

Chapter 2

AN AUSTRALIAN PERSPECTIVE ON INTERNATIONAL PRE-NUPTIAL AGREEMENTS

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INTRODUCTION

The present report is a decision of the Honourable Justice Murphy of the Queensland District Court at Brisbane in the matter of *Weinhopf & Weinhopf*,¹ a decision which, in proceedings instituted in Australian courts, the place of which is a pre-nuptial agreement executed outside Australia and the importance of which is a pre-nuptial agreement complying with Australian law where there are

the parties commenced cohabitation in 1972. They lived and worked in Germany. The parties executed a pre-nuptial agreement in Germany in 1973, prior to the marriage that year. At that time there was no statutory recognition of pre-nuptial agreements in Australia. It is not surprising to find that the German pre-nuptial agreement does not contemplate and provide for the parties' ultimate residence in Australia nor does it comply with the provisions of the Family Law Act. Eventually the parties moved to Australia in 1978. The husband worked overseas during the marriage.

The parties made inter vivos gifts of real estate situated in Belgium, shares, and investments were made by the wife's parents. The judge stated that it was clear that the wife's parents made the transfers of property and investments in reliance upon that pre-nuptial agreement.

The parties separated in June 2007. At the time of the trial the total net worth of the parties was \$10m (AUD) comprising property in Australia and Europe amounting to \$2.4m and European property worth \$7.6m.

Despite the existence of the pre-nuptial agreement, the court entertained an application by the husband for a property settlement (under s 79 of the Family Law Act).

¹ [2009] QDC 104, judgment delivered on 17 November 2009.

2.6 In relation to the German pre-nuptial agreement, the judge held:

'45. I accept the argument on behalf of the husband that the prenuptial agreement does not preclude the husband from pursuing his application for orders pursuant to s79, nor does it relieve the Court of its obligation to decide this matter in accordance with the provisions laid down in the Act. (See *D & D* Full Court, unreported, 30 April 1992, per Straus, Lindenmayer and McCall JJ and the earlier decisions there cited).'

Ultimately the trial judge ordered a division of the total property (including the Belgian/European property) as to 18% (\$1.8m) to the husband and 82% to the wife. Essentially the Belgian/European property remained with the wife, however the husband received 75% of the remaining property.

2.7 In Australia the pre-nuptial agreement (and the post-nuptial agreement) is part of the family of relationship agreements known as 'financial agreements' under the governing legislation, the Family Law Act (Commonwealth of Australia) ('Family Law Act'). The Family Law Act confers exclusive jurisdiction on the Family Law Courts (Family Court of Australia and Federal Magistrates' Court of Australia) in respect of 'matrimonial cause' which include proceedings with respect to the maintenance of one of the parties,² property of the parties or either of them,³ and a Part VIIIA financial agreement.⁴

2.8 To circumvent the prospect of a Family Law Court in Australia making unintended orders for property settlement or spousal maintenance where the marital relationship has cross-border connections between Australia and other foreign jurisdictions, it is imperative for parties intending to marry, to enter a pre-nuptial agreement which complies with Part VIIIA of the Family Law Act or is declared to be binding by the courts.⁵

2.9 In the absence of a binding financial agreement under Australian law, the parties risk being subjected to spousal maintenance orders and having all of their property both in Australia and overseas subjected to orders for alteration of property interests by the Family Law Courts of Australia.

BACKGROUND

Pre-nuptial agreements in Australia prior to 2000

2.10 Prior to 27 December 2000, the status of pre-nuptial agreements in Australia was as follows:⁶

² Section 4(1)(c), (ca)(d) and (ea); s 4(a) and (b).

³ Section 4(1)(ca) and (cb); s 4(e) and (d).

⁴ Section 4 (1)(ea).

⁵ Under s 90G(1A).

⁶ *In the marriage of Plut* (1987) FLC 91-834.

