisage four basic steps in a property settlement under this option:

**Step 1: Valuation:** Determine the property and its value (including superannuation\(^{30}\)). The existing definition of property would be unchanged\(^{31}\) and the Court would have jurisdiction in relation to the property whenever acquired\(^{32}\). The law in relation to the date of valuation would also apply being the date of hearing\(^{33}\).

**Step 2: Contributions:** Rather than making no statement about the starting point, which is the position under the current law, the legislation would set the starting point for the assessment of contributions at 50/50, making the assumption that each party

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\(^{30}\) See the discussion below on superannuation for the detail as to how it would be treated.

\(^{31}\) Subsection 4(1) states that “property” in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion”. See also *Duff and Duff* (1977) FLC ¶90-217.

\(^{32}\) Much of the law already developed in relation to matters such as windfalls (*Holmes and Holmes* (1990) FLC ¶92-181), inheritances (*Bonnici and Bonnici* (1992) FLC ¶92-272) and awards of damages (*Williams and Williams* (1984) FLC ¶91-541) would probably not be overruled.

\(^{33}\) *Warne and Warne* (1982) FLC ¶91-247. There are older examples where this rule was not applied on the facts of the case, see *Howes and Howes* (1981) FLC ¶91-044.
had contributed equally to both the acquisition, conservation and improvement of the property as well as the welfare of the family\textsuperscript{34}. The *Family Law Reform Bill (No 2) 1995* put it in the following terms:

\textbf{86B.} (1)...

(2) The court’s determination of what is just and equitable as between the parties to the marriage must be made as follows:

(a) the court is to start from an assumption that justice and equity require the disputed property to be divided between the parties in proportion to their respective contributions to the marriage as a whole (this is expanded on in section 86C);

(b) the court must make its determination in accordance with that assumption unless it considers that doing so would not produce a just and equitable result, having regard to other matters specified in section 86D.

(3)....

\textbf{86C} (1) In proceedings for a property order, a court is to assume, as a starting point, that the parties to the marriage have made equal contributions to the marriage as a whole. The assumption will be displaced if the court is satisfied, having regard to the matters mentioned in subsection (2), that the contributions were not in fact equal.

The matters in the proposed subsection 86C(2) went to the duration of the marriage and cohabitation, direct and indirect financial and non-financial contributions to the acquisition, conservation and improvement of the property, the financial resources of the parties and the welfare of the family. In addition, any other factor the court considers relevant could be taken into account. The matters in the proposed subsection 86D were broadly similar to the existing s 75 (2) factors. There was also provision in the proposed subsection 86C (3) that “the court must regard financial

\textsuperscript{34} The position prior to *Mallett v Mallett* (1984) 156 CLR 605 was that the Court assumed each party had contributed equally to the acquisition, conservation and improvement of the assets accumulated during cohabitation/marriage and that the wife’s contribution “ought to be equally equated to the efforts of the husband who is thus freed to pursue his direct outside employment” (*Wardman and Hudson* (1978) FLC ¶90-466 at 77,385 and 5 Fam LR at 894). This option extends the assumption to all assets.
contributions and non-financial contributions as being, intrinsically, equally significant.”

**Step 3: Rebuttal:** The assumption of equal contribution would be rebutted if the contributions were not in fact equal by leading evidence of the actual contributions to both the acquisition, conservation and improvement of the property as well as to the welfare of the family. The basis upon which the Court would depart from the assumption of equality of contribution would be where there was evidence that the parties did not contribute equally to the property. For example, this may be made out where one of the parties had earlier acquired property or where there was property acquired during the course of cohabitation/marriage but one of the parties had applied greater skills, talents and abilities to activities which might be considered outside the marriage such as business acumen.

