

THE CONSTITUTIONAL CONSTRAINTS ON ALTERING PROPERTY RIGHTS AFTER RELATIONSHIP BREAKDOWN

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Section 79(2) of the Family Law Act 1975 (Cth) provides that the court shall not make an order altering property rights unless it is just and equitable to do so. This article argues that s 79(2) is required by the constitutional foundations upon which the power to alter property rights rests. The discretion of trial judges may be wide, but it is constrained by the parameters of constitutionality and by the purposes for which Parliament may authorise the alteration of property rights. Because existing legal and equitable titles are the starting point for consideration in family property proceedings, courts must always ask whether there is a sufficient justification for stripping a party of their legal or equitable rights. The fact of relationship breakdown is insufficient. While the broad discretion given to courts to alter property rights was originally seen as a means of providing justice for women who took on the role of homemaker and parent, the practice of the family courts of giving little weight to legal title has often worked a profound injustice to women. An understanding of the constitutional constraints on judicial discretion is also very important to give effect to the assumptions that underpinned the marital relationship.

I STANFORD AND SECTION 79(2) OF THE FAMILY LAW ACT

Section 79(2) of the *Family Law Act 1975* (Cth) ('*Family Law Act*') provides that judges must not alter property rights on marriage breakdown unless satisfied that it is just and equitable to do so. There is a similar provision in relation to de facto relationships.¹ The section is drafted as a constraint on judicial power, not as an objective for the exercise of judicial power. That is, the instruction from Parliament is not for the court to make whatever orders it considers to be just and equitable, as leading decisions of the Family Court once held,² but rather not to make an order altering property rights unless it is satisfied that it is just and equitable to do so.³

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¹ *Family Law Act 1975* (Cth) s 90SM(3) ('FLA').

² *In the Marriage of Hickey, Re* (2003) 20 FamLR 355, [39] ('Hickey'); *Coghlan & Coghlan* (2005) 193 FLR 9, 22 [58].

³ Patrick Parkinson, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380 ('Judicial Restraint').

In *Stanford v Stanford* ('*Stanford*'),⁴ the plurality of the High Court (French CJ, Hayne, Kiefel and Bell JJ) gave new prominence to this section of the Act. It said that a court, exercising jurisdiction under the *Family Law Act*, had to consider, in every case, whether it was just and equitable to make any alteration of property rights without conflating that decision-making process with the evaluation of contributions, future needs and other considerations that Parliament has set out in ss 79(4) and 75(2) of the Act. It also made it clear, in three fundamental propositions, that the court should not assume it is just and equitable to alter property rights.⁵ The plurality reaffirmed that Australian law does not recognise the idea of community property arising from marriage.

Notwithstanding the prominence given to s 79(2) by the decision in *Stanford*, and its significance also in the High Court's more recent decision in *Hsiao v Fazarri* ('*Hsiao*'),⁶ the rationale for this provision has not been explored in any depth. It is argued in this article that s 79(2) is required by the constitutional limitations on the legislative power to alter property rights on marriage breakdown, and that careful consideration of the state of the legal and equitable title going into a trial may be, in many cases, a matter of gender equity. This contrasts with an assumption that has long underpinned family property law in various jurisdictions, that the broad discretion to alter property rights is necessary for women in order to avoid an undervaluing of the contribution that many women make to relationships as a homemaker and parent.

In fact, in many leading family law cases that have considered the homemaker and parent contribution over the last forty years, it has been through a failure to ask the question why women should be stripped of their legal entitlements, that injustices in outcomes have occurred.

II THE CONSTITUTIONAL BASIS FOR PROPERTY DIVISION

The federal Parliament has limited powers to pass legislation altering property rights on relationship breakdown, and despite the width of the discretion conferred by s 79, it must be read down to be within the legislative powers of the Commonwealth. The stream of judicial discretion cannot rise above the constitutional source of power.⁷

The Parliament does not have an unlimited power to make laws that take away people's property rights. It has power to make laws dealing with bankruptcy and insolvency (s 51(xvii)). It also has a limited power to make laws to acquire property from people, but the acquisition must be on just terms and for a purpose in respect of which the Parliament has power to make laws (s 51(xxxi)). The

⁴ (2012) 247 CLR 108 ('*Stanford*').

⁵ *Ibid* 121–2 [38]–[43].

⁶ (2020) 270 CLR 588 ('*Hsiao*').

⁷ *Heiner v Scott* (1914) 19 CLR 381, 393 (Griffith CJ).

taxation power (s 51(ii)) is also a source of authority to require people to transfer funds that they own or to force the sale of assets to meet a taxation liability.

The placita in s 51 (xxi) and (xxii) that provide the main constitutional bases for the enactment of the *Family Law Act* do not specifically provide a power to alter property interests of parties to a marriage either during a marriage or following the breakdown of that relationship. However, that power has been found to exist either as an exercise of the implied incidental power consequent upon divorce, or of the marriage power.⁸

In relation to the property of de factos, the constitutional power is derived from the legislation referring powers from each state that has done so, and is constrained by the terms of those referrals.⁹ While Parliament's powers in relation to de factos are not constrained by the constitutional powers concerning marriage and divorce, it would be strange if the discretion to alter property rights on the breakdown of de facto relationships were broader than for marriages. The courts are interpreting and applying the same statutory language under different statutory provisions.

The case law on s 51(xxi) and (xxii) indicates that, in relation to a marriage, the Parliament may enact a law permitting courts to alter property interests in circumstances arising out of the marital relationship or to deal with the consequences of the breakdown of a marriage. In relation to each head of power, the justification for altering property rights is that injustice might otherwise result if property rights were left unaltered. It follows from this that a necessary step in considering whether to alter property rights is to consider the current state of legal and equitable ownership, and then to ask the question whether an injustice would be done were the parties to be left to their rights at law.

A The Marriage Power

The High Court first considered the application of the marriage power to property in *Russell v Russell*.¹⁰ In that case it was only necessary to consider the power to declare property interests, not to alter them. Nonetheless, Jacobs J said:

⁸ See also Patrick Parkinson, 'Constitutional Law and the Limits of Discretion in Family Property Law' (2016) 44(1) *Federal Law Review* 49 ('Constitutional Law').

⁹ See, eg, the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4 provides that the reference of powers is to make laws about 'financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships'. Section 1(2) confirms this in explaining the Act's purpose: 'The purpose of this Act is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of s 51(xxxvii) of the Constitution of the Commonwealth.' There has been no general reference of powers from Western Australia because the Family Court of Western Australia can rely upon the *Family Court Act 1997* (WA).