'No Pre-Nuptial Agreement can be made under section 79 (Family Law Act) of the Family Law Act 1975 (Cth) unless the Court under the Act is satisfied that the agreement is for the benefit of both parties.'

'The pre-nuptial agreement could be set aside under section 79 of the Family Law Act 1975 (Cth) unless the Court is satisfied that the agreement is for the benefit of both parties.'

'As a result of amendments to the Family Law Act 1975 (Cth) in January 2000, a court may now make orders under section 79 of the Act from the commencement of Part VIIIA of the Family Law Act 1975 (Cth) in respect of a pre-nuptial agreement.'

'Part VIIIA of the Family Law Act 1975 (Cth) provides that a pre-nuptial agreement is binding if it is for the benefit of both parties and is declared to be binding by the court.'

'We accept that the purpose of the Act is to enable parties to their own affairs in the manner of their own choosing and to resolve disputes on marriage.'

'The relevant provisions of the Family Law Act 1975 (Cth) in respect of pre-nuptial agreements (including pre-nuptial agreements) are contained in Part VIIIA of the Family Law Act 1975 (Cth) from 27 December 2000.'

'Approximately 2 years later the government introduced Part VIIIA of the Family Law Act 1975 (Cth) which gave effect to the concept of property to include superannuation interests. Part VIIIB of the Family Law Act 1975 (Cth) provides that a pre-nuptial agreement is binding if it is for the benefit of both parties and is declared to be binding by the court as if those interest superannuation interests are not included in the property of the parties.'

'THE EFFECT OF A BINDING FINANCIAL AGREEMENT'

'If the agreement complies with section 90G(1A) of the Family Law Act 1975 (Cth) then it is binding. The effect of a binding financial agreement is set out in section 90C of the Family Law Act 1975 (Cth) and section 90D of the Family Law Act 1975 (Cth) respectively.'

'Including *Sales* (1979) FLC 90-651.

(1980) 138 ALR 542, *Dupont* (No 3) (1980) FLC 91-987, *Jackson* (1988) FLC 91-779, and *Grady* - unreported proceedings EA 25 of 1997 on 27 December 1997; see for instance 'Financial Agreements', Television Edition, 1997.

'It is noted that those people who had previously entered into pre-nuptial agreements which were not declared binding on the basis of section 79 of the Family Law Act 1975 (Cth) prior to 27 December 2000 are now able to rely on section 90G(1A) of the Family Law Act 1975 (Cth) to have their agreements declared binding on the basis of section 90G(1A) of the Family Law Act 1975 (Cth) from 27 December 2000.'

'The effect of a binding financial agreement is set out in section 90C of the Family Law Act 1975 (Cth) and section 90D of the Family Law Act 1975 (Cth) respectively.'

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agreement, the judge held:

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prior to 2000

status of pre-nuptial agreements in

'No Pre-Nuptial Agreement can preclude a Court from exercising its powers under Section 79 (Family Law Act) or preclude a party to a marriage from invoking the powers of the Court under that section.'

No pre-nuptial agreement could contract out of the parties' rights under Part VIII of the Family Law Act. There was a long line of supporting authorities.⁷

218 As a result of amendments made to Part VIIIA of the Family Law Act in January 2010, a court may now declare a pre-nuptial agreement entered prior to the commencement of Part VIIIA in 2000 to be binding and enforceable.⁸

Part VIIIA of the Family Law Act

'122. We accept that the purpose of Part VIIIA is to permit parties to arrange their own affairs in the manner they choose, to give certainty, and to avoid delay and costly disputes on marriage breakdown.'⁹

212 The relevant provisions of the Family Law Act governing financial agreements (including pre-nuptial agreements) commenced operation on 27 December 2000.

213 Approximately 2 years later, on 28 December 2002, the commonwealth government introduced Part VIIIB of the Family Law Act extending the scope of property to include superannuation entitlements. Section 90MH (of Part VIIIB) of the Family Law Act provides that a financial agreement (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 superannuation interests are not in existence at the time the agreement is made.