There may be an argument that the legislative statement on departure should be quite explicit about parliamentary intention in relation to the circumstances where rebuttal is made out. The legislation could, for example, say that the contributions to the welfare of the family are not to be taken to be of lesser quality than say the financial contributions and the legislative statements and explanatory material would need to be prepared in such a way that any change to the law along the lines of option 1 did not result in a contest about the differing quality of contributions. On the other hand, the legislation might require that the Court give credit to the contributions to earlier acquired property to the party who made the contributions. One might expect the longer the marriage the more difficult it might be to rebut the equality of contribution but it might also see an adjustment in favour of one of the parties where there were special skills outside the marriage such as in Ferarro’s case, where there are assets of considerable value. The Court has always considered the duration of cohabitation as relevant in assessing the significance of contributions. In general terms, for marriages of short duration where one party brings little to the marriage, the direct financial
contributions may be insignificant\textsuperscript{35} but where there are children, the indirect contributions may be much more significant even in short duration marriages.

The question of violence could also arise for consideration at this point in option 1. In Kennon\textsuperscript{36}, the court pointed out that where there is a course of violent conduct which is demonstrated to have a significant adverse impact upon the ability of a party to make contributions, then it is a matter which will go to the assessment of contributions. A separate factor along these lines could be included in the list of factors.

\textbf{Step 4:} Having regard to the financial resources of the parties, the Court would have a discretion to make a further adjustment. This is of course currently the s. 75 (2) factors which operate through s 79 (4) (e). As a legislative scheme, the technique where factors for one purpose operate for another purpose via a statutory link is not very satisfactory and has been commented upon by the court on a number of occasions\textsuperscript{37}. The adjustment factors would not necessarily be presented in this same somewhat circuitous way but could be set out as a separate set of factors which apply to property orders. The list might look something like the following:

(a) the age and state of health of the parties;

(b) their income, property and financial resources, and capacity to earn future income (taking account of any reduced capacity caused by family violence);

(c) responsibilities for children;

(d) commitments to support others;

(e) standard of living that is reasonable;

(f) support to enable further education of the parties;

(g) duration of the marriage;

(h) financial resources available if cohabiting with another person; and

(i) any other fact or circumstance.

\textsuperscript{35} Ramsey and Ramsey (1978) FLC ¶90-449.

\textsuperscript{36} Kennon v Kennon (1997) FLC ¶92-757 at 84,294.

\textsuperscript{37} See, for example, Waters v Jurek (1995) FLC ¶92-635 at 82,375.
The list could contain other matters but it would not be a straight copy from s 75 (2) because some of those factors are strictly maintenance related only. The opportunity could be taken to expressly state the unifying principle for the post-contribution property adjustment. In the past, the adjustment was loosely referred to “future needs” factors but, as mentioned earlier, the court has made it clear that this terminology is not an accurate description of this part of the process. The step is an adjustment to ameliorate the harshness of a result based solely on the assessment of contributions. If there is a unifying principle under the existing law, it is to make a further adjustment for ongoing support having regard to the outcome from an assessment of contributions and having regard to the financial resources available to the parties.

Financial Agreements: The ability for the parties to enter into a financial agreement has already been announced by the Attorney-General and would be available under this option. A financial agreement could be made either before or during marriage or after relationship breakdown. The legislation could contain a provision preventing the court from making an order in relation to any property that is covered by a financial agreement. In this way then, earlier acquired property can be quarantined. But financial agreements can extend to property acquired during the course of cohabitation/marriage. Thus, parties could agree to divide their property in whatever proportions and manner they choose and it will be binding upon the parties because the court would not be able to make an order over the property covered by the agreement.

There would also be a provision which requires the parties to be separately advised about the effect of the agreement. In relation to its legal effect, legal advice would be required in accordance with a legal practitioner’s practising requirements. In relation to its financial effect, a legal adviser may choose to provide the certification or the parties may seek to have it certified by a financial adviser. In terms of practice,

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38 For example section 75(2)(h) and 75(2)(n).
39 Press release by the Attorney-General, 19 February 1999
practitioners may choose to joint venture with financial advisers as lawyers move increasingly towards a multi-disciplinary practice.

Where one of the parties claims that the financial agreement should be set aside, the court would have jurisdiction to hear such an application. It would be required to give effect to the agreement to the maximum extent possible, but where it was unable to do so, the Court would be able to make an order in accordance with the general law in relation to property settlements. The grounds for setting aside a financial agreement could be as follows:

(a) miscarriage of justice by reason of fraud, including suppression of material particulars or the giving of false or misleading material particulars;

(b) miscarriage of justice by reason of duress or undue influence; and

(c) 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 were not set aside.

