Currently in Australia, couples cannot enter binding agreements about their financial affairs until after their marriage has broken down. Separating couples, however, often find it difficult to discuss such matters amicably, or to meet the costs involved in having solicitors negotiate for them. Would it help to reduce conflict and cost on relationship breakdown if couples could enter binding agreements before (or during) their marriage about property division and spousal support if they later separate – a pre-marital agreement?

This article examines this issue by considering recent Australian Institute of Family Studies data on the use of pre-marital agreements, and the attitudes of divorced Australians to such agreements. After briefly outlining the current legal position and policy issues, the findings from these data are presented. Findings are then considered in the context of current proposals for reform.

**Law and policy: the current position**

At the moment, married couples in Australia can only make binding financial agreements after their marriage has broken down. Agreements entered into before marriage, or during marriage but before separation, are not legally effective. After separation, only an agreement approved by the Family Court (under s. 87 of the Family Law Act 1975, or via consent orders) will exclude the court’s power to make property or spousal support orders.

If a couple has made an agreement, the Family Court may consider that agreement when making orders dividing property and/or spousal support. The court is not obliged to follow the agreement, and does not view the existence of an agreement as excluding or limiting the court’s power (Hannema 1981; Plut 1987). An agreement may be more likely to be followed if the couple, or one of them, has acted on it, but there is no guarantee of this.

The current approach of the Family Court is consistent with the traditional legal view that a wife’s agreement not to claim financial support from her husband in the future is void on public policy grounds. The concern is that agreements providing for future separation encourage marital instability. Such agreements are, on this view, inconsistent with state support of the institution of marriage (Eekelaar 1998: 471).

Other concerns have also been expressed at a policy level about binding pre-marital agreements. It is difficult for people to know ahead of time what is in their future interests –
attitudes may alter once the relationship has broken down, and financial circumstances may also change over time. In the context of intimate personal relationships, safeguards before signing, like independent legal or financial advice, are unlikely to have any impact on the decision to enter an agreement (Fehlberg 1997). In the United States, there is some empirical evidence suggesting that pre-marital agreements usually work to women's disadvantage due to their economically weaker position compared with men (Atwood 1992).

In contrast, those favouring legally binding pre-marital agreements argue that the process of discussing finances may in fact encourage marital stability, and that given the high divorce rate it is realistic to sort these issues out ahead of time (Joint Select Committee 1992: 297). These arguments are related to the central argument in favour: that allowing binding agreements would result in greater certainty and thus reduced costs, both emotionally and financially, on separation. Yet these hopes are in marked contrast with the United States experience, where couples entering binding pre-marital agreements now argue more frequently about the interpretation of their agreements. Thus one basis for conflict appears to have been replaced by another (Katz 1998).

The current non-binding legal status of pre-marital agreements in Australia (and the United Kingdom, where law reform is also currently being considered) does, however, certainly contrast with the position in many other countries, including New Zealand, Canada, the United States (most states), and throughout continental Europe.

It also contrasts with the law governing cohabiting couples in most Australian states and territories, where de facto couples can enter legally binding cohabitation and separation agreements. It may, however, be unwise to equate the position of married and de facto couples on this issue. There is strong evidence that married couples share their finances to a greater extent than do de facto couples (Glezer 1997). Binding pre-marital agreements may not be consistent with the financial arrangements of most married couples.

Since the 1980s, the question of whether Australian couples should be able to enter binding pre-marital agreements before marriage has been considered twice by law reform bodies, with the conclusion being in favour both times (Australian Law Reform Commission 1987; Joint Select Committee 1992). On both occasions draft legislation resulted but was never enacted. In February 1999, the Federal Coalition Government re-instituted the previous Labor Government's proposal that binding financial agreements may be made before and during marriage. The Government announced that couples who enter agreements with legal or financial advice 'will have the freedom to choose to make whatever agreements they like, and in most cases, the court will not be able to overturn these agreements' (Attorney-General's Department – Commonwealth of Australia 1999).

At the time of writing, no draft legislation has yet been released.

**Australian Divorce Transitions Project**

Although it appears that the current legal position is about to change, very little is known about how Australians feel about the greater and more binding use of pre-marital agreements, or about their use of such agreements to date. Given these gaps in our knowledge, data on the use of pre-marital agreements by divorcing couples collected by the Australian Institute of Family Studies is significant.