¹⁰ (1976) 134 CLR 495.

The purpose and operation of s. 79 is clear. Even if in law or equity the title to property is in one party to a marriage, the circumstances of the marital relationship may make an alteration of property interests just and equitable.¹¹

In *Fisher v Fisher* ('*Fisher*'),¹² which concerned the validity of s 79(8) of the *Family Law Act*, the Court gave further consideration to the scope of the marriage power to justify the alteration of property rights. Gibbs CJ, and Mason and Deane JJ, all made it clear that it is not sufficient for a valid law altering property rights that the parties happened to be married. The proceedings must arise out of the marital relationship. Those circumstances provided the justification for altering property rights.

To similar effect, Brennan J said this:

A jurisdiction to entertain any proceeding between parties to a marriage with respect to their property whether or not the proceeding arises out of the marital relationship cannot be created in reliance on the marriage power: *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, at pp 510–511, 527–528, 542, 552–553. On the other hand, if the jurisdiction is limited so that its exercise is governed by considerations arising out of the marital relationship, the creation of the jurisdiction is supported by s 51(xxi), at least where the parties to the proceedings are the parties to the marriage.¹³

Thus, central to the interpretation of s 79(4) in its constitutional context, is that the Court is asked to consider what circumstances arising out of the marital relationship justify the alteration of property rights, looking at the various factors listed in that subsection.

Brennan J went on to indicate that the jurisdiction is meant to be exercised 'only in cases where the moral obligations arising out of the marriage remain unsatisfied.'¹⁴ In *Stanford*, the plurality indicated that Brennan J's reference to moral claims should not be misunderstood. The rights of the parties, it made clear, must be determined according to law and not by reference to other, non-legal considerations.¹⁵ The important point remains that the justification for a property order lies in obligations arising out of the marriage which remain unsatisfied on the current state of the legal and equitable titles.

Dawson J spoke in similar terms to Brennan J. He said that it was not necessary to consider in that case how the limitation to matters arising out of the marital relationship affects the operation of s 79, but he observed:

It is enough in this case to say that the limitation means that while s 79(1) authorizes the alteration of existing rights and the creation of new ones, it does so only to satisfy the claims arising from marriage upon the property of either spouse.¹⁶

¹¹ Ibid 553.

¹² (1986) 161 CLR 438 ('*Fisher*').

¹³ Ibid 456.

¹⁴ Ibid 458.

¹⁵ *Stanford* (n 4) 125.

¹⁶ *Fisher* (n 12) 451.

In *Dougherty v Dougherty*,¹⁷ the Court gave further consideration to the issues. Mason CJ, Wilson and Dawson JJ said of s 79:

It purports to confer a wide discretionary power to vary the legal interests in any property of the parties to a marriage or either of them, but with no reference at all to the criteria by which a permissible claim to the exercise of the power may be identified. The validity of s 79 did not fall to be determined by this court in *Russell v Russell*, but the reasoning in that case indicates that the section can only have a valid application with respect to a claim based on circumstances arising out of the marriage relationship.¹⁸

Later in their reasons, their Honours referred to the court's power to 'alter the respective property interests of the parties inter se for reasons associated with and finding their source in the marriage relationship'.¹⁹ It is not only that the proceedings must arise out of the marital relationship; that is a jurisdictional question. The reasons for altering property rights must also arise from the circumstances of the marital relationship and, to this extent, s 79 needs to be read down.

B The Divorce Power

In *Lansell v Lansell* ('*Lansell*'),²⁰ the High Court had to consider a constitutional challenge to s 86 of the *Matrimonial Causes Act 1959* (Cth), which gave the court the power to order a settlement of property in association with proceedings for the dissolution of marriage or other principal relief. The High Court upheld the validity of the provision unanimously. Kitto, Menzies and Windeyer JJ thought that it was valid within the implied incidental power which attaches to s 51(xxii) of the Constitution.²¹ Taylor and Owen JJ thought that the provision was encompassed by the term 'matrimonial cause'.²²

Kitto J stated that, in a divorce, a 're-adjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and to the children is not to result'.²³ Consequently, s 86 of the *Matrimonial Causes Act 1959* (Cth), which provided for such property division, was within constitutional power. In *Sanders v Sanders* ('*Sanders*'),²⁴ Windeyer J quoted Kitto J's words with approval in a passage explaining the effect of s 86.²⁵

Section 79 is thus constitutionally valid only to the extent that it deals with circumstances arising out of the marital relationship or fulfills a remedial role in dealing with the consequences of marriage breakdown. While, as the High Court

¹⁷ (1987) 163 CLR 278 ('*Dougherty*').

¹⁸ *Ibid* 285–6 (citations omitted).

¹⁹ *Ibid* 286.

²⁰ (1964) 110 CLR 353 ('*Lansell*').

²¹ *Ibid*, Kitto J at 361–2; Menzies J at 369; Windeyer J at 370.

²² *Ibid*, Taylor J at 366; Owen J at 370.

²³ *Ibid* 361.

²⁴ (1967) 116 CLR 366 ('*Sanders*').

²⁵ *Ibid* 381.

held in *Stanford*, that power extends to the resolution of property disputes where the marriage has not broken down, the Court must nonetheless be satisfied that it is just and equitable to make an order. It follows that the purpose of the power given in s 79 to alter property interests is to prevent an injustice that would otherwise occur because of the circumstances of the marriage or its breakdown if no order were made. It is in this context that the term ‘just and equitable’ in s 79(2) needs to be understood.

This is reflected in the early jurisprudence of the Family Court. In *Rogers & Rogers*,²⁶ the Full Court cited with approval Strauss J’s view in *Ferguson & Ferguson* (‘*Ferguson*’):

It seems to me, that the main purpose of sec 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered, will go no further than the justice of the matter demands.²⁷

The language of ‘cogent considerations of justice’ reflects that of Barwick CJ in *Sanders*.²⁸

Once this is understood, it becomes apparent that the much-vaunted width of discretion of trial judges, acknowledged by the High Court in *Stanford*,²⁹ is actually not so wide after all. It is wide, but it is constrained by the parameters of constitutionality and by the purposes for which Parliament may authorise the alteration of property rights.

