INTOLERABLE CRUELTY DOWNUNDER

The development of prenuptial agreements in Australia with a comparison to New Zealand

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I. Introduction

This article addresses the legislative procedural requirements for prenuptial agreements in Australia. It does not discuss in any detail the practical and contextual aspects of entering into prenuptial agreements in Australia. Experiences to date suggests that there are some universal approaches to drafting sound prenuptial agreements which have been dealt with in other articles.[2]

II. The Status of Prenuptial Agreements in Australia Prior to 27/12/2000

Prior to 27 December 2000, no prenuptial agreement could preclude a Court in Australia from exercising its powers to determine the property settlement between the parties to a marriage[3] or preclude a party to a marriage from invoking such powers of the Court.[4]Despite the fact that parties entering a marriage could not contract to oust the jurisdiction of the Family Court of Australia to determine a property settlement or spousal maintenance claim, prenuptial agreements were still utilized particularly by high wealth individuals and persons entering second marriages seeking to protect the interests of their children. The prenuptial agreement at the very least had evidentiary value in subsequent proceedings when the relationship turned pear shape. Such agreements at least established the following frequently controversial aspects of a property settlement dispute: the identification of the property, resources and liabilities of the parties at the commencement of the relationship; the value of the initial contribution; the parties intentions, their understanding of their financial responsibilities and their roles

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[2] *See e.g*. Peggy Podell's article *Before your client says "I do" It has* the same application to Australian prenuptial agreements as it does in Milwaukee.

[3] Pursuant to section 79 of the *Family Law Act ("FLA")*

[4] There is a long line of authority including *Sykes (1979) FLC ¶90-652; Candlish and Pratt (1980) FLC ¶90-819; In re Hannema (1981) Fam LR 542; Dupont (No. 3) (1981) FLC ¶91-103; Plut (1987) FLC ¶91-834; Faraone -v- Shabalah (1988) FLC ¶91-987; Jackson (1988) FLC ¶91-904; Garrett (1984) FLC ¶91-539; Woodcock (1997) FLC ¶92-739* and *Grady [unreported judgment of Ellis, Baker and Lindenmayer JJ. Delivered on 27/2/98]*. Such decisions are consistent with the decision of the House of Lords in *Hyman -v- Hyman (1929) AC 601*.

during the course of their relationship. On occasion, when determining a property settlement the Family Court was not prepared to depart from the parties' agreement and essentially gave effect to their prenuptial agreement[5].

III. **The Inconsistencies with Public Policy and the Anomaly between the Treatment of De facto Cohabitation Agreements and Prenuptial Agreements**

There is currently a demarcation in Australia regarding various legislation and the courts' jurisdiction to determine relationship disputes and supervise relationship agreements. The Commonwealth (Federal) Government exercises power over marital disputes and agreements; The States and Territories Governments are currently responsible for de facto relationships and other relationship disputes and agreements. As will be discussed the current two tiered relationship system is about to undergo significant change. Shortly the Commonwealth Government will exercise its powers over de facto heterosexual relationships and legislate to cover financial disputes and agreements between such couples.

In Australia prior to December, 2000 there was discrimination between the legislative recognition of agreements between de facto couples and married spouses. Between 1984 and the present, legislation was enacted in the various States and Territories of Australia[6] enabling and recognizing the right of de facto spouses to enter cohabitation agreements (prior to, at the commencement of and during a de facto relationship)[7].No such legislative right existed for married spouses .In 1996 the Commonwealth Government announced reforms it intended to pursue including recognizing and giving effect to prenuptial agreements on property and spousal maintenance matters. This was in response to perceived deficiencies in the statutory regime for property settlement determinations and recognition of the desire of the individual to privately order their financial affairs[8].

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[5] *See e.g*. Dupont *(No. 3) supra* note 4 and Faraone -v- Shabalah *supra* note 4.

[6] NSW (1984); Vic (1987); Qld (1999); SA (1996); Tas (1999); ACT (1994); NT (1991)

[7] For instance, sections 264 & 266 of the *Property Law Act (Qld) 1974* {amended in 1999}. The objectives of the legislation (see section 255) include the desire "*to recognise de facto spouses should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement".*

[8] The Attorney General of the Commonwealth of Australia, the Hon. Daryl Williams in his discussion paper titled "Property and Family Law - Options for Change" flagged the following reasons signalling a change in approach to prenuptial agreements:
"*This represented a recognition that changes in society over the past 18 years meant that Pre-Marital ownership of property was more common and that serious injustice could result from lumping this property into a general pool of property…discussion of financial matters prior to marriage, and agreement about them, should lead to parties entering into marriage on a more informed and mature basis. Such discussions should also enhance the prospects of success of the marriage, or at worst, minimise the distress on its breakdown. Importantly, financial agreements can encourage people to take responsibility for their own financial affairs, rather than relying on outside intervention to resolve their affairs when the relationship breaks down."*

IV. **The Introduction of *Part VIIIA* [BFAs] and *Part VIIIB* [superannuation agreements] of the *Family Law Act (Cth)***

