Prenuptial agreements – What's happening?

Miranda Kaye, Lisa Sarmas**, Belinda Fehlberg*** and Bruce Smyth*****

* Faculty of Law, University of Technology Sydney. Miranda is a member of the Law Health Justice Centre, UTS.
** Melbourne Law School, University of Melbourne.
*** Melbourne Law School, University of Melbourne.
**** Australian National University, Canberra.

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[Abstract] Pre or early relationship ('prenup') financial agreements have been available in Australia for some years now, but there is still a dearth of research regarding how they are being used by lawyers and their clients. This article draws on interviews with family lawyers regarding prenup agreements, with a focus on who is using them and why, and what lawyers think about them. Key findings include that while most participants considered that power imbalance usually or often existed between the parties and was not overcome by the process of entering agreements, most also supported the continued availability of Family Law Act financial agreements – a position that, in our view, indicates the need for further legislative reform.

I Introduction

For some years now, Australian couples have been able to enter financial agreements before marriage or entry into a de facto relationship to determine their financial arrangements if they separate.[1] If an agreement is binding, the court is prevented from dealing with matters covered by the agreement.[2] The ability to enter such agreements (referred to as 'prenups' in this article[3]), has been available under the *Family Law Act 1975* (Cth) (*FLA*) to couples

[1] A financial agreement may cover a range of financial matters including property (including superannuation) and financial resources, spousal or de facto partner maintenance, and child support (if the requirements for binding child support agreements are satisfied) and may cover child maintenance (*FLA* 90E/90UH). For what may be covered by financial agreements entered before marriage, see *FLA* s 90B/90UB.

[2] *FLA* s 71A/90SA.

[3] To be precise, we use the term 'prenup' to refer to a financial agreement entered before, or soon after marriage or entry into a de facto relationship.

contemplating marriage since 27 December 2000,[4] and since 2009 for couples entering de facto relationships.[5] Prior to this, financial agreements between married spouses could be entered only during marriage and after separation, and such agreements had to be court-registered to oust the jurisdiction of the court to make an order that departed from the agreement.[6] De facto partners were able to enter financial agreements under state and territory laws that were binding as contracts.[7]

Under the *FLA*, an agreement is a financial agreement if it is between two spouse parties or de facto parties who are not party to any other financial agreement covering the same content,[8] is expressed as made under the relevant section of the FLA[9] and deals with how the property, financial resources or maintenance of the parties will be dealt with in the event of separation or breakdown.[10] The financial agreement must also be enforceable in contract and equity.[11] For the financial agreement to exclude the court's jurisdiction regarding matters covered by the agreement, certain statutory requirements must be satisfied. The exact requirements differ according to the date on which the agreement was made due to

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[4] *Family Law Amendment Act 2000* (Cth); Part VIIIA *Family Law Act 1975* (Cth).

[5] *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* (Cth); Part VIIIAB *Family Law Act 1975* (Cth).

[6] The previous provisions allowed court approved maintenance agreements entered by parties during their marriage or after separation in substitution of their property and maintenance rights under FLA Part VIII (FLA s 87) and court registered maintenance agreements that could be enforced as court orders but not ousting the jurisdiction of the court (FLA s 86). See further: Grant Riethmuller and Robin Smith, *Family Law*, 7th ed, Lawbook Co, 2022, 939.

[7] *De Facto Relationships Act 1984 (NSW)* pt IV; *Relationships Act 2008* (Vic), pt 3.2; *Property Law Act 1974* (Qld), pt 19, div 3, sub-div 1; *De Facto Relationships Act 1996* (now the *Domestic Partners Property Act)* (SA), pt 2; *Family Court Act 1997 (WA)*, pt 5A, div 3; *Relationships Act 2003 (Tas)*, pt 6; *De Facto Relationships Act 1991* (NT), pt 3; *Domestic Relationships Act 1994* (ACT), pt 4.

[8] For agreements entered before marriage or entry into a de facto relationship, see ss90B(1)(aa)/ 90UB(1)(b).

[9] For agreements entered before marriage or entry into a de facto relationship, see ss90B(1)(b)/90UB(1)(c).

[10] For agreements entered before marriage or entry into a de facto relationship, see ss90B(2)/90UB(2).

[11] *FLA* s 90KA/90UN.

legislative amendments in 2003 and 2009[12] to 'shore up the enforceability of agreements'.[13] They include that before signing the agreement, independent legal advice must have been provided to each party about the effect of the agreement on the rights of the party and on the advantages and disadvantages, at the time the advice is given, of making the agreement.[14]

To our knowledge there has been no research on de facto relationship agreements entered under state law, and since the changes in 2000 there has only been one empirical study conducted on *FLA* financial agreements, by Belinda Fehlberg and Bruce Smyth very soon after the introduction of Part VIIIA. Their research was completed well before the *FLA* was amended to include de facto partner financial disputes and focussed on financial agreements entered before or soon after marriage.[15] It comprised a small-scale empirical study, involving an email survey sent to family lawyers during the first year of the operation of Part VIIIA. The study found that while family lawyers had experienced increased client enquiries about prenups after the legislative changes came into effect, ongoing commitment to the idea resulting in parties entering a prenup was rare.[16] It also suggested that prenups appealed to some men and also some women, and that use was more likely in relationships characterised by one or more of: wealth disparity, second marriages, and family wealth.[17] Subsequently,

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[12] *Family Law Amendment Act 2003* (Cth); *Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009* (Cth). For detail on these amendments see Owen Jessep, 'Marital agreements and private autonomy in Australia', in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective*, Hart Publishing, 2012.