In the same way, the terms ‘just and equitable’ in s 79(2) have a constitutional context that informs their meaning. They are not synonymous with whatever the judge happens to think is fair. The *Constitution* does not allow a Chapter III court to be invested with a discretion to exercise justice under palm trees.³⁰ Several points follow from this.

III IMPLICATIONS OF THE CONSTITUTIONAL FRAMEWORK

A The Importance of Existing Legal and Equitable Rights Under s 79(4)

The first point is that the court must pay close attention to the legal and equitable rights of the parties going into the trial, because the fundamental question

²⁶ (1980) FLC 90–874, 75, 539 (‘*Rogers*’).

²⁷ (1978) 34 FLR 342, 358.

²⁸ *Sanders* (n 24) 376.

²⁹ *Stanford* (n 4) 120.

³⁰ Parkinson, ‘Constitutional Law’ (n 8) 68–72. A Chapter III court is a federal court established under Chapter III of the Commonwealth Constitution which deals with judicial power.

required to be asked by s 79(2) is whether there is any justification in altering them, and if so, to what extent. In *Mallet v Mallet* ('*Mallet*'),³¹ the High Court decisively rejected any notion that there is a starting point or presumption that the property will be shared equally between the parties. Such a presumption or starting point, it said, is nowhere to be found in the legislation. Although s 79(2) did not get much attention in *Mallet*, *Stanford* made it clear that this subsection is the real starting point for consideration of property rights on separation or divorce. That is, legal and equitable title should prevail unless and until the court is persuaded of the need to exercise its statutory powers, and even if it is so persuaded, the current state of legal and equitable title represents a vital starting point in determining the extent to which alteration of property rights can be justified because of considerations arising out of the marital relationship or its breakdown.

The importance of justifying an alteration of the legal and equitable interests was at the heart of the difference between the majority and minority of the High Court in *Hsiao*.³² The case involved a marriage that lasted only 23 days. The couple had been together for some time before this, and had tried to have a child together, but had not lived in a de facto relationship. The husband had purchased a house for \$2.2 million, which, with renovations, had become worth more than \$3 million at the time of trial. When it was purchased, he gave her, as a gift, a 10 per cent share in it. Later, at a time when he was in hospital with a suspected heart attack, his wife pressured him (so the trial judge found) into signing a transfer of the property into a joint tenancy. While this might have made the transaction voidable due to undue influence or pressure, he subsequently entered into a deed that reflected that intent, at a time when he was not under such pressure. The deed provided for money to be paid to the wife's brother and sister should she predecease him, reflecting substantially the value of a half share in the property at the time.³³ This deed was not a binding financial agreement.

The trial judge did not consider it necessary to determine whether the transaction was voidable for undue influence, or subsequently ratified because of the deed. This was because he considered, in any event, that it was just and equitable to alter property rights. The house had been purchased and renovated in the expectation that the marriage would last and that this would be their marital home. The lack of fulfilment of this expectation justified the alteration of property rights.³⁴ He ordered the transfer of the home back into the husband's sole name and awarded the wife \$100,000 plus the \$80,000 previously transferred to her to pay her legal fees, in lieu of the half share in the property, which was worth about \$1.5 million.

³¹ (1984) 156 CLR 605 ('*Mallet*').

³² *Hsiao* (n 6).

³³ *Ibid* 597–600 [15]–[21], 600–1 [24].

³⁴ *Ibid* 601 [25].

The Full Court and the majority of the High Court upheld this as a reasonable exercise of the trial judge's discretion. Kiefel CJ, Bell and Keane JJ rejected criticisms of the trial judge for not determining whether the transfer of the property into joint names had been procured through undue influence or pressure, and whether, even if that were so, the deed had in effect ratified and confirmed the transfer. This was because the wife had chosen not to participate in the trial. As a consequence, she did not run the arguments at trial that she subsequently ran on appeal.³⁵

There was a strong dissent from Nettle and Gordon JJ, who had granted the special leave. They considered that, as *Stanford* requires, the judge first had to determine the legal and equitable interests of the parties. They said that 'it is the statutory imperative to take into account the considerations stipulated by the legislature, including, critically, the existing interests of the parties, that characterises the power conferred by s 79 as judicial power. Consequently, proper consideration of existing interests is of fundamental importance.'³⁶ The trial judge had not credited the wife with a financial contribution of the additional 40 per cent of the equity in the home since it could not be seen as a gift to her as a result of the circumstances under which it arose. That is, he made an implicit finding in the analysis of the parties' respective financial contributions under s 79(4)(a) without a close analysis of the facts, in accordance with equitable principles, to determine whether the gift was voidable or whether the deed constituted a subsequent ratification.

Nettle and Gordon JJ were particularly critical of the Full Court for treating the resolution of the dispute about the transfer of the property into joint names as a 'distraction'.³⁷ The legal and equitable interests 'should have been front and centre — the very starting point — in the determination of what was "just and equitable" for the purposes of s 79', they said.³⁸ The significance, for them, of resolving the issues of legal and beneficial ownership, was that the next question had to be whether it was just and equitable to deprive the wife of her half share in the property, a share with a value in excess of \$1.5 million. Was it just and equitable for her to receive only \$100,000 plus the \$80,000 received in advance to assist her with her legal costs? They asked 'what justice and equity could there be in stripping the appellant of the totality of her 50 per cent legal and beneficial interest in the property and conferring it on the respondent, who, on the evidence,

³⁵ Ibid 608 [50], 609–10 [53].

³⁶ Ibid 615–16 [66]. Their reference to the requirements necessary for the power under s 79 to be an exercise of judicial power is in essence a reference to one of the constitutional limitations that constrains judicial discretion. A Chapter III court cannot exercise justice under palm trees: Parkinson, 'Constitutional Law' (n 8) 68–72.

³⁷ Ibid 620–1 [77].

³⁸ Ibid 621 [78].

was an extremely wealthy man’?³⁹ He had assets of more than \$9 million at the time of trial.⁴⁰

In the minority’s view, therefore, the existing legal and equitable interests ought to have a persuasive influence upon the determination of whether, and to what extent, it is just and equitable to alter those property rights.

On the minority’s approach, the significance of determining the legal and equitable interests of the parties is not merely because it forms step one of the four-step approach in *Hickey*⁴¹ to identify what property rights might need to be altered in the final orders. Rather, determining the legal and equitable interests of the parties is significant because it is the starting point from which the court must consider whether it is just and equitable to deprive a party of some of those rights, and if so, to what extent.