On the 29 November 2000, the Commonwealth Government enacted amendments to the *Family Law Act (Cth) 1975* ("FLA") by introducing Part VIIIA enabling parties to a marriage (or entering a marriage) to enter a binding and enforceable financial agreement (generically referred to as "Financial Agreements" or BFA) of which the prenuptial agreement is one form. The legislation took effect 27 December 2000. Approximately 2 years later, on 28 December 2002, the Commonwealth Government extended the concept of property to include superannuation entitlements by introducing Part VIIIB of the *FLA*. The new part of the legislation gave the court power to bind third party trustees of superannuation funds and split the payment of a spouse's superannuation entitlement between the parties to a marriage. The new part further allowed the parties to a marriage to enter their own agreements regarding superannuation splitting and flagging (which is a form of injunction or freezing arrangement). Section 90MH (of Part VIIIB) of the *FLA* provides that a BFA (including a prenuptial agreement) under Part VIIIA may include an agreement that deals with the superannuation interests of either or both of the parties to the agreement as if those interests were property. Further it matters not that the super interests are not in existence at the time the agreement is made.

The requirements for a binding and enforceable prenuptial agreement in Australia are summarized below.

#	Requirement	Section of FLA	Comment
1.	The prenuptial is entered by people contemplating entering into marriage	S90B(1)(a)	There is an ambiguity in the legislation as to whether a third party can join in the agreement or whether a collateral contract is required to bind the third party.
2.	The agreement must be in writing	S90B(1)(a)	
3.	The agreement addresses: • How in the event of a breakdown of the marriage <u>all or any</u> of the <u>property or financial resources</u> of either or both of them at the time when the agreement is made, or at a later time and before their divorce is to be dealt with; and /	S90B(2)(a) S90B(2)(b)	

	or • The maintenance of either of them during and / or after divorce; and may • Deal with matters incidental or ancillary to the property division and / spousal maintenance; and may • Terminate a previous prenuptial agreement	S90B(3) S90B(4)	
4.	There must be no other BFA in force between the parties in respect of any of the matters dealt with in the new agreement	S90B(1)(aa)	
5.	The agreement must be expressed to be made under S90B of the *Family Law Act.*	S90B(1)(b)	
6.	The agreement must specify any provision for spousal maintenance or child maintenance otherwise any provision for maintenance in the agreement is void	S90E	
7.	The agreement must be signed by both parties	S90G(1)(a)	
8.	Each party must receive independent legal advice		I refer you to my suggested model for preparing a BFA set out in the appendix to this article.
9.	The agreement must contain a statement relating to each party that they have received independent legal advice (of the matters detailed below in point 10.) from a legal practitioner before the agreement was signed by that party	S90G(1)(b)	
10.	The legal practitioner for each party must sign a certificate in an annexure to the agreement stating they have provided their client with advice as to the following: a. the effect of the BFA on the rights of the client; b. the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement;	S90G(1)©	This aspect of Part VIIIA of the *Family Law Act* has caused practitioners in Australia the most consternation. Indeed many experienced practitioners refuse to prepare and advise on BFAs to avoid having to sign the legal

			certificate. Financial advice.
11.	The BFA has not been terminated or set aside by a court	S90G(1)(d)	
12.	After the agreement is signed, the original is given to one of the parties and a copy is given to the other.	S90G(1)(e)	There is no provision in the legislation for registration of the agreement in court or for judicial approval of the agreement. One concern of the court is that the legislation provides no scrutiny of the prenuptial agreement until application is made to enforce or set aside the agreement.
13.	Whilst it is not expressly provided for in the legislation, it is implicit and at least addressed by reference in the grounds for setting aside, that the parties make full and frank disclosure of their financial circumstances to each other. The agreement ought contain schedules detailing the property, financial resources and liabilities of each of the parties. Valuation and inspection of financial documents is often necessitated to ensure a level playing field for the parties when entering the agreement.		The concept of full and frank disclosure is the cornerstone of all financial proceedings under the *Family Law Act,* [see for example *Weir (1993) FLC ¶92-338*].
14.	For the Financial Agreement to be of full force and effect, at least one of the parties must sign a Separation Declaration stating that : a) the parties have separated* and are living separately and apart at the declaration time; b) in the opinion of the party making the declaration, there is no reasonable likelihood of cohabitation being resumed.	S90DA	*S90DA(5) defines "separated" as having the same meaning as S48 FLA (as affected by S49 FLA). Such provisions import a 12 month period of separation. Whilst in practice separation declarations are being signed upon the parties separation, it remains to be seen whether the Courts adopt a robust interpretation of

			S90DA(5) and require the 12 month period. Such an approach would be a nonsense.

V. The Mechanics of *Part VIIIA*

A complying [binding] prenuptial agreement ousts the jurisdiction of the Family Court of Australia (and other courts of competent jurisdiction) from exercising its powers under Part VIII of the *Family Law Act* to make orders for property settlement and spousal maintenance to the extent that the BFA deals with such matters[9].If the BFA does not deal with all of the property and / or spousal maintenance then the court retains its jurisdiction to make orders directed to same. A binding prenuptial agreement continues to operate despite the death of a party and is binding on their estate.[10] Therefore if a provision is made for spousal maintenance which is intended to cease on the death of one or either party, then the BFA must contain a statement to that effect otherwise the payment of maintenance will inure.

