

Pre-Nuptial Agreements

This article looks at recent amendments to the *Family Law Act 1975*, which have led to the recognition of pre-nuptial agreements and agreements entered into during marriage by Australian Courts.

PRE-NUPTIAL AGREEMENTS

Until recently, Australian courts have refused to recognise pre-nuptial agreements entered into by parties to a marriage. Now, with the introduction of section 90B of the Family Law Act, agreements entered into by parties contemplating a marriage relating to property and maintenance before, during and after a marriage are recognised and enforced by the courts.

What may the agreement cover?

The agreement may cover:

Property prior to or during marriage or in the event of a breakdown (s 90B(2)(b)); and/or
Maintenance during marriage or in the event of a breakdown (s 90B(2)(c)).

"Property" may include:

- real estate;
- businesses;
- cash and shares;
- cars, wine and art collections;
- life insurance;
- superannuation;
- proceeds of litigation.

"Maintenance" may be expressed in terms of regular payments for a specified period, the payment of certain bills and expenses incurred (such as school fees or rate payments in relation to a residential property), or as a lump sum. Note that either or both of the parties are entitled to maintenance, although it is usually calculated to be paid from the party with higher earnings to the party with lower income or earnings (but need not be).

What is required for a valid agreement?

For a pre-nuptial agreement to be considered valid under section 90B it must:

- Be in writing (s 90B(1)(a));
- Be expressed to be made under s 90B (s 90B(1)(b));
- The parties must receive independent legal and/or financial advice prior to entering into the agreement (s 90G(1)(b));
- The parties must present a certificate signed by the provider of the independent legal and/or financial advice (s 90G(1)(c));
- The agreement must be signed by both parties (s 90G(1)(a)); and
- After the agreement is signed, the original agreement must be kept by one of the parties and a copy given to the other (s 90G(1)(e)).

It should be noted that any new agreement will have the effect of terminating previous agreements (s 90B(4)).

Can the agreement be set aside by the court?

Yes, under s 90K the court can set aside an agreement if it is:

- Void;
- Unenforceable;
- Procured by fraud; or
- Puts the party responsible for the welfare of a child/children in a position of hardship.

In considering whether to set an agreement aside, the court will have regard to whether the circumstances of the parties have changed to such an extent since the making of the agreement as to make the agreement unjust. The courts will have particular regard to the effect of any existing agreement on the welfare of the children of the marriage.

To avoid an agreement being set aside by the court, the parties should consider entering into a new agreement when there is a significant change in circumstances, which may include (but is not limited to):

- The birth of a child;
- A child or children moving out of home or getting married;
- Purchase or sale of a house or unit;
- Purchase or sale of shares or investment assets;
- Purchase or sale of other major assets, such as a motor vehicle;
- The receipt of proceeds of a deceased estate as a beneficiary by one or both of the parties;
- Retrenchment/job loss or retirement of one party or one party not returning to the workforce following maternity or paternity leave;
- Set up or termination of a new business

AGREEMENTS ENTERED INTO DURING MARRIAGE

Under section 90C, parties can enter into agreements relating to property and maintenance. Section 90C is in all respects identical to section 90B (agreements entered into before marriage), except that it applies to agreements entered into after the marriage has taken place.

A new agreement entered into during marriage will terminate any existing pre-nuptial agreement under s 90B or any agreement entered into under s 90C (s 90C(4)).

As with pre-nuptial agreements, the agreement may cover "property" of the marriage both during and after marriage. This includes property acquired by the couple or by each party separately during the marriage. Property may include cash in bank accounts, shares, insurance, cars, homes, businesses, intellectual property and other assets, such as art or wine collections. The agreement should stipulate clearly what items of property it applies to, as property not covered by the agreement may be dealt with separately by the court in the event of a breakdown. Thus, to ensure all assets are covered, the agreement should be reviewed frequently, particularly at the time of sale or purchase of major assets such as the family home. The easiest way to do this is to incorporate a list of property into the agreement by way of an annexure, thus making it easy to review.

What is required for a valid agreement?

For an agreement entered into during marriage to be considered valid under section 90C it must:

- Be in writing (s 90C(1)(a));
- Be expressed to be made under s 90C (s 90C(1)(b));
- The parties must receive independent legal and/or financial advice prior to entering into the agreement (s 90G(1)(b));
- The parties must present a certificate signed by the provider of the independent legal and/or financial advice (s 90G(1)(c));
- The agreement must be signed by both parties (s 90G(1)(a); and

- After the agreement is signed, the original agreement must be kept by one of the parties and a copy given to the other (s 90G(1)(e)).

AGREEMENTS ENTERED INTO AFTER MARRIAGE BREAKDOWN

These may be entered into under section 90D following the breakdown of marriage. Again, these are similar to both pre-nuptial agreements under s 90B and agreements entered into during marriage under s 90C.

Financial agreements entered into following the breakdown of marriage have the effect of terminating any existing pre-nuptial agreements or agreements entered into during marriage under ss 90B, 90C.

The requirements for a valid agreement under s 90D are the same as those required under ss 90B and 90C.

Why enter into an agreement?

- To save court time and money in the event of the breakdown of marriage;
- To ensure each party is provided for sufficiently in the event of a marriage breakdown;
- To ensure each party feels that their own property, which they have brought into the marriage, remains secure from other claims;
- So that each party feels they have achieved a sense of fairness, have had the opportunity to make their own arrangements and will be protected in the future.

When should the parties enter into an agreement?

As has been discussed above, the sections which related to premarital agreements, those entered into during marriage or those entered into after the dissolution of marriage differ very little. However, it is preferable for the protection of each party's separate property that the agreement be entered into as soon as possible (ie. in contemplation of marriage under s 90B).

Comasters can advise clients on pre-nuptial and nuptial agreements.

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