The data are drawn from the Australian Divorce Transitions Project, a random national telephone survey of divorced Australians (excluding Western Australia due to legislative differences between that state and the rest of Australia). This survey, conducted in late 1997 by the Australian Institute of Family Studies, examined the divorce transition and its consequences for parents.

The sample comprised 650 respondents (361 women, 289 men). Women and men in the sample were of similar age (in their mid-forties), had been married for an average of 14 years, and had separated on average about six years ago. Most respondents had at least one child under 18 years at the time of separation. The survey covered a broad range of issues related to the divorce transition, including parenting arrangements, property division, spousal support, and economic and personal wellbeing.

Pre-marital agreements were considered in the property division section of the survey, and were defined for respondents as 'an agreement made before marriage which states how property is to be divided should the marriage end.' Three particular issues regarding such agreements were then examined: (1) incidence; (2) perceived usefulness of pre-marital agreements; and (3) views about whether such agreements should be alterable or binding if circumstances changed after the agreement was made.

**Findings**

The data suggest that (1) pre-marital agreements are rarely used, (2) there is a general perception that such agreements are not, or would not, be useful in reaching fairer outcomes for divorcing couples, and (3) if binding pre-marital agreements are introduced, they should be alterable on the basis of children's interests. Finding (3) suggests support for binding pre-marital agreements, but finding (2) indicates current pessimism about their usefulness. This general pessimism could well be a reflection of the current non-binding legal status of pre-marital agreements in Australia. These findings are now considered in more detail.
Use and usefulness of pre-marital agreements

Of the 650 respondents, only 13 (five women, eight men) (2 per cent) had a pre-marital agreement. Although no conclusive statements as to causality can be made, low incidence is consistent with the fact that pre-marital agreements are not legally binding. Low incidence suggests that if the Government does legislate to introduce binding agreements, some effort will have to be made to inform the public of the change if greater use is to be encouraged.

It should be emphasised that the low incidence rate we report may be the result of certain other factors. Respondents had been separated across a period of almost ten years (1988–1997), but had been married for up to 33 years. Incidence may be lower among the Institute’s sample compared with, say, a sample comprised of those still married (if we were to assume that pre-marital agreements strengthen marriages). Incidence may also be higher among particular sections of the population (for example, the very wealthy, who have more assets to protect) than among the Institute’s sample.

Given popular views regarding the likely users of pre-marital agreements, it is of intrinsic and immediate practical interest to know who makes such agreements. In particular, there is the view that such agreements are most attractive to ‘divorcing couples entering new partnerships, or wealthy individuals seeking to safeguard their assets’ (Eekelaar 1998: 470). Cultural norms may also be influential. In the event, due to the low incidence of agreements in the sample (n=13) (and thus the population), profiling is problematic. When a profiling exercise was attempted, those who had pre-marital agreements were not distinguishable on the basis of any shared characteristics from the sample as a whole. For example, those with agreements were not substantially wealthier than those without agreements.

Perceptions of fairness

Most respondents did not consider that a pre-marital agreement had or would have helped them to reach a fairer financial settlement.

Table 1 refers to the perceived usefulness of agreements for the majority (98 per cent) of respondents who did not have a pre-marital agreement.

Of those not having a pre-marital agreement, about two-thirds (68 per cent) of women and men did not think such an arrangement would have helped in reaching a fair financial settlement. The view that a pre-marital agreement would not have helped is consistent with the current non-binding legal status of pre-marital agreements. This apparent pessimism once again suggests the importance of clearly communicating to the broader community any change to the current legal position.

Among the very small number of respondents who had agreements, only one of the eight men, compared with three of the five women, felt that the agreement had helped. Women with agreements were thus most inclined to believe that their pre-marital agreement had helped them to achieve a fairer financial settlement. However, these numbers are far too small to be relied upon. Indeed, there is contrasting United States research suggesting that women are particularly likely to challenge the validity of pre-marital agreements in court (Atwood 1992; Brod 1994; Nasheri 1998).

Altering pre-marital agreements

Under what conditions do divorced individuals think that pre-marriage agreements should be altered? Of the options offered, ‘the needs of children’ was the basis most favoured by respondents.