There is some conjecture as to whether the death of a party constitutes a sufficient nexus to the breakdown of the marriage to trigger the operation of the property settlement provisions of a prenuptial agreement.[11] In Australia the BFA represents part of an effective estate plan for an individual that ought to dovetail into their will and other provisions (including Family Trusts and Enduring Powers of Attorney). Therefore BFAs on occasion define the "breakdown of the marriage" as including the death of a party.

A. Property settlement

There is a hiatus in the legislation as parties will not be afforded the protection of Part VIIIA with respect to property acquired by them after a divorce but within the statutory period of limitation for bringing a property settlement claim of 12 months after a divorce.[12] The Family Court has the power to make orders for property settlement directed towards property in existence at the time of the trial notwithstanding such property may have been acquired after separation[13]. The universal approach to property division under prenuptial agreements is alive and well in Australia. Parties tend to embrace the dichotomy of separate property (which is quarantined on separation and retained by the owner); community property (which is divided between the parties on

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[9] *See* Section71A of the *Family Law Act.*

[10] *See* Section 90H of the *Family Law Act*

[11] *See e.g*. Martin Bartfield Q.C. *Financial Agreements – Drafting Suggestions* @ p.21

[12] *See* Section 44(3) of the *Family Law Act*

[13] *See e.g. Farmer –v- Bramley (2000) FLC ¶93-060,* where the husband won $5M in a lottery after separation & the Court awarded 35% of the proceeds to the Wife.

separation in some agreed fashion) and where appropriate a reasonable additional allocation to the financially disadvantaged party is made.

B. Spousal maintenance and the impact of the government's welfare / retirement policy

Generally the legislation and jurisprudence of spousal maintenance in Australia is driven by public policy considerations to protect the public purse and ensure where possible that the parties fund their respective maintenance needs before turning to a pension. To that end a party who has maintenance need and is entitled to an income tested pension benefit or allowance from the government will have standing to apply for maintenance from their spouse. This position dovetails into child support considerations and the government's broader welfare policy and retirement policy that aims to have parties funding their own retirements. Notwithstanding, the parties may contract to preclude claims for spousal maintenance, if, when the agreement came into effect, a party was unable to support him or herself without an income tested pension allowance or benefit (after taking into account the terms and effect of the BFA), the Court has the power to make an order for spousal maintenance and gazump or override the parties agreement.[14]

The grounds for setting aside an agreement are summarized below:

#	Ground	Section of FLA	Comment
1.	Agreement obtained by fraud (including non disclosure of a material matter)	S90K(1)(a)	
2.	Agreement is void, voidable or unenforceable	S90K(1)(b)	Void (common mistake,uncertainty) voidable (misrepresentation, mistake, duress, undue influence, unconscionabilty); unenforceable (public policy, illegality, breach, frustration)
3.	Circumstances arisen since agreement made which render the agreement impracticable to be carried out	S90K(1)(c)	
4.	Since making of the agreement a material change in circumstances	S90K(1)(d)	

[14] *See* Section 90F(1) of the *Family Law Act*

	has occurred relating to the care, welfare and development of a child of the marriage and as a consequence the applicant parent / career (with caring responsibility for the child) will suffer hardship		
5.	A party to the agreement engaged in unconscionable conduct in making the agreement	S90K(1)(e)	
6.	Either party entered into the agreement for the purpose of defrauding or defeating a creditor or with reckless disregard of the interests of a creditor	S90K(1)(aa)	Refer to section 7 of this article for the reasons for the amendment of the legislation on 5 December 2003 to insert this ground.
7.	In respect of a superannuation interest covered by the agreement: a. it is the subject of a payment flag under Part VIIIB and there is no reasonable likelihood of a flag lift occurring b. it is an unsplittable interest for the purposes of Part VIIIB.	S90K(1)(f) S90K(1)(g)	
8.	Again whilst it is not an express provision of the legislation and strictly speaking not a ground for setting aside; a failure to comply with the formal requirements of the legislation which I have referred to in section 4 of this article, will result in the agreement not being binding and the court being able to make orders under Part VIII for property settlement and / or spousal maintenance.		
9.	An agreement may be held to be invalid, unenforceable or ineffective according to the principles of common law and equity.	S90KA	

VI. The Art of Drafting an Inviolable Agreement: The Concept of the "reasonable" Provision

One of the most important steps in the exercise is determining the reasonable provision to be made for the financially disadvantaged party at separation. It is fair to say that nobody can predict what will occur during a marriage and it becomes difficult, if not impossible, to draft an agreement to provide for all contingencies. This is a universal principle. It is important to acknowledge that the agreement determines the parties' entitlements at a time unknown (if at all) in the future, when the asset pool at the time in the future is unknown, when the value of assets at a time in the future is unknown and when their rights before the Court at that time in the future is also unknown. In addition there is uncertainty concerning the monetary and non-monetary contributions in the future, the respective financial circumstances (including earning capacity and health) in the future and whether the parties will have children who at the time of the separation may be minors or over 18 years and dependent on the parties.

In view of this it is difficult to know whether or not the agreement is fair and equitable if and when the agreement comes into effect, which is not until the parties separate, if ever. A Court determination would take into account assets at the date of separation and all actual contributions, monetary or otherwise that actually took place. The agreement does neither, being based on the parties agreed upon current arrangements and long term expectations. There is a substantial probability that the parties entitlements as determined in the agreement will be different from those to which the parties may be entitled to if the agreement is not entered into. They may be greater or they may be less. Accordingly, one of the parties could be at a disadvantage by signing the agreement.