Other matters which might be considered include where it is impracticable for the agreement to be carried out in full or in part and where it is severable, the court may make an order in relation to the severed property but where it is not, the court would be able to make an order in relation to all the property; There could also be public policy exceptions so that people could not agree away all their property and become dependent on the public purse. There would be no requirement for the financial agreement to be registered but its enforcement would be simply on contractual terms and not as an order of the Court.

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40 The final form of the legislation is not yet settled and these are provided for the purposes of discussion only.

41 The law of severability is beyond the scope of this paper and while it usually applies in cases of illegality, it is also available where the contract is void for uncertainty or incompleteness, see Whitlock v Brew (1968) 118 CLR 445.

42 See, for example, Brooks v Burns Philp Trustee Co Ltd (1969) 121 CLR 432.

43 Enforcement as an order of the Court requires Court supervision in accordance with the decision in Brandy v Human Rights and Equal Opportunities Commission and Others (1995) 183 CLR 245.
Spousal maintenance: Part VIII in its current form has no separate divisions and the existing provisions dealing with spousal maintenance are simply provisions contained within Part VIII. Given that this option should make clear the legislative intention, purpose and role of the s. 75(2) factors, the most likely way spousal maintenance would be presented in the statute would be as a separate Division of Part VIII. Section 72 would be retained requiring each party to maintain the other and it would be contrary to public policy for this liability to be agreed away. The liability would continue after any breakdown in the relationship, this being an important distinguishing feature between family law under the *Family Law Act 1975* and matters arising under state and territory de facto law. The Court would have the power to order that one of the parties continue to maintain the other either by way of capital transfer or income stream. The factors to take into account would be similar to the list that currently exists.

Superannuation - Accumulation phase: Superannuation under this option would give the court jurisdiction over the subject matter and the power to bind third parties but would not go as far as the position outlined in the Government’s position paper released in May 1998. Significantly, the formula to divide the superannuation would not be an element of this option but all superannuation, whenever accumulated, would be available for division, the actual division being determined as a matter of court discretion to achieve justice and equity in the circumstances of the case. It would not be an automatic 50/50 division confined to superannuation accumulated during the course of cohabitation/marriage. It will quickly be realised that under this option where the parties cannot agree on an outcome, the proportions in the superannuation is to be divided between the parties would be a matter for the court in the circumstances of the case.

44 Section 72 of the *Family Law Act 1975* is not limited to the period of marriage
46 Subsection 75 (2) of the *Family Law Act 1975*.
47 The constitutional position has been canvassed in an earlier paper - Bourke, Meibusch and Durkin, *Proposed Superannuation Reforms*, 12 Australian Family Lawyer 6-10.
There would be amendments to both the *Family Law Act 1975* and the *Superannuation Industry (Supervision Act) 1993*, together with other consequential amendments, and the essential elements would be as follows:

- A superannuation account in an accumulation plan would be able to be divided either at the direction of the parties or by court order;
- This direction would be binding on third party trustees;
- Where the rules of the fund permit, the non-contributor would have the election be able to remain in the fund in a separate account or to have the funds rolled out into an alternative superannuation plan;
- Where the rules of the fund have not been amended, the Family Law Act would contain a statutory election that the funds be held separately for the benefit of the non-contributor and attract the fund’s rate of interest or that the non-contributor may elect that the funds be rolled out into an alternative superannuation plan;
- A superannuation account in a defined benefit plan would be able to be nominally divided or flagged;
- Where the rules of the fund permit, the non-contributor would have the election be able to remain in the fund in a separate account or to have the funds rolled out into an alternative superannuation plan;
- Where the rules of the fund have not been amended, the superannuation account in a defined benefit plan would remain nominally divided or flagged and, for constitutional reasons, the funds would not be able to be released until the contributor satisfies a condition of release;
- Parties would be required to obtain advice before entering into a binding agreement to divide a superannuation account. In relation to its legal effect, legal advice will be required in accordance with a legal practitioner’s practising requirements. In relation to its financial effect, a legal adviser may choose to provide the certification or the parties may seek to have it certified by a financial adviser;
• The grounds for setting aside an agreement to divide a superannuation account would be the same as for other financial agreements but where the parties could not be put into the same financial position, other property could be used to offset;

• The trustee would be required to certify prior to the settlement of the agreement or order that the division is able to be put into effect.