THE EFFECT OF A BINDING FINANCIAL AGREEMENT

214 If the agreement complies with the various requirements of the Family Law Act then it is binding. The effect of a binding agreement is provided in s71A(1) of the Family Law Act.

⁷ Including *Sykes* (1979) FLC 90-652, *Candlish and Pratt* (1980) FLC 90-819, *Re Hannema* (1981) Fam LR 542, *Dupont (No 3)* (1981) FLC 91-103, *Plut* (above n 6), *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 in proceedings EA 25 of 1997 on 27 February 1998.

⁸ Section 90G(1A): see for instance Martin Bartfield QC, 'Recent Amendments to Binding Financial Agreements', Television Education Network, February 2010, where he said: 'That means that those people who had what they thought were pre-nups which were entered into before any of this was permitted, that is before the year 2000, may now be able to have those pre-nups declared binding on the basis that equitable principles should apply . . .'

⁹ *Winter* (2009) FLC 93-420.

2.15 A financial agreement that is binding, prevents a court from making a property settlement order and/or a spousal maintenance order to the extent those matters are covered by the agreement.¹⁰

'It is not to the point that the financial agreement purports to oust the jurisdiction of the Court but rather that the compliance with the requirements of the Act gives rise to the ouster of the jurisdiction.' (emphasis added)

2.16 If the financial agreement does not deal with all of the property and/or spousal maintenance then the court retains its jurisdiction to make orders directed to same:¹¹

'Thus, the court's power to make Part VIII orders is curtailed only in respect of "financial matters" to which a "financial agreement" applies and only if any such "financial agreement" is "binding".'

2.17 A binding pre-nuptial agreement continues to operate despite the death of a party and is binding on their estate. Therefore if a provision is made for spousal maintenance which is intended to cease on the death of one or either party, then the financial agreement must contain a statement to that effect otherwise the payment of maintenance will inure.

2.18 Amendments made to the Family Law Act in 2008 confirmed that death of a spouse does not constitute a breakdown of the marriage for the purposes of Part VIIIA.¹² However, whilst the Family Law Act may limit the usefulness of a pre-nuptial agreement as an estate planning tool ensuring that provisions for property adjustment and maintenance upon the death of the parties cannot be enforced and do not constitute part of a binding financial agreement, nevertheless under general law the civil courts in Australia may still give effect to the parties testamentary provisions in a pre-nuptial agreement.¹³ The court in estate litigation may give due weight to the terms of a pre-nuptial agreement where there is conflict between the surviving spouse's claim from the estate and the pre-nuptial agreement.¹⁴

2.19 There is a hiatus in the legislation as parties will not be afforded the protection of Part VIIIA in respect of 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.¹⁵ The Family Court has power to

¹⁰ *Ruane & Bachman – Ruane & Anor* [2009] FamCA 1101 at para 30.

¹¹ *Fevia & Carmel-Fevia* (2009) FLC 93-411 at para 174.

¹² Section 4(1) definition of 'breakdown'.

¹³ Section 95 of the Succession Act 2006 (New South Wales); *Smith* (1986) 66 ALR 1; 60 ALJR 508; FLC 91-604, *Russell v Quinton* [2000] NSWSC 322; see the paper 'Domestic Relationship Agreements for Marriages and De Facto Relationships in Queensland' by Geoff Wilson delivered to LAAMS seminar on 18 May 2000.

¹⁴ *Hills v Chalk & Ors (as executors of the estate of Chalk)* [2008] QCA 159; see also *Singer v Berghouse* [1994] HCA 40; *Barns v Barns* (2003) 214 CLR 1169; *Gigliotti* [2002] VSC 279; *Vigolo v Bostin* [2005] HCA 11.

