

These procedural and finality variations between states may be simplified if all states refer power over de facto couples' property divisions to the Federal Parliament.

All of these Acts enable, in limited circumstances, the couple's contract about finance and property to be legally binding, rather than the broad statutory discretion of a court to apply to the division of the property. For example, a couple could contract that all their property be divided 70:30, whereas after a long relationship a court might divide their property 50:50.

Delicate balances in law and policy

The legal rules in Australia under part VIII A of the *Family Law Act* and the various state de facto relationships Acts about marriage and cohabitation contracts try to strike delicate balances between competing values. This is also true in other countries which recognise such agreements, even for rich and famous Californians. These balances include:

1. Finality versus flexibility

The couple wants certainty, but also the ability to change the agreement if a business collapses, or a child is born, or one person is badly injured. How many other life events should justify a legal rule to alter a 'contract'?

2. Finality versus children's interests

Clearly, an adult couple should not be permitted to enter into a financial agreement which restricts income to their children, who did not know about the contract, consent to it, or probably even exist when it was signed.³

3. Haste versus thoughtfulness

Some wealthy couples want to sign up these agreements quickly and cheaply, just days before a wedding – or quickly "before (s)he finds out just how wealthy I am".

Passion, haste and ignorance do not lead to 'informed consent'. Therefore legislation, such as the *Family Law Act* (s90G), contains complex (and expensive) procedural go-slow requirements

which require two independent lawyers, full documented disclosure of assets (s90K) and mellow reflection (s90K(1)(b), (e)).

In Queensland, the *Property Law Act* 1974 s266 reduces the procedural and expense requirements to only one lawyer as a 'witness', but thereby dramatically increases the risks of pressure and uninformed consent.

4. Individual freedom of contract versus support by the taxpayer

Predictably, legislators are nervous when they suspect that marriage or cohabitation contracts will be used to leave women impoverished and therefore dependent on social security; or to transfer assets between family members and thereby avoid paying state stamp duty. Stamp duty is a tax payable on 'ordinary' transfers of things such as cars, houses, businesses or paintings.

5. Support of family versus payment of creditors

When a family member has large debts to a bank, a hire purchase company, the taxation office, or to the butcher, baker and candlestick-maker, who should be paid first? His/her long list of creditors, or the beneficiaries under his/her marriage or cohabitation contract? No one has ever been able to find the right legal rules to balance these two sets of 'legitimate' claims.

6. Encouraging marriage breakdown versus encouraging orderly planning

Some people have argued that if a contract provides for the possibility of marriage breakdown, somehow it encourages less commitment and more marriage breakdown (like insurance contracts encourage fires?). Australian legislation and case law has rejected this proposition in favour of the policy that married or cohabitating couples should be able to plan in an orderly fashion for an almost 50% chance of marriage breakdown.⁴

Whatever balances are struck between these six sets of competing interests, certain lobby groups will always be unhappy. The law will always be too rigid, too flexible, too expensive, too delayed, too lawyer-inhabited or too exploitative of the ignorant. That is, every possible reform of these balances has predictable advantages and disadvantages.

'Lifestyle' and financial clauses

Some couples include in their agreements 'lifestyle' clauses which set out their mutual expectations. These are not legally enforceable. For example:

- "We agree to encourage one another in our separate careers, and separate spiritual development."
- "We plan to give financial and emotional support to our aging

parents and, if necessary, care for them in our home."

Financial clauses need to be long and detailed in order to be clear enough to be legally enforceable. For example:

- "If the parties are ever divorced, Bill will pay to Margaret within 30 days of the decree absolute of divorce the sum of \$100,000 (Australian) for each and every anniversary of their wedding day which has passed between the date of their wedding and the decree absolute of divorce."

Limited future – why?

Marriage and cohabitation contracts will probably continue to be used by only a tiny majority of couples in Australia (and elsewhere) for the following reasons:

1. These contracts are very stressful to negotiate. A couple in love are attempting to put monetary values on each other, and discuss the possibility of separation. Tears and tissues abound. Family members hover in the background and exert unwelcome pressure to promise more or less dollars. The writer has seen a number of couples split up during the pressures of negotiating these contracts. They have always been thankful that the negotiation process identified early that the cracks in their relationship were chasms.
2. Following the first point, each of the couple need to be mature and articulate. Few of us have competent and visible role-models of couples who have negotiated a marriage contract.
3. These agreements are very expensive for the poor and middle class as they require two lawyers, complex wording, precise drafting and re-drafting, time and reflection.
4. For the wealthy, marriage contracts provide a degree of certainty on how assets will be divided at a relatively low financial (but sometimes high emotional) cost. However, specialised family lawyers are always nervous about their wealthy clients. This is because the lawyers must explain very carefully in writing about the long list of uncertain exceptions to

the finality of marriage contracts as contained in sections 90F – 90K of the *Family Law Act*, and elsewhere.