This contrasts with the position so often seen in the Family Court’s jurisprudence that, as long as the judge has found reasons to make some kind of order altering property rights, thereby crossing the s 79 threshold, then consideration of what orders are just and equitable rests entirely on a consideration of s 79(4). No further reference is needed as to why it is justifiable to deprive a party of his or her legal or equitable rights. After *Stanford*, it has become the norm for judges to pay lip service to the requirement of s 79(2) by invoking just one paragraph of the High Court’s judgment in that case, paragraph 42, to the effect that alteration of property rights is justified because the parties no longer share a common home.⁴² On that approach, little more than the fact of relationship breakdown is sufficient reason to open up the court’s wide discretion to alter property rights.

It is submitted that Nettle and Gordon JJ’s approach to the issues is far more consistent with the constitutional basis for alteration of property rights than the approach typically adopted, applying the four steps in *Hickey*. It is also consistent with what Bryant CJ and Thackray J said in *Bevan & Bevan*,⁴³ quoting Strauss J in *Ferguson*, to the effect that s 79(2) ‘is directed to both the questions whether an order should be made at all, and what the order should be, if one is made’. Strauss

³⁹ Ibid 621–2 [81].

⁴⁰ *Fazarri & Hsiao (No 2)* [2018] FamCA 447, [69].

⁴¹ *Hickey* (n 2).

⁴² Paragraph 42 of *Stanford* (n 4) does not say that just because the marriage has come to an end it is just and equitable to alter property rights. What the plurality in that case observed, quite rightly, is that ‘in many cases’ it is just and equitable to alter property rights because the arrangements that were satisfactory to the parties during the marriage (involving co-residence, very often with children) can no longer operate now that the parties do not have the common use of property. It is frequently just and equitable to alter property rights in favour of the spouse who will have primary care of the children if for no other reason than to meet the children’s housing needs. However, in *Bevan & Bevan* (2013) 279 FLR 1, 15 [70] (*‘Bevan’*), Bryant CJ and Thackray J treated paragraph 42 as per se justifying the alteration of property rights in most cases, thus appearing to render the s 79(2) requirement as being of little more than token importance. See further, Parkinson, ‘Judicial Restraint’ (n 4).

⁴³ *Bevan* (n 42) 18 [87].

J had said in that case that ‘the Court must be satisfied that the alterations [to property rights] so ordered, will go no further than the justice of the matter demands.’⁴⁴

B The Benefits Already Received from the Other Spouse During the Relationship

Second, it is submitted that the constitutional basis for property alteration requires at least some consideration of the benefits each of the parties has already received from the marriage before the court can answer the question about whether there is a need to alter property rights further. To adapt the questions asked by Kitto J in *Lansell*, what injustice would result if legal title were to remain unaltered, given the benefits that the applicant spouse has already received from the relationship? Or adapting the language of Brennan J in *Fisher*, what obligation, arising out of the marital relationship, remains unsatisfied?

Consider, for example, a situation where a man with high earning capacity goes through a marriage breakdown, makes a property settlement with his ex-wife, and thereafter sees his teenage children at weekends and in school holidays. A couple of years after the divorce from the first wife, he forms a de facto relationship with another woman who has no children of her own. That relationship breaks down after, say, seven years, and there are no children of that relationship. Both of them worked throughout the relationship, but his earnings were much higher than hers. They kept their finances separate but he paid for most of the outgoings in the household.

There could be some kind of claim based upon care of the de facto husband’s children,⁴⁵ as well as future needs factors; but in considering whether it is just and equitable to alter property rights, consideration must at least be given to the benefits the de facto wife has already received. That might be, for example, that she has enjoyed a very high standard of living for the last seven years, which she could not have enjoyed otherwise; or that because he provided the home and paid the bills, she had no housing costs and could save her own money. These are not insubstantial benefits, and they must be weighed in the balance in determining whether, as a consequence of a seven-year childless de facto relationship, there is any injustice in leaving property rights as they stand at law.

There is authority that supports the contention that, when considering s 79(4)(c), the kinds of contributions made by the husband in providing a high standard of living for his wife should weigh in the balance as a contribution to the welfare of the family constituted by the couple. In *Ashton & Ashton*,⁴⁶ Strauss J,

⁴⁴ Cited with approval by the Full Court in *Rogers*, see above n 26 and accompanying text.

⁴⁵ *In the Marriage of G and D J Robb* (1994) 18 FamLR 489.

⁴⁶ *In the Marriage of T M and P L Ashton* (1986) 11 FamLR 457.

with whom the other judges on the Full Court agreed, observed that the husband made contributions to the welfare of the family by his financial provision:

The husband and the wife contributed to the welfare of the family, he by providing generously for the support of the wife and children and fulfilling the expected role as a husband and parent in the home, and she by running the household and being the primary caretaker of the children.⁴⁷

Nygh J made similar observations about the respective contributions to the welfare of the family in *Aldred & Aldred (No. 3)*.⁴⁸ Under the heading of ‘welfare of the family’ he observed:

[T]he husband’s financial contribution is overwhelming. To his great credit he pursued a policy of treating all the children, whether his or hers, equally. He financed their education at private schools and made provision for their futures ... he provided the household with a very high standard of living.

So far as the non-financial contributions to the welfare of the household are concerned, the wife with some assistance from domestic help paid by the husband, provided for the combined family of six boys during cohabitation and continued to render household services for the husband ... If his financial contribution was outstanding, so was her care for the family.⁴⁹

In *Ferraro & Ferraro* (‘*Ferraro*’), Baker, Murray and Fogarty JJ observed that the husband’s financial support of the family during the marriage was an important contribution by him under s79(4)(c).⁵⁰

These dicta provide authority for the proposition that, when focusing on the question of whether any alteration of property rights is just and equitable, the court must consider what obligation, arising out of that relationship, remains unsatisfied, taking account of the contributions that one spouse has already made to the wellbeing of the other by means of financial provision during the course of the relationship.

C Disparities in Wealth

The third implication is that there is no constitutional power for the federal Parliament to authorise courts to redistribute property from the more well-off to the less well-off, without the justification arising from the circumstances of the marital relationship or its breakdown. In appropriate circumstances, this may be a reason for invoking s 79(2). As Wilson J explained in *Mallet* concerning s 79:⁵¹

⁴⁷ Ibid 463.