¹⁵ See s 44(3) of the Family Law Act.

make orders for property settlement at the time of the trial notwithstanding after separation.¹⁶

There are revenue considerations beyond the scope of this chapter financial agreements.

Whilst the commentary is correct, law applies to post-nuptial agreements, ie s 90B for pre-nuptial (after divorce) for post-nuptial.

MATTERS OF FORM AND

The requirements of Part VIIIA

For the agreement to be requirements set out in Part VIIIA

A financial agreement (pre-nuptial) complies with:¹⁷

(1) s 90B of the Family Law Act

(a) Is it an agreement?

(b) Is it a financial agreement?

(2) s 90G of the Family Law Act

(a) Is it binding?

(3) s 90DA of the Family Law Act

the court declares the agreement

Is it an agreement?

Fundamentally, the agreement must be an agreement at all.

¹⁶ For instance, see *Farmer v Bramley* (1984) 154 ALR 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

¹⁷ *Black and Black* [2008] FamCAFC 7; 23 FamCA 100.

... prevents a court from making a marital maintenance order to the extent of the agreement.¹⁰

... agreement purports to oust the jurisdiction of the court in accordance with the requirements of the Act (emphasis added)

... not deal with all of the property and the court retains its jurisdiction to make orders

... Part VIII orders is curtailed only in respect of a financial agreement¹¹ applies and only if any

... continues to operate despite the death of the parties. Therefore if a provision is made to cease on the death of one or either party, it must contain a statement to that effect and will inure.

... Family Law Act in 2008 confirmed that the breakdown of the marriage for the purposes of the Family Law Act may limit the usefulness of a financial planning tool ensuring that provisions in a will take effect upon the death of the parties cannot be part of a binding financial agreement. The courts in Australia may still give effect to a pre-nuptial agreement.¹³ The court may vary the terms of a pre-nuptial agreement to give a surviving spouse's claim from the estate and

... on as parties will not be afforded the same protection of property acquired by them after marriage. A period of limitation for bringing a property claim in divorce.¹⁵ The Family Court has powers

... FMCA 1101 at para 30. ... para 174.

... (South Wales); *Smith* (1986) 66 ALR 1; 60 ALJ 423; 133 SWR 322; see the paper 'Domestic Relationships in Queensland' by Geoff Wilson (2003) 214 CLR 1169; *Gigliotti* [2002] VSC 270.

... *Chalk*) [2008] QCA 159; see also *Sage* (2003) 214 CLR 1169; *Gigliotti* [2002] VSC 270.

... the property settlement directed towards property in existence at the time of the trial notwithstanding such property may have been acquired

... revenue considerations in entering a binding financial agreement (including duty exemptions and capital gains tax rollovers) which are beyond the scope of this chapter but warrant attention when preparing financial agreements.

... While the commentary is confined to pre-nuptial agreements, the same principles apply to post-nuptial agreements. The only difference between a pre-nuptial form of financial agreement and post-nuptial form of financial agreement is the applicable section of the Family Law Act constituting the agreement, i.e. s 90B for pre-nuptial and ss 90C (during marriage) and 90D for post-nuptial.

FACTORS OF FORM AND PROCEDURE

Requirements of Part VIII A: the checklist

... for the agreement to be binding it must comply with specific requirements set out in Part VIII A of the Family Law Act.

... financial agreement (prepared before marriage) is binding if it

... of the Family Law Act:

- (a) is an agreement?
- (b) is a financial agreement?

... of the Family Law Act:

- (a) is binding?
- ... of the Family Law Act;

... declares the agreement to be binding under s 90G(1A).

... agreement?

... Essentially, the agreement must meet the requirements of a contract. If any of the essential elements of a contract are missing then the document will not be a binding agreement at all.

... *Farmer v Bramley* (2000) FLC 93-060, where the husband won \$5m in a lottery and the court awarded 35% of the proceeds to the wife.

... *Stoddard* [2007] FMCAfam 735.