The list is so long and uncertain that the majority of wealthy clients say 'what's the point?'. Moreover, 'love is blind, and marriage is a magnifying glass'. Thus, starry-eyed wealthy couples rarely understand the lengthy written list of exceptions to the finality of their agreement. Instead, years later when they separate, one or both sues his/her lawyer for being 'misleading' – "You told me that this pre-nup was binding. Now I find that I will have to pay out much more to my ne'er-do-well partner. It's all your fault." This dangerous pattern of blaming the lawyer means that astute suburban or commercial lawyers will not draft marriage or cohabitation contracts for the wealthy.

5. The long list of uncertain legislative exceptions to the finality of marriage contracts and cohabitation agreements will take decades of litigation and interpretation to give those words a degree of certainty.⁵

Conclusion

In Australia, marriage and cohabitation contracts will remain of interest to the rich and famous, and to a small minority of other couples. Such contracts will continue to provide interesting twists to murder mysteries, Hollywood films, and emerging law reports.

notes

- 1 *Property (Relationships) Act* 1984 (NSW); *Property Law Act* 1974 (Qld); 1958 (Vic); *De Facto Relationships Act* 1996 (SA); 1991 (NT); *De Facto Relationship Act* 1999 (Tas); *Domestic Relationship Act* 1994 (ACT).
- 2 See *Family Law Act*, s90E, 90F, 90J, 90K.
- 3 See *Family Law Act*, s90E.
- 4 *Family Law Act* 1975, s90B.
- 5 For example, 'fraud', 'voidable', promissory estoppel, 'impracticable', 'hardship', 'serious mistake', – see *Family Law Act* s90F – 90K; and state family provision legislation; and state *De Facto Relationship Acts*.



boggo road gaol tours

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Guided tours are available through bookings only. All of our guided tours are conducted by ex-prison officers who worked at Boggo Road Gaol during its operation. The cost for these is \$6 for adults, \$4 concessions, and \$3 for school aged children. Teachers do not pay when bringing a school group in. We will start a tour usually from 9am to 2.30 pm. We are flexible, and can make times outside these. Tours go for about 1.5 hours which also includes a question and answer period with the tour guide.

We can also offer night tours/ weekend tours for visitors. These must also be booked and the cost for these is \$10 for adults, \$8 concession/school aged children, and \$6 per student when part of an organised school group. School sleepovers can also be arranged by contacting the gaol management.

For school groups, our website contains info about the gaol, as well as a worksheet that can be downloaded from the site. The questions on the worksheet will be answered by the tour guide at the gaol.

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marriage & cohabitation contracts

by **John Wade**



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Hollywood films and movie stars sometimes mention 'pre-nups' or 'marriage contracts', but what are these mystery documents?

One description is that a marriage or cohabitation agreement is a written record of the expectations of a married or cohabitating couple in relation to lifestyle and finances which is entered into before, and sometimes during, marital cohabitation. In limited circumstances, certain parts of such agreements are legally enforceable. In some countries and cultures, including South Africa and Quebec, marriage contracts are common amongst the wealthy.

At present in Australia, these agreements are rare. At a guess, less than 1% of married or cohabitating couples have such a marriage contract. Why is this so?

If 50% of cohabitating couples separate, and more than 40% of marriages end in divorce, why not make fair financial arrangements early, rather than late? Less than 1% of Australian houses burn down in a decade, but over 90% of house owners have fire insurance. Why contract for an unlikely life event, and not for a likely life event?

'Popularity' with whom?

Anecdotally, the writer has observed people from the following five groups who inquire about, or actually use marriage or cohabitation contracts:

The very wealthy who want their assets to stay with the individual who brings wealth to the marriage – for example, the wealthy female entrepreneur who cohabits with an artist.

Australian males who import brides from Asia and hope to restrict these young women from leaving the

marriage with any, or much, property. This practice begins to introduce one of the dark and exploitative sides of marriage contracts.

The previously married and divorced who are still carrying scars from a bitter first separation – "I don't want that to happen again."

'Older' couples (say over 50 years of age) who want to enter a new relationship yet also want to keep their assets separate so that their separate wealth can be inherited by their own children (from previous relationships) and grandchildren.

Counter-culture couples who live in alternative communities and do not want their assets to be divided under the principles of the Australian *Family Law Act*, which they may consider to reflect the values of a capitalist, greedy or sexist society.

Despite this large 'market' for the 'pre-nup' product in Australia, marriage and cohabitation agreements remain rare. It is unlikely that you are friends with even one family who has such an agreement in place. Why?

Legislation in Australia

The current legislation in Australia which governs the formalities, finality and effect of marriage contracts (known as 'financial agreements') is the *Family Law Act 1975*, sections 90A-90L.

The law relating to cohabitation agreements varies slightly between each state and territory and is governed by seven different state and territory Acts.¹

All state Acts provide different procedural requirements and have different but overlapping exceptions to finality for cohabitation agreements.