However it is important that the parties turn their minds to the eventuality of their separation when the agreement comes under examination. Indeed if the Courts incorporate tests of procedural fairness and substantive fairness when assessing the agreement in any application to set it aside; or when considering an application for property settlement then the following may well be the Court's yardstick of fairness and reasonableness and may well be relevant to the question of whether the agreement is unconscionable. As the relationship progresses the parties' entitlements change in accord with their contributions and position at that time. The challenge for the parties is to consider various scenarios that may present over their relationship and try to plot a provision that places each of them in the range of reasonable entitlement should those scenarios transpire. Turning the mind to this matter will to an extent address some of the potential pitfalls and grounds for setting aside the agreement at the back end of the relationship. It involves an understanding of the range of entitlements at law and trying to place the client as near as possible to the range, within reason. The Family Law Courts in Australia when determining a property settlement application exercise discretion to make an award that is fair and equitable. The Courts have the power to adjust parties' interests in property.

Over the years the Courts have identified the following process in arriving at a property settlement award:

Step I: Determining the Property Pool:

The Court determines the pool of assets, liabilities and financial resources for consideration in property settlement. The Court will take into account all of the property in existence at the time of the hearing.

Step 2: Determining the Value of the Pool:

The Court then values the items in the pool. Generally the Court will value the items as at the date of the hearing.

Step 3: Determination of Entitlement:

The Court then determines the entitlements of the parties by way of a three tier exercise, namely:

Stage 1 Assessment of Contributions:

The Court determines the contributions which the parties have made to the acquisition, conservation and improvement of the property. The contributions can be direct and indirect, financial and non-financial as well as relating to the welfare of the family unit. The Court will take into account the contributions made at the commencement of the relationship, during the relationship and since separation.

Normal Contributions:

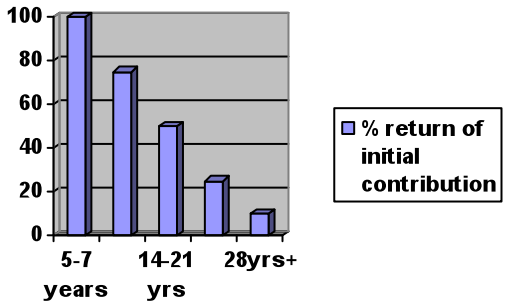
It is accepted by the Court that in mid to longer range marriages, all other contributions being equal, and each party has worked equally hard in their respective spheres (whether as breadwinner, homemaker and/or caregiver) that contribution will start on a platform of 50%/50%.

Special contributions:

The assessment of contribution will not be equal in circumstances where one party has made a greater initial contribution than the other, one party has received a significant inheritance, one party has received a significant gift, one party has through negligence, wanton recklessness and/or criminal activity caused financial loss to the parties; or one party has created significant wealth for the family as a result of special skills or entrepreneurial ability.

In a short marriage (up to seven years) the Court is more likely to adopt an asset by asset or piecemeal approach to the assessment. In mid to longer range marriages the Court is more likely to adopt a global assessment of contributions.[15] When taking into account the contributions of the parties the Court will consider any period of cohabitation prior to marriage.

I**nitial contributions:** Simply put with the effluxion of time the significance of a parties' initial contribution to a property adjustment may reduce, given contributions made by the other party. Simplistically there is a continuum where the return to the party of their initial input may reduce as represented as follows:



The leading decision of the Court on this point is the case of *Pierce*[16].