[13] Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform', (2018) 46 *Federal Law Review* 367, 387.

[14] FLA s 90G(1)(b)/90UJ(1)(b).

[15] Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16(1) *International Journal of Law, Policy and the Family* 127 ('Binding Pre-Nuptial Agreements in Australia'). Fehlberg and Smyth's earlier work also included analyses of the use of such agreements before 2000 (drawing on Australian Institute of Family Studies' Australian Divorce Transition s Project data), and of the 2000 reforms: Belinda Fehlberg and Bruce Smyth, 'Binding Pre-marital Agreements – Will They Help?' (1999) 53 *Family Matters* 55; Belinda Fehlberg and Bruce Smyth, 'Pre-nuptial Agreements for Australia: Why Not?' (2000) 14 *Australian Journal of Family Law* 1 ('Why Not?').

[16] Fehlberg and Smyth, 'Binding Pre-Nuptial Agreements in Australia', n 15, 135.

[17] Ibid 134.

our understanding of lawyers' use of, views about, or practices in relation to prenups has been anecdotal and there is a dearth of knowledge in Australia as to how or whether prenups are being utilised by family lawyers and their clients.

Internationally there has also not been a large amount of empirical research into the views or practices of practitioners in relation to prenups in common law systems,[18] despite calls for such research.[19] Emma Hitchings' qualitative research,[20] conducted in England in 2008-2009 before *Radmacher v Granatino*[21] (in which the UK Supreme Court made clear that the enforcement of prenups was no longer against public policy, and that such agreements will now be enforced 'unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'[22]) involved focus groups and semi-structured interviews with a total of 39 legal practitioners from London and regional cities in England (including a diverse sample of lawyers from regional 'premier' firms, from firms with branches in urban, regional and rural locations, specialist family law firms, and some high street practitioners (what might

[18] In common law jurisdictions such as Australia, England and Wales, and New York, the default position if there is no prenup is based on a judge's discretionary assessment. For why jurisdictional differences must be acknowledged when researching prenups, see: Sharon Thompson discusses, 'Using Feminist Relational Contract Theory to Build upon Consentability: A Case Study of Prenups' (2020) 66(1) *Loyola Law Review* 55, 57-58.

[19] Elizabeth R. Carter, 'Are Premarital Agreements Really Unfair? An Empirical Study' (2019-20) 48(2) *Hofstra Law Review* 387, 388-389 citing Gail Frommer Brod, 'Premarital Agreements and Gender Justice' (1994) 6 *Yale Journal of Law and Feminism* 229, 240; Brian Bix, 'Premarital Agreements in the ALI Principles of Family Dissolution' 8 (2001) *Duke Journal of Gender Law and Policy* 231, 232.

[20] Emma Hitchings, *Law Commission Report: A study of the views and approaches of family practitioners concerning marital property agreements* (2011). See also research conducted at a similar time in England and Wales into public attitudes towards prenups: Anne Barlow and Janet Smithson, 'Is Modern Marriage a Bargain: Exploring Perceptions of Pre-Nuptial Agreements in England and Wales' (2012) 24 *Child and Family Law Quarterly* 304. For more on public understandings and use of prenups see: Ian Binnie et al, *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) 44-49; Lynsey K Romo and Noah Czajkowski, 'An Examination of Redditors' Metaphorical Sensemaking of Prenuptial Agreements' (2022) 43(1) *Journal of Family and Economic Issues* 1.

[21] *Radmacher v Granatino* [2010] UKSC 42.

[22] *Radmacher v Granatino* [2010] UKSC 42, [75].

be termed 'generalists' in Australia))[23] regarding their approaches to drafting, advising on and dealing with existing agreements, and their views and opinions on whether prenups should be legally binding. Hitchings concluded that the approaches and attitudes of her participants varied 'dramatically' on all these issues,[24] but also suggested that there was consensus regarding who sought agreements (identifying, consistent with Fehlberg and Smyth, family wealth, individual wealth, and second marriages),[25] and the problems involved in predicting the future course of family relationships ('crystal ball gazing'), with the result that, '[g]enerally practitioners found it difficult to advise clients'.[26] Shortly after, Sharon Thompson's qualitative research[27] included a comparison of the English position on prenups with that in New York State, where prenups are legally binding and very likely to be enforced. Thompson's research included interviews with 20 practitioners in the Manhattan area of New York City who were highly skilled in the formation and litigation of prenups regarding their experiences, focussing on issues of autonomy and power. Her interview participants identified the same three groups of proposers[28] and the problem of 'crystal ball gazing'.[29] Thompson concluded that, 'the problem with the prenuptial context is that power imbalance is so ubiquitous it is not recognised'[30] and that 'autonomy is something which *both* parties to an agreement almost never have but are almost always presumed to have, as if the prenup evenly reflects the wishes of both parties'.[31] The theme of power imbalance was suggested again more recently, in Peter Leeson and Joshua Pierson's US research, published in 2016, which analysed 2171 prenups that entered the public court record between 1985 and 2013 due to a legal

[23] Hitchings, n 20, 8, 10.