⁴⁸ (1988) FLC 91-933.

⁴⁹ Ibid [34]–[35].

⁵⁰ (1992) 111 FLR 124, 151 (‘*Ferraro*’).

⁵¹ *Mallet* (n 31) 638.

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 ...

The Full Court made it clear in *Clauson & Clauson* that a disparity in financial resources is not itself a reason for adjustment of property interests.⁵² Section 79, it said, 'is not an exercise in social engineering'.⁵³ There are of course a great many situations where an imbalance in the earning capacity of each of the parties at the end of the relationship reflects the consequences of the role division within that relationship, as one spouse, usually the woman, prioritises family responsibilities for a time over involvement in the workforce. In *Waters & Jurek*,⁵⁴ Fogarty J explained why a disparity between parties' incomes may be relevant to the need to make a determination that is just and equitable:

In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests — as individuals and as a partnership ... Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon.⁵⁵

These are circumstances arising out of the marital relationship. However, in other circumstances, where a disparity in wealth does not arise from the circumstances of the relationship, an application of the discretion to award one spouse more of the assets 'simply based upon the situation ... that one party is very rich while the other party is not',⁵⁶ fails to read the *Family Law Act* down to remain within constitutional power. It is not a justification for altering property rights.

D Assets Acquired With no Connection to the Marital Relationship

Fourth, it may be beyond constitutional power to alter property rights in circumstances where there is no justifiable claim to a share of the existing assets that arises from the circumstances of the marital relationship or its breakdown. This is of particular significance when assets are acquired long after the separation. An example, where the reasoning was based upon s 79(2), is *Zaruba & Zaruba*.⁵⁷ The application in that case was filed in 2008, heard by a trial judge, sent back for redetermination by the Full Court, and reheard in 2015. That decision was again overturned on appeal in 2017. The Full Court re-exercised the discretion.

⁵² (1995) 18 FamLR 693.

⁵³ Ibid 711. See also *Kavanagh & Metzger* [2010] FamCAFC 201.

⁵⁴ (1995) 126 FLR 311.

⁵⁵ Ibid 321–2.

⁵⁶ *In the Marriage of Farmer and Bramley* (2000) 27 FamLR 316, 330.

⁵⁷ [2017] FamCAFC 91 ('Zaruba').

By the time of the second appeal, the parties had maintained separate finances for 30 years and been divorced for over 20 years. They had lived together under the one roof until 2005, and during that time, twins who were born to the wife from a different father after the divorce, lived with the parties. To that extent, then, the husband made a parenting contribution that could be taken into account under s 75(2)(o) of the *Family Law Act*.⁵⁸ In addition to the former matrimonial home, a property, known as Mindarie, had been acquired by the wife some five years after they had separated their finances, with no contribution from the husband. The trial judge awarded the husband 10 per cent of this asset, as well as dealing with the former matrimonial home.

This was overturned by the Full Court. The primary reason was by application of s 79(2). The Full Court said this:

In the vast majority of cases, it will be appropriate to address the s 79(2) question by ascertaining the legal and equitable interests in property without making distinctions between individual assets. That is because the “express and implicit assumptions that underpinned the existing property arrangements” can be seen to apply (to the extent and degree to which they do apply) to all of the property of the parties or either of them, including property in which the legal interests vary.

However, the position is likely to be different in circumstances where, as here, the characteristics of the property and the circumstances of its acquisition, improvement and the like can be seen to differ significantly and where, as here, the parties’ relationship had taken on quite different characteristics during the period to which the s 79 inquiry is directed.

We are respectfully unable to see any evidentiary foundation by which it was open to his Honour to conclude that it was just and equitable to alter the wife’s legal and equitable interest in Mindarie.⁵⁹

The Court held in any event that the same result should have been reached by exercise of the judicial discretion, since there was no evidence that the husband had made any contribution.

Another example is *Skoflek & Baftirovsky*.⁶⁰ The parties had been married in Yugoslavia in 1947. They were divorced there in 1956. That divorce decree did not include any property settlement. The evidence indicated that they had little property of any significance at the time. After the divorce the parties moved to Australia. They lived together and acquired assets. In 1982 they separated. In 1985 the wife was granted leave to institute proceedings under s 79 pursuant to s 44(3). The husband appealed orders for property settlement, arguing that the Court lacked jurisdiction to entertain the wife’s application under s 79 because of a lack of nexus to the marriage (at this stage, there was no federal jurisdiction to alter property rights on the breakdown of a *de facto* relationship).

The Full Court agreed with the husband’s submission. It said:

⁵⁸ *Robb* (n 45).

⁵⁹ *Zaruba* (n 57) [38]–[40].

⁶⁰ (1988) 90 FLR 126.

Since para (ca) relates to proceedings with respect to the property of the parties, it is those proceedings which must arise out of the marital relationship ... This is not to say that the court may not consider contributions made before the commencement or after the termination of a marital relationship or include in its orders assets acquired after separation or even dissolution. Once the court has jurisdiction there are many matters which it can consider pursuant to sec 79 and 75(2).

However, the origin of the claim to adjustment of property rights must arise from the property relationship of the parties during marital cohabitation. Where all claims have been disposed of... or no claim could have arisen in the absence of any assets as in the present case, it is difficult to see how the proceedings under sec 79 can be said to have arisen out of the marital relationship.⁶¹

This view was overruled by another bench of the Full Court in *Kowalski & Kowalski*.⁶² This was also a case involving post-divorce cohabitation for a lengthy period after a short marriage that had ended in divorce. The Full Court in that case said:

[O]nce a marriage has been celebrated between the parties, the entire relationship between the parties whether arising out of contributions before, during or after the formal tie of marriage was entered into or dissolved, falls within the ambit of Part VIII of the *Family Law Act 1975*. This principle explains why contributions made between cohabitants who later marry are judged according to the criteria set out in the *Family Law Act 1975* and not according to those set out in the *Property Law Act 1958* (Vic.) or the *De Facto Relationships Act 1984* (NSW). It is also consistent with the proposition that post separation and post divorce contributions continue to be taken into account. These parties are before the Family Court because they were once married and hence the proceedings can be said to arise out of the marital relationship, even if the property, the subject of such proceedings, does not.⁶³

However, the issue cannot be regarded as completely settled. In *Benenke & Benenke*, Fogarty and Finn JJ said:

To the extent that *Kowalski's case* may suggest that, once the parties have or had been married, any financial dealings, no matter how far they pre-date or post-date the marriage, are encompassed by s 79, we have reservations about that as we feel that there must be some causal or at least temporal connection.⁶⁴

The issue typically arises in cases where there is a post-separation inheritance. In many such cases, the inheritance has been taken into account as a factor under s 75(2), and this represents a sufficient connection to the marriage,⁶⁵ but potentially a constitutional argument is open as to whether it can be taken into account in terms of contributions if it is not referable to the efforts of the parties

⁶¹ Ibid 130.