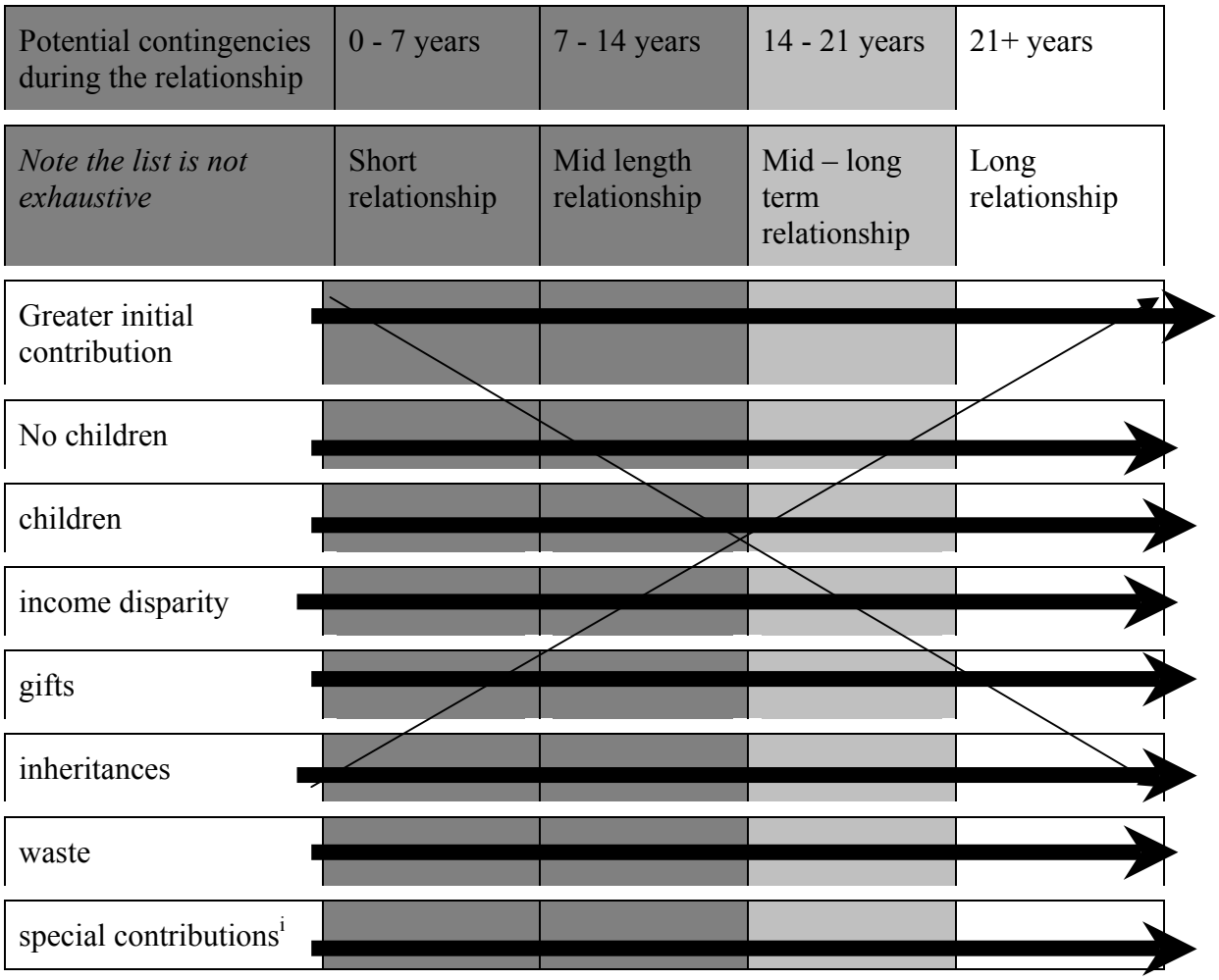
. [15] For instance with high wealth cases the reported decisions discern the following ranges: short relationships [0 – 7 years] 8.6% to 12% to the non entrepreneur;m Mid to long duration relationships: mid [35-40%]; long 27.5% (pool of $37.5M) to 45% (pool of $4.2M)

[16] There the Full Court of the Family Court held: 'It simply reflects the circumstance that the respective contributions of the parties over a long period of marriage "offset" the significance which might otherwise be attached to a greater initial contribution by one party. This is, in my view, made clear by the Full Court in *White and White* (1982) FLC 91-246 where that court pointed out that the principal in *Crawford and Crawford* (1979) FLC 90 - 647 is that the original contribution should not be carried forward as a mathematical proportion; ultimately, when it comes to the trial such a contribution is one of a number of factors to be considered. The longer the marriage the more likely it is that there will be later factors of significance and in the ultimate the exercise is to weigh the original contribution with all other, later, factors and those later factors, whether equal or not, may in the circumstances of the individual case reduce the significance of the original contribution". 28. In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution. In the present case that use was a substantial contribution to the purchase price of the matrimonial home: See also *Campo and Campo* (unreported, Full Court (Ellis, Lindenmayer and Finn JJ), Sydney, delivered 19 May 1995 at pages 21 and 22 of the joint judgment) and *Zahra and Zahra* (unreported, Full Court Sydney, delivered 3 October 1996, per Ellis J. at page 10)."

Stage 2: Adjusting Factors: The Court then assesses the future disparity for the parties having regard to a number of issues set out in Section 75(2) of the Family Law Act including income and earning capacity, property and resources, superannuation entitlements, deficits in health, the need for one party to care for children of the relationship etc.

Stage 3: Just and Equitable: The Court will have arrived at an assessment of entitlement in percentage terms. The Court will review its assessment and make any further adjustments it considers necessary to achieve a fair and equitable distribution.

Step 4: Dividing the Property: The Court will then divide the net property of the parties to achieve the property settlement division. The rest of the agreement is generally, standard pro forma. The exercise of skill relates to the provision made and the challenge is trying to plot the provision in the agreement to cover the contingencies including the impact of the following factors on the potential outcome for the parties (if there was no agreement between the parties):



VII. Revenue and Other Implications of Prenuptials

#	Issue	Implication	Relevant legislation
1.	CGT (Capital Gains Tax)	Property transferred pursuant to a BFA or superannuation agreements are subject to rollover relief. Self managed funds: in specie transfers between funds are subject to rollover	BFA: *Tax Laws Amendment (2006 Measure No.4) Act 2006*
2.	Duty	There is a general exemption from duty applicable to the agreement and transactions entered pursuant to the terms of the agreement	S90L of the *Family Law Act*
3.	GST (Goods & Services Tax)	There is no concession	Refer to GSTR 2003/6
4.	Child Maintenance Trust	A tax effective trust can be established as part of the agreement	Ss 102AG & 102AGA of the *Income Tax Assessment Act*
5.	CFC [post marital family trust]	A tax effective trust can be established upon separation & a divorce, providing exclusion from non – resident transferor trust attribution rules and controlled foreign trust attribution rules	Ss 356(6), 360(2) & 328(2) of the *Income Tax Assessment Act*
6.	Bankruptcy	There is no longer exemption from relation back applying to transactions under the agreement When a BFA is entered and one party becomes insolvent due to one or more of the transfers under the BFA then that person commits an act of bankruptcy.	S123(6) of the *Bankruptcy Act* does not apply to BFA. S5(1) of the *Bankruptcy Act* specifically excludes BFA from Maintenance Agreements which are protected.