• Accounts which are too small ($2,000) would not be permitted to be divided but the value could be offset;

• Where there are multiple accounts, there would be no requirement that all accounts be divided but the court could offset the value;

• Valuation factors to apply to each party’s superannuation interest would be developed by the Australian Government Actuary, with a discretion that where there is a strong likelihood of a change in the position of the member in the near future, other than one that is brought about as a matter of choice by the member, an independent valuation could be obtained;

• Self managed funds could retain the non-contributor as a member but the non-contributor could elect to transfer the interest of the non-contributing spouse out of the fund and where the fund failed to do this, the fund would no longer fall under the definition of a self managed superannuation fund but would be required to appoint an independent trustee and be regulated by the Australian Prudential Regulation Authority;

• The taxation arrangements would be that where a superannuation interest was transferred to a non-contributing spouse, each person will have access to a low rate Eligible Termination Payment (ETP) threshold and be subject to separate Reasonable Benefit Limit (RBL);

• Interests would be divided in the same preservation proportions as when the benefit accumulated and would be preserved in those proportions; and

• Where the Court found it was unable to make an order because it would not be just and equitable to make the order, under this option the court would have a discretion to adjust the division of the superannuation.
The superannuation proposals will see the creation of the new low rate ETP threshold and a new RBL. This will require revenue protection measures and the parties would be required to make the following declarations:

- a declaration that the parties have separated on a *bona fide* basis on the relevant date and that the decision to divide the superannuation is based on the fact of permanent marriage breakdown;

- a declaration that the parties have settled their matrimonial property arrangements and that the division of the superannuation forms a part of that settlement; and

- a declaration that the parties are aware that the Australian Taxation Office may be notified of the decision (the prescribed form would clearly note that it would be an offence subject to penalty to enter into sham arrangements for tax minimisation purposes).

Superannuation in the benefit phase: Sometimes referred to as pension splitting, superannuation in the benefit phase would also be available for division, the proportions being a matter of agreement between the parties or court order in the circumstances of the case. This would be achieved not by ordering the superannuated party to pay a proportion of the superannuation to the non-contributing spouse but by a direction to the superannuation trustees to pay directly to the non-contributing spouse. In the case of lump sum superannuation, the proportion to be paid to the non-contributing spouse would be a lump sum which may be used to purchase an annuity or invested in another way. In the case of an income stream by way of a pension, a direction could be given to the trustees to pay the pension to each of the parties separately.

**Option 2 Community of Property**

The discussion paper released by the Attorney-General states that a community of property regime is based on the assumption that marriage is an equal partnership,
having both a social and an economic dimension. Each party performs an integral role as part of that single social and economic unit, however the role that each plays will differ in type and quality. The community of property regime that is being put forward for consideration here does not inquire into, nor does it attempt to weigh, the different contributions each party makes. It assumes an equality which is reflected in the fact that each party has an equal interest in the communal assets of the marriage. Parties may retain separate legal ownership of the communal assets during the marriage but in the event of marriage breakdown, the property is treated as joint and divided between the parties. This approach is known as a deferred community of property regime.

A pure community of property regime would see legal ownership in all communal assets being joint from the time of commencement of cohabitation/marriage. This would be enormously difficult to manage in modern society and one can imagine the difficulties in commerce under a pure community of property regime. A deferred community of property regime defers the joint ownership until the relationship breaks down.

Under this option, communal assets would be identified by reference to the period of cohabitation/marriage. Any property acquired during the period of cohabitation/marriage would be a communal asset. Any property held by either of the parties at the commencement of cohabitation/marriage would not be communal assets but would be the separate property of the party owning those assets and would not be divided in the event of marriage breakdown. Where separate property was traded during cohabitation/marriage such that it became property acquired during the period of cohabitation/marriage and thus a communal asset, there are three possible approaches in dealing with this. First, do nothing and leave it to the parties to make a financial agreement to exclude the converted asset from the communal pool. Secondly, institute tracing provisions, but these are typically very complex. Thirdly, undertake an accounting approach where the value of assets at the commencement of cohabitation/marriage.