⁶² (1992) 109 FLR 193.

⁶³ Ibid 201.

⁶⁴ (1996) 20 FamLR 841, 847.

⁶⁵ See e.g. *Wall & Wall* (2002) FLC ¶193-110; *Jarrott & Jarrott (No. 2)* [2012] FamCAFC 72; *Marcel & Garrigan* [2013] FamCAFC 94; *Bevis & Bevis* [2014] FamCAFC 147.

in the course of their marriage.⁶⁶ The constitutional limits of s 79 in relation to post-separation assets was raised, but not authoritatively dealt with, in *Calvin & McTier*.⁶⁷

IV GENDER EQUITY AND SECTION 79(2)

As has been argued, there are constitutional constraints that ought to impact upon the interpretation and application of s 79 of the *Family Law Act* and how the wide discretion of the judge is exercised. One of the problems in the current and very inconsistent case law on the division of family property on relationship breakdown is that, once a reason is found to justify altering property rights (which may be for no greater reason than that the parties no longer share the same home), little attention is then paid to the question of whether it is just and equitable to strip a person of their legal or equitable rights and, if so, to what extent.

Put differently, once a justification is found for exercising the s 79 power, the legal and equitable interests of the parties cease to be seen as having any gravitational pull on how the discretion should be exercised. On this approach, it is not necessary to bear in mind the statutory principle of judicial restraint contained in s 79(2) once the threshold required by that subsection is crossed. Instead, the importance placed on legal and equitable rights in the s 79(2) inquiry is displaced by the statutory considerations, with the outcome usually based upon a percentage assessment of ‘contributions’ and other factors, mainly future needs. The assumption is that the proposed orders will be just and equitable for no other reason than that the judge has purported to apply the statutory considerations in s 79(4).

However, there is reason to think that, in 2024, this casual displacement of legal and equitable title in favour of a broad statutory discretion may not provide the benefit to women that was once the primary justification for that statutory discretion. The origins of the statutory regime lie in the perceived inadequacy of equitable doctrines to provide justice for women on relationship breakdown at a

⁶⁶ See, eg, *Singerson & Joans* [2014] FamCAFC 238. The issue has also arisen in the context of post-separation lottery wins, see *Eufrosin & Eufrosin* [2014] FamCAFC 191 in which the Full Court chose not to follow the reasoning concerning contributions to a post-separation lottery win in *Farmer & Bramley* (n 56), on which the appellant had relied.

⁶⁷ [2017] FamCAFC 125. The wife commenced the proceedings in January 2015 and in March 2015 was given leave out of time, pursuant to s 44(3) of the Act to pursue the property claim against the husband. That meant that the case was filed around five years after separation, and a little under four years after the divorce. The inheritance represented 32% of the joint assets of the parties. The inheritance was not received until three years after the divorce, so if the wife had filed her application in a timely manner, the inheritance would not have been part of the property available for division. The trial judge’s decision was challenged on appeal on the basis that there needed to be a connection between the asset sought to be divided and the marriage, citing the High Court in *Dougherty* (n 17). The Full Court rejected this argument, citing *Stanford* to the effect that the Court must take the parties’ property as at the date of trial.

time when, so often, title to the family home was in the name of the man, and when it was common for women to be stay at home mothers.⁶⁸ As English family law scholar John Eekelaar wrote of the general law doctrines: ‘A woman’s place is often still in the home, but if she stays there, she will acquire no interest in it.’⁶⁹

Gender equity has long been, quite rightly, an important consideration in family property cases. Perhaps it is ongoing concern about justice for women that has led the Family Court to be so resistant to the three fundamental principles articulated in *Stanford*.⁷⁰

However, a notable feature of the Family Court jurisprudence is that in some of the leading cases on the homemaker and parent contribution over the years, the discretionary approach that gives little or no weight to legal and equitable title has actually worked to the disadvantage of women. That issue continues to this day. The wife in *Hsiao*,⁷¹ for example, would undoubtedly have been better off if the trial judge had been required to provide ‘cogent considerations of justice’ as to why the wife should have been stripped of her joint ownership of the home. Perhaps on the facts, those cogent considerations of justice could have been articulated, but Nettle and Gordon JJ considered that the trial judge had not adequately justified the alteration of property rights.

Women’s disadvantage arising from discounting legal title goes back to the leading case that articulated the importance of the homemaker and parent contribution: *Rolfe and Rolfe*.⁷² The judgment of Evatt CJ in that case still constitutes the classic explanation, in the Australian jurisprudence, for giving the homemaker and parent contribution substantial weight. Her Honour said:

The purpose of s 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a homemaker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his Wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family the Act clearly intends that her contribution should be recognized not in a token way but in a substantial way.⁷³

⁶⁸ Patrick Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’ (2003) 31(1) *Federal Law Review* 1, 20–2.

⁶⁹ John Eekelaar, ‘A Woman’s Place – a Conflict between Law and Social Values’ (1987) *Conveyancer and Property Lawyer* 93. The principle for why men should be required to share their property with women was well expressed by Sir Jocelyn Simon, the President of the Probate, Divorce and Admiralty Division of the High Court in England, who explained in a speech that the cock can feather its nest because it doesn’t have to spend most of its time sitting on it: Sir Jocelyn Simon, ‘With All My Worldly Goods’ (Presidential Address, Holdsworth Club, 20 March 1964).

⁷⁰ Patrick Parkinson, ‘Why Are Decisions on Family Property So Inconsistent?’ (2016) 90(7) *Australian Law Journal* 498, 520–2.

⁷¹ *Hsiao* (n 6).

⁷² (1977) 34 FLR 518.

⁷³ *Ibid* 519.

Reading that explanation, one might think that title to the main assets was in the husband's name, but this was not so. The wife was a joint owner of the family home, and this was the only asset of substance, raising squarely, therefore, the application of s 79(2). The Full Court decision favoured the husband because he had provided the primary care of the children since separation for the last five years, and still needed to house his 15-year-old daughter. That is a conventional application of the contribution provisions and the s 75(2) factors. The net value of the home (the only asset) was \$30,000 and the wife ended up receiving a quarter of this, that is, \$7,500.