VII. Case Law to Date; a Discrete Point on the Standing of Third Parties

To date there has been no reported decision of the Family Court (or other court) dealing with the full purport of the legislative changes brought about by the introduction of Part VIIIA of the Family Law Act.

There have been a few cases dealing with discrete issues. For instance, the decision of *Australian Securities and Investments Commission –v- Rich & Rich*[ii] attracted

media attention and was a sequae to events surrounding the monumental [$1b] collapse of One-Tel in May 2001.Jodee Rich was the chief executive of One Tel. His wife is a prominent lawyer. Jodee and Maxine Rich were not separated. Between 17 May 2001 and 4 June 2001, Jodee engaged in a series of acts and events for the purposes of transferring or otherwise altering the ownership of his assets or assets of his associates. In particular on the 31 May 2001 Jodee and Maxine entered into a BFA which provided for certain transfers of Jodee's interests to Maxine as a provision for maintenance and accommodation of Maxine and their children during their cohabitation and in the event of a breakdown of their marriage. On 31 May 2001 ASIC commenced an investigation of Jodee in relation to suspected contraventions of the *Corporations Law.*

The agreement signed by the parties stated that *"*Jodee's financial affairs have taken a significant turn for the worse and his financial future is under a cloud.... *"*The matter came before the Family Court on the application of ASIC to set aside the agreement. Jodee responded by objecting to the jurisdiction of the court to hear the matter. Ultimately O'Ryan J. found that ASIC had no jurisdictional standing to pursue its application, in circumstances where there was no concurrent, pending or completed proceedings between the Husband and Wife, and he dismissed the application.[17] The trial judge did find however that there was prima facie evidence that the parties entered into the agreement in order to reduce the extent and value of the Husband's assets. O'Ryan J. stated[iii]:

> What is also of concern is that various commentators have stated that if there are third party creditors or a business in serious trouble or there is the prospect of bankruptcy then the parties should settle by a financial agreement. This appears to be the advice that is being given to legal practitioners, and no doubt to their clients, and in my view, in certain circumstances, it may raise ethical issues.[18]

Consequently the Commonwealth Government moved to amend the legislation to overcome this loophole by introducing Section 90K(1)(aa) on 5 December 2003.It was reported on 14 November 2003 that the Jodee and Maxine Rich terminated the offending agreement.[19]

In *Ju –v- Ju* [20] *a* challenge was made as to the form of the agreement i.e. as to whether the subject agreement was a binding agreement because it did not literally comply with the legislative requirements regarding the legal certificate. Unfortunately the practitioner who prepared the agreement failed to update his precedents to take account of legislative amendments. In that case, the trial judge, Justice Collier found strict compliance with the Family Law Act is required if parties seek to uphold a Financial Agreement. His Honor held:

> "Clearly the legislation intended that if this method of parties resolving their differences was to be used without any supervisory

[17]Unreported judgment of the Honourable Justice Stephen O'Ryan delivered on 15 October 2003
[18] At para 117 of the judgment
[19] This was accomplished by a Termination Agreement pursuant to section 90J
[20] Unreported single judge decision delivered on 20 March 2006

> power of a Court, in a situation where parties rights were to be affected, then that which has to be done, had to be done fully in compliance with that, which the statute set out and required."

In *Hunt –v- Zuryn*[21] the Full Court of the Family Court of Australia, whilst determining an appeal concerning a property settlement order, made reference to the findings of the trial judge who set aside a BFA on the grounds it was contrary to policy and was unconscionable, noting:

> ``146. I find that the financial agreement was unwisely (and probably against her better judgment) entered into by Ms Hunt under considerable pressure from Mr Zuryn for the sake of a quick rather than just result. The terms of settlement were not fair and reasonable by virtue of a combination of factors, including the undervaluation of the property, inadequate recognition of the wife's overall contribution, deduction of `disposal costs', the overly generous provision for the husband's older children, and the inadequate provision for the two children of the marriage.

Further procedural issues concerning an application to set aside a BFA relating to spousal maintenance or to declare the BFA not valid, unenforceable or not effective, were dealt with in *YG & RG*[22].

VII. De Facto Cohabitation Agreements in Australia

A. Current jurisdiction sourced from the various States and Territories

As referred above, the laws regarding the entering of cohabitation agreements between de facto couples in Australia are regulated by the various States and Territories applicable to the residence of the parties (or where their property is sited).