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49 Some commentators use the labels a bit differently to describe the same concepts.
cohabitation is deducted from the value of assets on separation. However, this will become a more difficult exercise the longer the period of cohabitation/marriage.

Excluding property, by force of statute, that was acquired prior to cohabitation/marriage will automatically protect property built up in earlier marriages including property which may have been in the family for generations, such as family farms. This would also apply where the earlier acquired property was the family home. It should be remembered, however, while the value of the property at the time of marriage would not be available for reallocation, the increase in value of the excluded property would be included. The exercise then becomes one of valuation, and while the principles of valuation will be questions of law, the valuations themselves will be a question of fact. Some examples might help.

Take the case of rural properties where the property has been in the family for some time. Where the period of cohabitation/marriage between the parties was short and the increase in value of the property was small, there is a stronger likelihood that the property would remain intact. This is because any increase in its value might be small and could be met from other assets. However, for longer periods of cohabitation/marriage, where the increase in value might be substantial, unless there are other assets that could be used, the property may have to be sold. However, it should be remembered that the spouse who married into the family will have typically worked on the property for some years and it could be unfair for that person to walk away with little while the other party takes the benefit of the work of both parties.

Another example might be where each of the parties own houses and they decide to rent one and live in the other. The value of each of the properties at the commencement of cohabitation/marriage would be excluded from the communal pool by statutory definition. The increase in value of each of the properties during the course of cohabitation/marriage would not. The parties would share equally in any increase in value. Where one of the parties buys a house in contemplation of marriage, again the value at the commencement of cohabitation/marriage would be excluded but any increase would be a communal asset for equal division.
The basic steps in a settlement under this option might be as follows:

**Step 1:** All property identified as communal property would be valued. Valuation would be as at the date of separation. It would be necessary to obtain evidence of the value of property in existence at the commencement of cohabitation/marriage to determine the net increase in value of those assets over the period of cohabitation/marriage. Under this option, valuation records will be important and where practitioners have the opportunity, clients should be advised of the importance of such records. In addition, the value of all property acquired during cohabitation/marriage would be valued to give the value of the total asset pool.

There would not be a requirement for particular items of property to be shared. What is shared is the value of the pool of communal assets and how the actual division is put into effect is an issue to be settled in the circumstances of the case.

There is a question as to whether there should be exceptions to communal property and if so what they should be. The main reason for excluding property from the communal pool would be because particular property can be readily identified as personal such that it is acquired for reasons wholly unconnected with the marriage relationship. If there were exceptions, there would need to be statutory provision to identify the class of exclusions. This could be done either by way of a general descriptive definition, such as personal property acquired for reasons wholly unconnected with the marriage relationship, or by a specific identification of particular property. Two particular examples can be considered.

First, windfalls such as gifts or inheritances may considered to be of such a character that they are essentially personal and have no connection with the marriage relationship. On this basis, it could be argued they should be excluded from the communal pool. It may also be argued that a personal gift or inheritance is property that is entirely personal and any system of family law should not attach such property.
On the other hand, where one party meets the day to day expenses of the household and there are not other assets on marriage breakdown, apart from a gift or inheritance, it may unfair to exclude these assets. Where the gift or inheritance is in the nature of a capital sum, it may be readily identified, but it raises a further question about how to treat any income stream derived from investments of the gift or inheritance. On the other hand, where the gift or inheritance is in the nature of a house, which the parties use for the matrimonial home, the passage of time may start to alter the character of the gift or inheritance. And what of cases where assets which are acquired by gift or inheritance and are then sold or converted on a number of occasions. There would need to be tracing provisions to identify where the excluded property has finally ended up and whether there are sufficient assets to meet the value. These are issues which should be considered if a submission were to argue for exclusions from the definition from the communal pool.

The second example is damages for personal injury where the injury occurred during the period of cohabitation/marriage. There will be components of the award of damages which are for pain an suffering as well as for future economic loss. Both of these elements are again largely personal to the individual and there is at least an argument that they be excluded from the communal pool but all the questions of tracing, investment and income streams will also arise.