The wife would have been much better off leaving title as it stood, but it may be that the husband would also have been better off. Even in the mid-1970s, this was a very modest asset-pool case. The costs of litigation and appeal to the husband may well have dwarfed the benefits he received from the application of s 79 in his favour. The broad discretion of s 79 imposes heavy costs on low-income parties who cannot find a way to settle.

In other leading cases, failure to look carefully at the legal property rights of the parties going into the trial, and asking why those rights should be diminished, has been manifestly to women's disadvantage. One such case is the well-known one of *Ferraro*.⁷⁴ In that case, the Full Court overturned the trial judge on the basis that inadequate consideration had been given to the wife's contribution as a homemaker and parent.

The parties were married for 27 years and had three children. When they commenced married life, they were in their early twenties and had no assets. The husband initially worked as a carpenter and, early on, the wife helped with bookkeeping and other such duties. However, after the birth of their first child the wife devoted herself to the duties of homemaker and parent. They had three children. The husband built up a business that proved to be hugely successful. About \$10.5 million had been acquired in the course of the marriage. During the course of that development, he worked long hours, leaving the parenting of the children almost entirely to the wife.

The trial judge awarded the woman 30 per cent of the total assets. The wife successfully appealed because, so the Full Court held, such a result undervalued her homemaker contribution. However, the Full Court still only credited her with 37.5 per cent on the basis of contributions.

Ferraro was the case in which the doctrine of special contributions was first articulated. It provided a justification for departing from the usual practice of the Court in quantifying the homemaker and parent contribution as being equal to the efforts of the other spouse in earning income during the course of a marriage, and when there is no imbalance of contributions due to premarital assets or inheritances. The basis of the concept of special contributions, as expressed in

⁷⁴ *Ferraro* (n 50).

Ferraro, was that the entrepreneurial spouse had shown special skill in accumulating such a large amount of wealth.

The doctrine of special contributions was a controversial doctrine because it conflicted with norms of gender equality and appeared to undervalue women's contributions to the marital partnership.⁷⁵ The debate on this issue was part of a larger critique of the Family Court's approach to assets involving businesses. Numerous scholars argued that the homemaker contribution was undervalued in these cases.⁷⁶

In fact, the bigger problem with *Ferraro* is that the Court did not take proper account of the way in which the partnership of husband and wife had been expressed through the legal structures. Baker, Murray and Fogarty JJ noted that, although there were some ventures into which the husband entered through companies controlled solely by him, substantially the business was conducted through jointly owned company structures.⁷⁷ The case proceeded on the basis that essentially everything was jointly owned. It was the husband, in that case, not the wife, who was asking the court to alter legal title in order to deprive the wife of shares that she owned.⁷⁸

Had the Court focused on the s 79(2) question, in the light of the constitutional basis for altering property rights, it might well have reached a different conclusion. Surely the husband could not have complained if the judge had left their legal positions at law, for the partnership of husband and wife formed the financial substratum of their whole relationship. He should not have been permitted to hold her out as an equal partner in the business structures, and then to deny that equality when the marriage broke down.

Another example where the assessment of contributions disadvantaged the woman by diverting focus away from legal rights, was *JEL & DDF*.⁷⁹ This was a case of a long marriage involving a homemaker and parent contribution by the wife in bearing and raising their three children. A substantial fortune had been built up through the husband's efforts in developing a gold mine in Queensland. The husband and wife were the sole directors and equal shareholders in each of the trustee companies, and could vote to distribute any or all of the income

⁷⁵ See, eg, Lisa Young, 'Sissinghurst, Sackville-West and "Special Skill"' (1997) 11(3) *Australian Journal of Family Law* 1. See also the criticism of the doctrine by Nicholson CJ and Buckley J (obiter) in *Figgins & Figgins* (2002) 173 FLR 273.

⁷⁶ See, eg, Hilary Charlesworth and Richard Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6(1) *Law in Context* 29; Hilary Charlesworth, 'Domestic Contributions to Matrimonial Property' (1989) 3(2) *Australian Journal of Family Law* 147; Regina Graycar, 'Gendered Assumptions in Family Law Decision-Making' (1994) 22(2) *Federal Law Review* 278; Regina Graycar, 'Matrimonial Property Law Reform and Equality for Women: Discourses in Discard' (1995) 25(1) *Victoria University of Wellington Law Review* 9; Rebecca Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Re-Opening the Debate' (1998) 12(1) *Australian Journal of Family Law* 3.

⁷⁷ *Ferraro* (n 50) 149.

⁷⁸ *Ibid.*

⁷⁹ (2000) 163 FLR 157.

and/or capital of the trust to either the husband or the wife, in their absolute discretion. Powers of appointment of the trustees to the different trusts were variously distributed.⁸⁰

On the basis of a s 79(4) assessment of contributions, the Full Court gave the wife only 27.5 per cent of the assets. Again, had the question been asked whether it was just and equitable to deprive the wife of assets that she had a prima facie equal entitlement to control through the relevant trust structures, the result might well have been different. The business and trust structures indicated an intention that they be equal partners, and this underpinned the financial arrangements made during the course of the marriage.

The same adverse consequences of not paying close attention to the state of the legal title going into the trial is evident in the landmark case of *Fields & Smith*, in which the doctrine of special contributions was finally repudiated. This was a case where the husband built up a highly successful business while the wife was engaged as a homemaker and parent to their three children in the course of a 29-year marriage. The trial judge assessed contributions as 60–40 per cent in favour of the husband.⁸¹ His decision was overturned on the appeal, with the wife getting 50 per cent.⁸²

The outcome gave the wife no more than she already had, going into the trial. The parties had an equal shareholding in the family business. They were joint owners of the family home. Apart from some jewellery that was owned by the wife, everything was jointly owned. The husband's application involved depriving the wife of some of her property. If the Court had considered s 79(2) properly, it could not have sensibly concluded that property rights should be altered. The Full Court result was correct, but for the wrong reasons.

V LEGAL TITLE AND THE STATED AND UNSTATED ASSUMPTIONS OF THE PARTIES

The state of the legal title is very often an indication of the way in which the parties understood the financial substratum of their relationship during happier times. Gone are the days when it was common for the property to be held just in the husband's name in a marriage where the couple specialised in their roles, and the wife was primary carer of the children. Typically, married couples at least will

⁸⁰ Ibid 163 [44].