B. Reform: the referral of power to the Commonwealth Government

It is worth noting that the States and Territories have generally agreed to refer powers over de facto property disputes to the Commonwealth Government. At this time the Commonwealth Government is on the cusp of introducing a Bill into Parliament directed to property, spousal maintenance and superannuation disputes and agreements between heterosexual de facto spouses.Commentators (indeed the governments) have suggested that the Commonwealth will legislate for such changes within the *Family Law Act* and empower the Family Court to regulate and deal with disputes. In those circumstances an educated guess suggests that de facto cohabitation agreements will fall into line with BFAs.Indeed the Exposure Draft pf the *Family Law Amendment (De Facto Financial Matters) Bill* released on 6 November 2006 is currently embargoed, awaiting release to the profession and public. It is anticipated the Bill will enter the Second sittings (Winter) of the Parliament in 2007.The new Act will apply to all current de facto agreements (i.e. it will have a retrospective effect). There will be no difference between marital and de

[21] (2005) FLC 93 - 226
[22] [2006] Fam CA 1097 (delivered 27/10/06)

facto BFA's and superannuation agreements. The legislative requirements at this stage will be identical.

C Anecdotal *stuff* – the relevance of prenuptial agreements for Australians.

Despite the review of the Australian Divorce Transitions Project (late 1997) by Fehlberg and Smyth[23][iv] finding that pre-marital agreements are rarely used, there is a general perception that such agreements are not, or would not, be useful in reaching fairer outcomes for divorcing couples; and if binding pre-marital agreements are introduced, they should be alterable on the basis of children's interests, of the 650 respondents surveyed only 2% had a pre-marital agreement. They do qualify their findings stating: "This general pessimism could well be a reflection of the current non-binding legal status of pre-marital agreements in Australia."

The anecdotal evidence offered by the author both from his provision of services to the website, Pre-nuptial agreements Australia and from referrals directly to him at his firm Hopgood Ganim: is that between July 2001 and December 2003, he fielded 379 enquiries to prepare pre-nuptial agreements. During the period 2003 to 2006 he prepared 64 Prenuptial / Cohabitation agreements. The breakdown of enquiries was as follows:

Period	No.
07/01 – 12/01	11
01/02 – 12/02	87
01/03 – 12/03	94
01/04 – 12/04	55
01/05 – 12/05	51
01/06 – 12/06	81
Total	379

VII.New Zealand and Cross-border issues

It is beyond the scope of this paper to traverse the Australian authorities concerning the acceptance of International Prenuptial agreements by the Family Court of Australia, given the issue raises matters of conflicts of law and the complexities which abound in that topic. It suffices to refer you to the following cases which are instructive: *In re Hannema [1981] 7 Fam LR 542;Miller and Caddy [1985] 10 Fam LR 858andHenry (1996) FLC ¶92-685*

The author is indebted to Peter Szabo[v] who provided him an opinion prepared by Gray Cameron, Barrister, Auckland, New Zealand which deals with practical issues confronted by lawyers in New Zealand when advising clients about pre - nuptial agreements. A review of the material provided by the Family Court of New Zealand and the Family Law Section of the New Zealand Law Society is also instructive.

The relevant legislation in New Zealand concerning pre-nuptial agreements is the *Property (Relationships) Act 1976 ("PRA"),* which was introduced (by the Property

[23] *Binding pre-marital agreements Will they help?* Australian Institute of Family Studies, Family

(Relationships) Act 2001) on 3 April 2001 and commenced operation on 1 February 2002. The legislation renamed the previous *Matrimonial Property Act 1976.*Part 6 of the PRA details the contracting out provisions and in particular enables parties to enter pre-nuptial agreements.

The distinguishing features of the PRA vis-a-viz the Australian legislationare: The PRA applies to both marriages and de facto relationships (including same sex relationships). There will be parallel legislation once the Commonwealth Government of Australia legislates giving effect to the States referral of power [although at this time same sex relationships are to be excluded]; and the PRA delineates between "Relationship Property" (which will be divided equally unless the Court considers there are extraordinary circumstances that will make equal sharing repugnant to justice) and "separate property" (which is any property which is not relationship property and which will remain the property of the owner and be quarantined from claim unless it is transformed into relationship property pursuant to provisions of the PRA such as Ss9A, 15A, 17 and 17A).The PRA also makes provision for the division of property upon the death of one spouse and gives the surviving spouse an election to take under the will or to receive a half share of the relationship property. The PRA enables parties to make agreements about the status, ownership and division of property. The parties can enter an agreement to contract out of the PRA, in much the same way as parties can contract out of Part VIII of the *Family Law Act* in Australia. A distinguishing and positive feature of the PRA designed to minimize legal expenses, is the ability to make regulations prescribing model forms of agreement.