**Step 2:** Each party would get 50% of communal assets and there would be no inquiry into contributions. An important distinction between option 1 and option 2 is the way that they treat contributions. As explained earlier, contributions under option 1 are assumed to be equal unless there is an application to rebut the presumption. Actual contributions might therefore arise for consideration. Under option 2, however, there is no inquiry into contributions. They are not only assumed to be equal, they are actually equal as a matter of law. The reason for this approach is that the assessment of contributions is highly subjective and one which proves very difficult to make comparative judgements. It has been criticised as raking over the details of married

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50 *Bonnici* supra.
life. The Full Court has described its task as onerous when examining “the disparate contributions to which s 79(4) refers and the translation of those into monetary terms”. Thus, option 2 seeks to avoid these difficulties by making no inquiry into contributions.

If there is no requirement to look at contributions, it should be remembered that this would apply to both negative as well as positive contributions. The law in this area has undergone considerable change in recent times and the part of this option where the effect of violence and other forms of control and oppression would be considered arises under step 3.

**Step 3:** Departure from equal sharing. There would be a mechanism under this option to depart from the equal sharing in one of two possible ways. The first of these would be a departure having regard to factors along the lines of section 75(2). In general terms, where one of the parties met one the listed requirements, having regard to the principle that parties to a marriage have a liability to maintain the other party, the court could depart from the equal sharing. The factors which would govern the exercise of the court’s power in departing from the equal sharing might be along the following lines:

(a) prospects of the future earning capacity of either of the parties;
(b) prospects of future employment of either of the parties in the light of the prevailing labour market;
(c) the level of skills, training and qualifications of the parties;
(d) the opportunities forgone within the marriage; and
(e) the ongoing caring responsibilities for any children.

It will be immediately apparent that the grounds for the exercise the discretion in these circumstances contains an important difference from the grounds for departure under

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option 1. The discussion paper does not include a “catch all” factor at the close of the list. The arguments in favour of having a closed list of factors to govern the exercise of a discretion is that one which advocates that there be a less discretionary model of family law. The argument in favour of such an approach is that by reducing the area of discretion, the more predictable and certain the outcome. One theme of concerns that was presented to the Joint Select Committee inquiry was that the outcome in family law proceedings is uncertain\(^{54}\) and there is then difficulty in advising clients. On the other hand, those in favour of retention of a “catch all” factor, including the Law Council of Australia in its earlier submissions\(^{55}\) argue that the facts and circumstances the court has to consider are so wide that if there is no “catch all”, then there will be cases which will not fit within one of the identified factors and injustice will result. One inquiry those making submissions might make is to examine the use to which the current “catch all” factor in s. 75(2)(o) has been put. This might assist in identifying its primary use, but even if it were retained it would not be used to introduce issues surrounding marital conduct, a matter which was settled by the Full Court, in the early days of the operation of the Act\(^{56}\). In the end, there will be a diversity of views as to whether there should or should not be a catch all provision but submissions should consider the use to which such a provision would be put.

The question of violence could also arise for consideration at this point in this option. As was mentioned earlier, in Kennon\(^{57}\) the court pointed out that where there is a course of violent conduct which is demonstrated to have a significant adverse impact upon the ability of a party to make contributions, then it is a matter which will go to the assessment of contributions. A separate factor along these lines could be included in the list of factors.

\(^{53}\) In the Marriage of Kennon (1997) 22 Fam LR 1
\(^{55}\) ibid
\(^{56}\) Sobusky and Sobusky (1976) FLC ¶90-124.
\(^{57}\) Kennon v Kennon (1997) FLC ¶92-757 at 84,294,
While the approach just described is based on departure from equal sharing because of factors going to a requirement for ongoing support, an alternative could be to have a structured discretion based on the economic consequences of the marriage and its breakdown. This approach to departure would aim to achieve economic equity between the parties because of the marriage and the consequences of its breakdown. This approach would be quite new to Australian jurisprudence and would require the separation of the effects of the marriage and its breakdown from effects outside the marriage. It derives in part from the 1985 Divorce Act (Canada) where spousal maintenance has regard to the economic consequences of the marriage and its breakdown. The discussion paper identifies three objects:

(a) to promote economic self sufficiency;

(b) the relief of economic hardship, including any adverse economic impact caused by family violence; and

(c) to take into account economic advantages and disadvantages.