⁸¹ *Smith & Fields* [2012] FamCA 510.

⁸² *Fields & Smith* (2015) 53 FamLR 1.

have joint title to the family home, and at least one joint bank account.⁸³ Often, only the superannuation will not be held jointly.

The legal title to assets will usually reflect the parties' mutual intentions about property rights. While many couples purchase property and have bank accounts in joint names, others, adopting a more individualistic approach to the relationship, keep their finances separate, apart from maybe a joint account for household expenses. In *Stanford*, the plurality of the High Court drew attention to this issue of the couple's intentions by speaking of the stated and unstated assumptions of the parties as to their property rights. They said that there must be 'a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage'.⁸⁴

Just as in some cases equal ownership of the assets, or an equal right to control the assets, will be evident in the legal title to real estate or the structure of companies or trusts, so, conversely, a lack of sharing in terms of property rights will be indicative of the stated and unstated assumptions of the parties. People may go through a succession of intimate partnerships in the course of their lives, none lasting for a particularly long time. Separation of finances is much more common in second or subsequent marriages or de facto relationships than in first relationships.⁸⁵

Consideration of those stated and unstated assumptions ought to be particularly significant in cases where couples are childless, as in such cases the disadvantage usually experienced by females in withdrawing from the workforce or reducing participation in paid work in order to care for the children is not a factor.

Even in a childless relationship, the court must consider contributions to the welfare of the family constituted by the parties. It is not that the contribution to the welfare of the family is irrelevant in cases where the couple have no children or there is no role specialisation. Parliament has required judges to take contributions to the welfare of the family into account without limiting it in this way. The problem is rather that, in situations where there is no role specialisation as homemaker and parent, there is very often no reasonable basis for saying that

⁸³ According to one large Australian survey in 2006–7, 83% of married persons had joint accounts, either only joint or combined with separate accounts, with half having only a joint account. Conversely, 85% of persons in de facto relationships had separate accounts, with or without joint accounts: Supriya Singh and Clive Morley, 'Gender and Financial Accounts in Marriage' (2011) 47(1) *Journal of Sociology* 3, 4, 7.

⁸⁴ *Stanford* (n 4) 121–2 [41].

⁸⁵ Yangtao Huang, Francisco Perales and Mark Western, 'To Pool or Not to Pool? Trends and Predictors of Banking Arrangements within Australian Couples' (2019) 14(4) *PLoS ONE* 0214019: 1–29, which found differences between first relationships (married or de facto) and subsequent relationships (remarried or repartnered). In the subsequent relationships, couples were much more likely not to have a joint bank account.

one party has contributed more to the welfare of the family constituted by the couple than the other one has. In almost all marriages and de facto relationships, there is a process of mutual benefit conferral.⁸⁶ Each spouse confers benefits on the other — perhaps different kinds of benefits — but benefits nonetheless.

The significance of s 79(2) and s 90SM(3) in this context is illustrated by *Chancellor & McCoy*.⁸⁷ The parties were both teachers, and lived in a same-sex de facto relationship for 27 years. For the most part, they kept their financial affairs separate. They each contributed to household expenses, but there were otherwise few indications that their lives were financially intermingled. They lived in homes owned by the respondent. The applicant made contributions to assist with the housing costs.

Following separation, the applicant sought a share of the respondent's assets and superannuation. These were worth more than double those of the applicant, who had salary-sacrificed into her super. The trial judge concluded that it was not just and equitable to make any order for property alteration. The Full Court agreed.

VI SECTION 79(2) AND LAW REFORM

The property division sections of the *Family Law Act* are once again under review. An Exposure Draft of the Family Law Amendment Bill (No 2) 2023 was released in September 2023. It proposes some minor changes to pt VIII of the Act, including the addition of several new factors for the court to take into account. Excluding the catch-all 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account',⁸⁸ but including the just and equitable requirement (s 79(2) and existing factors in s 79(4)(d),(f) and (g)), the Bill contains 30 factors that the court must consider in the proposed new legislation.⁸⁹

Having 30 factors to consider is a recipe for increased incoherence, particularly when the legislation offers no objects to guide trial judges in what they are meant to achieve by the exercise of their discretion. The constitutional basis for property division, focusing upon the inequity that might result in the circumstances of the marriage if the property rights remain unaltered, or the obligations arising out of that relationship that remain unsatisfied, can offer a rational set of objectives for the alteration of property rights that will help judges read down the width of discretion in the statute to be within constitutional power,

⁸⁶ For further explanation of this concept see Patrick Parkinson, 'Beyond *Pettkus v Becker*: Quantifying Relief for Unjust Enrichment' (1993) 43(2) *University of Toronto Law Journal* 217.

⁸⁷ [2016] FamCAFC 256.

⁸⁸ FLA (n 1) s 75(2)(o).

⁸⁹ The Bill actually contains 31 factors because there is an accidental duplicate: s 79(4)(g), which is not repealed, is duplicated by s 79(5)(r).

at least for marriages. While the law in relation to de facto relationships is not constitutionally constrained, in a time when people may go through a number of intimate partnerships in their lifetime, the questions that the *Constitution* requires judges to ask are all the more relevant to childless de facto relationships in which the parties may not have perceived themselves as in a socio-economic partnership involving an assumption of shared property ownership.

The retention of s 79(2) is probably a constitutional necessity, so far as marriages are concerned. It is far from an anachronism. When the law gives judges a discretion across such a range of differently constituted relationships, some involving a traditional partnership in bearing and raising children together, others being intimate relationships involving financially autonomous and quite independent individuals, a starting point that examines carefully their intentions as expressed in the legal title, and their equitable interests that may be grafted onto that legal title, makes sense. The question then arises whether there are cogent reasons of justice to alter those rights. This approach may be very protective for women who have built successful careers or who have brought property into a second or subsequent relationship from a property division in a first failed marriage. Claims against their assets need to have a rational justification, and if the law is applied in a manner that is gender neutral, men too will be protected from unmeritorious claims arising out of having shared a bed and a home together for a few years.

Even a modest reform that places objects into pt VIII, derived from the constitutional basis for property division, could help give greater coherence to a law in which judges have a myriad of factors to consider, but no clear indication of the purposes for which those vast discretionary powers have been given.