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**GETTING TO GRIPS WITH ENCROACHMENTS ON FREEDOMS IN
COMMONWEALTH LAWS: THE ALRC FREEDOMS INQUIRY**

Rosalind Croucher

This article provides a snapshot of the work of the Australian Law Reform Commission in the 18-month inquiry into encroachments by Commonwealth laws on “traditional rights, freedoms and privileges”, that concluded with the tabling of the report, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, on 2 March 2016. The contextual landscape of the common law is discussed; and the challenge of crafting an appropriate methodology to tackle this wide-ranging inquiry to meet the tasks of the Terms of Reference and provide a forward-looking law reform response is considered. The article concludes with an illustration of the law reform approach in two areas in the list of 19 dot-points of the Terms of Reference: freedom of speech and property rights. ... 478

WHY ARE DECISIONS ON FAMILY PROPERTY SO INCONSISTENT?

Patrick Parkinson AM

This article argues that the law on family property in Australia is plagued with uncertainty at its very core and that the Full Court of the Family Court, as the primary appeal court in this jurisdiction, is structurally incapable of providing doctrinal coherence. Decisions of the Full Court, which ought to provide guidance to trial judges, are often inconsistent in their approach to similar fact situations, both in terms of reasoning and outcome, thus making it difficult to settle cases in the shadow of the law except in straightforward matters. Examples of the uncertainty are given concerning how the Court should deal with third party debts, property owned prior to the relationship, inheritances, post-separation windfalls, superannuation entitlements, the treatment of domestic violence in property cases and the significance of a disparity in wealth for the purposes of s 75(2) adjustments. This article then seeks to explain why the law has become so unclear. Reasons include the lack of objects and principles in the legislation, the decision of the High Court in *Mallet* (1984), the misinterpretation of the 1983 amendments by the Full Court in *Shaw* (1989), the lack of guidance on how to interpret the s 75(2) factors after *Collins* (1990), an unconstitutional view of the width of judicial discretion, the rarity of High Court interventions and the lack of an authoritative decision-making process in the Full Court. As a consequence, family property law is for the most part, a practice without a theory. The article concludes with consideration of whether and how the coherence of this area of law can be restored to allow people to bargain in the shadow of a reasonably settled body of law. It is argued that the problems, which have serious consequences for the general public, are unlikely to be resolved without major structural reform to the Full Court, more prescriptive legislation, or both. In the absence of statutory reform, the use of the case-stated mechanism with five-member Benches may help to resolve some inconsistencies. 498

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