The factors which might govern the exercise of the discretion for this prospective component could be:

(a) the effect on the earning capacity of each spouse arising from responsibilities assumed during the marriage;

(b) the capacity and reasonable prospects of a spouse to obtain education and training including by reason of age and state of health;

(c) the ability of a party to the marriage to relieve any adverse economic impact caused by family violence;

(d) the length of time the parties cohabited; and

(d) any ongoing parenting responsibility or duty to maintain another person.
Those interested may wish to argue for a similar or different set of factors to govern the exercise of this discretion or indeed reject it outright.

If this approach were adopted, the parties entire economic picture and circumstances could be considered in an integrated way. There is a concern that the current law deals with the economic circumstances of the parties after separation in a way which is too fragmented. There is, firstly, a property adjustment which takes into account the s 75 (2) factors, secondly, there may be a spousal maintenance order either by way of capital or income having regard to the s 75 (2) factors and thirdly, there may also be a child support order, although of course not necessarily in that order. What emerges is a picture where separate components of the financial arrangements do not seem to be neatly tied together and integrated. In addition, there may be changes in circumstances where, for example, one or both of the parties may or may not have commenced living in a new household and where there may be disparities in the income earning capacities of each of the parties induced by the marriage leaving a sense that one or other of the parties has been over-compensated.

In summary, the effect of adopting the community of property option would be that the parties share equally in the division of matrimonial property, because it assumes an equality in the marriage partnership. It would apply only to that property accumulated during the course of cohabitation/marriage. Any departure from the equal division would depend on the nature of the scheme for departure. Under the “ongoing support” model, departure from the 50/50 division is governed by a closed list of factors aimed at addressing concerns about certainty. It is thought that this approach would enable parties to know in advance what share they would be likely to achieve and the circumstances for departure from an equal division would be clear. The alternative scheme for departure is one which contains has an objective of achieving economic equity between the parties because of the consequences of the marriage and its breakdown. A key component of this approach is to introduce a global assessment of

58 The available evidence is that the group least likely to re-partner is women who have ongoing primary care for children
the parties’ economic circumstances, having regard to income and capital transfers in whatever form they are made either as property, spousal or child support/maintenance.

Financial Agreements: Financial agreements would be available under this option as with the first, however, the use to which they are put may be slightly different. A financial agreement made prior to marriage would probably be a much less frequent occurrence than under the first option because the law would define out all earlier acquired property. Given that the primary purpose of a financial agreement made prior to cohabitation/marriage is to quarantine earlier acquired property, it renders any financial agreement in these circumstances otiose. Financial agreements made during the course of the marriage may, however, be used to cover items which would fall within the definition of communal property but which the parties wish to agree to define out of the communal pool. For example, a financial agreement might be used to exclude inheritances or damages awards at the time they were obtained rather than rely on statutory exclusions. Financial agreements could also be used to exclude property converted from separate property by reason of a transaction which occurred during the course of cohabitation/marriage. Financial agreements made after the breakdown of the relationship will, on the other hand, be an alternative means for parties to deal with their financial affairs. The circumstances for dealing with any financial agreement that breaks down would be the same as for the first option. Where one party does not wish to be bound by the agreement, that party may seek to have it set aside on the grounds outlined earlier. At the same time, the other party can seek to have the agreement enforced and make submissions that it should not be set aside. As with option 1, each party would need to be separately advised either as to its legal effect or its financial effect and there would be no requirement for the financial agreement to be registered, Enforcement would be simply on contractual terms, not as an order of the Court.

Superannuation in the accumulation phase: The way superannuation in the accumulation phase would be treated under this option would be largely as set out in the Position Paper released by the Government in May 1998. The machinery elements
set out above under the first option would operate but there would be some important additions to the way superannuation would be divided under this option. First, the only value of the superannuation that was accumulated during the course of cohabitation/marriage would be available for division. Secondly, the formula to ascertain the shares for division would be the means by which the superannuation was divided.