The following chart provides a summary of Part 6 of the PRA:

#	Requirement	Section of PRA	Comment
1.	The pre-nuptial agreement is entered by 2 persons in contemplation of entering a marriage	S21(1)	Same as in the FLA
2.	The agreement addresses any matter they think fit with respect to the status, ownership, and division of their property including future property: a. during their joint lives; and / or b. when one of them dies. And in particular <u>may</u> do all or any of the following: ❑ provide that any property is	S21(1) S21(2) S21D S21D(1)(a)	Not as extensive as the FLA

	to be relationship property or separate property; ❑ define the share of the relationship property the parties receive when the marriage ends or on the death of one of them ❑ provide the methodology for calculating the shares or how the relationship property is to be divided	S21D(1)(b) & (c) S21D(1)(d) & (e)	
3.	Model forms of agreement may be prescribed	S21E	Not in the FLA
4.	The agreement must be in writing	S21F(2)	Same as the FLA
5.	The agreement must be signed by the parties and witnessed by a lawyer.	S21F(2) & (4)	Same as FLA except no requirement that the agreement be witnessed by a lawyer
6.	Each party must have independent legal advice before signing the agreement.	S21F(3)	Same as FLA
7.	The lawyer who witnesses the signature of a party must certify that before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement. Example Certificate: *'I [xyz] a barrister (or solicitor) holding a current practising certificate in xxxx do hereby certify that before the said [abc] signed this agreement I explained to him / her the effect and implications of the agreement.* *Dated this xxx day of xxx 2004* *……* *Signature witness."*	S21F(5)	Not as detailed as the FLA. However the simplicity of the certificate is misleading. There have been at least 2-3 cases where following the upsetting of an agreement the unfortunate party has sued the certifying solicitor on the other side and it has been held that the certifying solicitor may owe an obligation / duty to the other party upon which they are reliant, and with a consequence in damages.[vi]

8.	Setting aside prenuptial agreements in circumstances where: ❑ the general principles of law and equity apply to the contract ❑ an agreement is void because it does not comply with the form in ss 21F (2) - (5). ❑ The Court is satisfied that giving effect to the agreement would cause serious injustice. The Court must have regard to: 1. the provisions of the agreement; 2. the length of time since the agreement was made; 3. whether the agreement was unfair or reasonable at the time it was made and since it was made; 4. the desire of the parties to achieve certainty; 5. any other matters the Court considers relevant.	S21G S21F(1) S21J S21J(4)	To overcome the conversion of separate property to relationship property by the maintenance, sustenance or other contribution by one party to the separate property of the other, a suggested clause is: "For the avoidance of doubt the provisions of sections 9A, 15, 15A, 17 and 17A of the Property (Relationships) Act 1976 (New Zealand) are hereby expressly negated and this agreement shall for all purposes be read and construed as if such sections had never been passed into law to the intent that the classification of property herein contained as the separate property of the party entitled thereto shall not be affected in any way by the application of relationship property or the actions or contributions of the other party thereto."

If the Family Court of New Zealand invalidates a prenuptial agreement, then the provisions of the PRA have effect as if the agreement had never been made.[24]

IX. Conclusion

It is fair to say that practitioners who prepare prenuptial agreements for clients in Australia are sailing in unchartered waters at this time. The Former Chief Justice of the Family Court of Australia, Alistair Nicholson has expressed his reservations about the agreements. It remains to be seen whether Family Court judges regarding prenuptial agreements adopt the following sentiments expressed by one of our eminent civil judges when dealing with a de facto couple's cohabitation agreement:

> If the parties do make agreements intended to have legal effect, I see, at present, no reason why at least in relation to property rights the agreements should not be recognized.[25] The extent to which the Court machinery can operate in this field can only be gradually tested as concrete cases appear. The Courts should not become alchemists transmuting the ashes of dead passion into gold…….What this case does prove is that extra marital agreements are not for the amateur lawyer. There being no conventional framework, as in marriage, foresight as to pitfalls, which only professional training or many bitter experiences can supply, is required….[26]

Additional reading

The following are further articles related to prenuptial agreements in Australia:

1. *Pre-nuptial agreements for Australia: why not?* by Belinda Fehlberg and Bruce Smyth, (2000) 14 AJFL 80 (Butterworths);
2. *Setting aside financial agreements* by Professor Patrick Parkinson, (2001) 15 AJFL 26 (Butterworths)
3. *Financial Agreements – a practical overview* – Professor Patrick Parkinson, Australian Family Lawyer, Vol 15 No 1 Autumn 2001 page 16;
4. *Marketing Financial Agreements* – Dr Tom Altobelli, Australian Family Lawyer, Vol 17 no 1 Spring 2003
5. *Financial Agreements Drafting Suggestions* – by Martin Bartfield Q.C.
6. *The Perils and Potential of Financial Agreements* – by Dr Tom Altobelli, paper delivered to QLS CLE/FLPA residential seminar, 26 April 2001; and

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[24] *See Connell -v- Odlum [1993] NZFLR 189.* Note the same principle in the High Court of Australia decision of *Hawkins -v- Clayton*

[25] This is consistent with *K –v- K (Ancillary Relief: Prenuptial Agreement) [2003] 1 FLR 120*

[26] *Seidler –v- Schallhofer (1982) FLC ¶91-273* at page 77,554 per Hutley J.A.

7. D*omestic Relationship Agreements for Marriages and De Facto Relationships in Queensland* by Geoff Wilson delivered to LAAMS seminar on 18/05/00 [this paper is available under the publications section of Hopgood Ganim's website @ www.hopgoodganim.com.au/publications/index]

8. *Section 90B Financial Agreements* by Peter Sheehy, delivered to Lexis Nexis Family Law Essentials Seminar, November 2006, Brisbane

9. *Setting Aside Financial Agreements* by Catherine Carew, Volume 19 No.2 Australian Family Lawyer page 35.

Appendix:

SUGGESTED MODEL FOR PREPARING A BFA