Figure 1 suggests that most respondents (76 per cent) considered that a pre-marital agreement should be alterable due to the needs of children. Women were more likely than men to hold this view (80 per cent of women compared with 70 per cent of men). In contrast, fewer respondents thought that alteration was warranted on the basis of who decided to separate (22 per cent) or the duration of the marriage (36 per cent). These views were consistent across age and gender.

Did those who had agreements feel particularly strongly about the issue of subsequent alteration? Once again, the numbers were too small for any firm trends to emerge. Of those who had agreements, all of the five women considered that a pre-marital agreement should be alterable due to the needs of...
children. Three of the eight men who had agreements held this view; three others believed that a pre-marital agreement should not be altered; one respondent couldn’t say, and another believed that being left by a spouse was grounds for altering an agreement.

**Conclusions**

Data from the Institute’s Australian Divorce Transitions Project suggest a low incidence of pre-marital agreements, and a perception among divorcing people that, to date, such agreements are not helping to produce fairer financial settlements.

These findings are consistent with the current non-binding legal status of pre-marital agreements. They do not necessarily indicate that the introduction of binding agreements would not be welcomed. In fact, respondents’ views regarding the circumstances in which agreements should be altered suggest a general support (albeit hypothetical) for legally effective pre-marital agreements – with the proviso that such agreements should be alterable in the interests of children.

If binding agreements are introduced, the capacity of couples to contract out of financial obligations to their children and each other is likely to be restricted if changes to the agreement would result in reliance on social security. This is certainly the position regarding private agreements for child support: payments below 75 per cent of the levels set out in the child support formula in effect breach current social security benefit eligibility rules.

Unfortunately, however, non-reliance on social security does not indicate absence of poverty. Children usually reside with their mothers after marriage breakdown, and evidence from the United States suggests that women have not been served well by pre-marital agreements due to their weaker economic position compared with men. In this context respondents’ general support for the idea that the interests of children provide a legitimate basis for reconsidering pre-marital agreements seems sound, even outside the social security context.

Given that the introduction of binding-pre-nuptial agreements is on the law reform agenda, a central issue is how binding such agreements should be. To say that pre-marital agreements should be alterable on the basis of ‘the needs of children’ would not go far enough – indeed, we did not test a wide range of options regarding alteration. There is little doubt that if legally binding pre-marital agreements were introduced, they could be set aside or modified by a court on normal contract grounds – for example, misrepresentation, and undue influence. More doubt surrounds other possible (and more controversial) grounds, such as events unforeseen by either party at the time the agreement was signed, and whether the agreement would result in significant injustice to one of the parties if it was enforced.

The introduction of a broad range of grounds for overturning pre-marital agreements is necessary to avoid injustice, but does undermine their ‘binding’ nature. And as in the United States, the presence of any grounds for relieving parties from their promises under such contracts may shift conflict to a new forum, rather than reducing dispute and cost associated with separation and divorce.

Of course, all this assumes that the parties have the resources (financial and otherwise) to seek legal assistance necessary to challenge the terms of a pre-marital agreement. The most likely legislative scenario is that unless both parties agree, only a court will be able to vary or set aside an agreement. Given this, injustice may result from one party’s inability to challenge an agreement once made – even if, technically, grounds for avoiding it exist.

While the findings discussed in this article provide an indication of use of pre-marital agreements and attitudes regarding their usefulness and alteration, there are many questions left unanswered. We still know little about the current and likely users of pre-marital agreements, the content of such agreements, the extent to which those with agreements are less likely than those without agreements to litigate their financial disputes, and the attitudes of Australians generally (beyond those who have divorced) to the use of *binding* agreements. Given the likelihood of legislative change to introduce legally binding pre-marital agreements, these issues will be of increasing importance in the future.

**References**


**Cases**

In the *Marriage of Hannema* (1981) 7 Fam LR 542.

In the *Marriage of Phon* (1987) 11 Fam LR 687.

**Belinda Fehlberg** is a Senior Lecturer in the Faculty of Law at the University of Melbourne. **Bruce Smyth** is a Research Officer at the Australian Institute of Family Studies.

For further information about the Australian Divorce Transitions Project contact Grania Sheehan at the Australian Institute of Family Studies. Phone: 9214 7888.