Interests in an accumulation scheme\(^59\) are able to be divided with relative ease. This is because the value is determined with relative ease and can be derived by determining contributions and investment earnings, minus administrative charges. Parties will be able to divide a superannuation interest equally referable to the period of their cohabitation, or in some other proportion if they so agree\(^60\).

The Family Law Act will provide parties with the following formula they can use to establish an equal division of that part of a superannuation interest that relates to a period of cohabitation:

\[
\frac{\text{value} \times \text{period of membership during cohabitation}}{\text{period of membership to end of cohabitation}} \times \frac{1}{2}
\]

where:

- value = the value of the superannuation at the date of separation
- period of membership during cohabitation = the time of membership during which the member was living with the partner
- period of membership to end of cohabitation = the total time of membership of the fund until the end of cohabitation

Division of an interest in a defined benefit scheme will be more complex, because of the inherent difficulty of valuing them, and also because of constitutional considerations, principally the just terms requirement in section 51 (xxxi).

Valuing an interest in a defined benefit scheme is also problematic because entitlements are typically based upon years of service with an employer and salary

\(^{59}\) Any part of an accumulation scheme which is not fully vested will be treated in the same manner as a defined benefit scheme.
levels prior to retirement, as well as contributions and investment earnings. As the final benefit is dependent on future events, the full value of the retirement benefit cannot be known with certainty at the time of the marriage breakdown.

Typically the benefit in a defined benefit scheme has two components – the vested benefit and the unvested value. The unvested value is an amount to which the member has a notional entitlement but it may not be realised until the member satisfies certain requirements according to the rules of the fund. For example, an employee may not fully qualify for additional benefits unless he or she remains employed by the company for a certain number of years.

Division of the vested benefit only in an interest in a defined benefit scheme does not fully recognise the value of the interest and in many cases is not fair. The unvested value, while it accrues during cohabitation, will not be finally determined until a condition of release is satisfied.

There are many examples where the value of an interest in a defined benefit scheme is now simply put forward on the basis of the amount vested in the scheme ignoring the often valuable unvested amount. To deal with this uncertainty, the Court may adopt the deferral approach but is reluctant to do so where there are other options to address the situation.

Superannuation in the benefit phase: Superannuation in the benefit phase or pension splitting would be available under this option but only that portion of the superannuation which was attributable to the period of cohabitation/marriage. Thus an income stream of which say 90% is referrable to cohabitation/marriage would be divided between the parties with the non-contributing spouse receiving 45% and the contributor receiving 55%.

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60 Parties may agree to divide a superannuation interest in some other proportion if one of the parties wishes to trade a lesser interest in the other party’s superannuation for a greater share of other property (eg. equity in the former matrimonial home).

61 In the Marriage of O’Shea (1987) 12 Fam LR 537– where the proceedings were deferred for a period of 20 years.
AN EXAMPLE TO TEST THE DIFFERENT OPTIONS

1. One party has $5m in business assets on marriage and the other party has no assets. After 5 years of toil in the business where both worked equally hard, the business was worth $5m on separation. There were no children. What we the would be the outcome under:

   Option 1: ————————————————————————————————————
   ————————————————————————————————————
   ————————————————————————————————————
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   Option 2 (a): ————————————————————————————————————
   ————————————————————————————————————
   ————————————————————————————————————
   ————————————————————————————————————

   Option 2 (b): ————————————————————————————————————
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2. Would it make any difference if the business was worth $4m at the end of the marriage? ————————————————————————————————————
   ————————————————————————————————————
   ————————————————————————————————————
   ————————————————————————————————————
3. Assume that the business was started by both parties and built up over the course of the marriage to say $1m but then it fell on hard times. The business then fell into negative equity and owed $1m. There were no other assets and no children. What would be the outcome on marriage breakdown?

Option 1: ____________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

Option 2 (a): ______________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

Option 2 (b): ______________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________

4. Would it make any difference if there were say two children born over the course of the 5 year marriage on the same facts as in Q 3? ________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________
___________________________________________________________