[24] Ibid, 130.

[25] Ibid 30-33.

[26] Ibid 132.

[27] Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice*, London, Hart Publishing, 2015. Thompson's empirical research involved semi-structured interviews conducted in 2010.

[28] Ibid 79.

[29] Ibid 98.

[30] Ibid 103.

[31] Ibid.

dispute.[32] While they noted that there 'is no way to ensure that the information gleaned from such cases is representative' of all prenup users,[33] they identified the 'most striking' finding from their analysis as the substantial economic inequality between spouses in the prenups analysed:

> Prenup-using husbands' median net worth at marriage is more than 21 times wives', and wives' median annual income at marriage is less than 39 percent of husbands'. Similarly, while both prenup-using husbands and wives tend to be well educated at marriage, there is a large education gap between them. The percentage of prenup-using husbands with a college education at marriage is 20 points higher than the percentage of prenup-using wives with a college education.[34]

They concluded in relation to users of prenups that they 'are composed of an economically well-off and a significantly less economically well-off spouse whose premarital contract is designed to protect the former's financial interest against the latter's financial claims in the event of divorce'.[35]

In Australia, the prospect of conducting further empirical research on prenups has been delayed by several factors including the desirability of waiting until things settle down after legislative amendments in 2003 and 2009 mentioned earlier,[36] followed by discussion of still more legislative amendment,[37] followed by the High Court's decision in *Thorne v Kennedy*.[38]

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[32] Peter T Leeson and Joshua Pierson, 'Prenups' (2016) 45(2) *Journal of Legal Studies* 367.

[33] Ibid 373.

[34] Ibid 374.

[35] Ibid 376. We have not compared our findings with those of Leeson and Pierson (n 32) nor with those of Carter (n 19) because the research methodologies are so different. Those studies analysed the prenups and/ or court-collected information while our study (like those of Fehlberg and Smyth, Thompson, and Hitchings) is a qualitative research interviewing lawyers on their views and experiences.

[36] Above n 13 and 14.

[37] Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, which did not proceed.

[38] *Thorne v Kennedy* [2017] HCA 49; (2017) 263 CLR 85; (2017) 56 FamLR 559. See further: Katy Barnett, 'Thorne v Kennedy: A Thorn in the Side of "Binding Financial Agreements"?' (2018) 31 *Australian Journal of Family Law* 183; Dilan Thampapillai, 'Archetypes of Age and Romance: Unconscionable Conduct and the High Court in Thorne v Kennedy' (2018) 37(2) *University of Queensland Law Journal* 299; Sharon Thompson, 'Thorne v Kennedy: Why Australia's Decision on Prenups Is Important for English Law' (2018) 48(April) *Family Law* 415; Rick Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell Johnson v Buttress? Part I' (2018) 35(1) *Journal of Contract Law* 56, Rick Bigwood, 'The Undue

In that case the High Court unanimously set aside *FLA* financial agreements entered shortly before and just after the parties' marriage, on the basis of unconscionable dealing and, by majority, for undue influence, despite Ms Thorne having received impeccable legal advice[39] – a decision that seemed likely to encourage greater practitioner caution and focus on procedural and substantive fairness.[40]

A further major challenge for research is that obtaining information about prenups is difficult. Prenups in Australia are not registered in court or any other central repository. Difficulties in researching prenups in Australia may also reflect the rarity of such agreements and the challenges often encountered by researchers studying financial arrangements within

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Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell Johnson v Buttress? Part II' (2019) 35 *Journal of Contract Law* 187; John Eldridge, 'Lawful Act Duress and Marital Agreements' (2018) 77(1) *Cambridge Law Journal* 32-35; Matthew Foley, 'Equity Strikes Back - The Aftermath of Thorne v Kennedy' (2019) 28(1) *Australian Family Lawyer* 22; Renata Grossi, 'The Discomfort of Thorne v Kennedy: Law, Love and Money' (2019) 44(4) *Alternative Law Journal* 281; Geoffrey Monahan, 'In the High Court: The High Court's First Foray into Financial Agreements: Thorne v Kennedy' (2019) 8(1) *Family Law Review* 46; Eleanor Rowan, 'A "Thorne" in the side for family lawyers in Australia: undue influence and prenuptial contracts' (2018) 40 *Journal of Social Welfare and Family Law* 1; Lisa Sarmas and Belinda Fehlberg, 'Equity, the Free Market and Financial Agreements in Family Law: Thorne v Kennedy' 16; Lance Rundle, 'Thorne v Kennedy — A Reminder by the High Court of Australia the Law of Contract and Equity Underpin Family Law Financial Agreements' (2020) 48(3) *Australian Bar Review* 405; Elizabeth Kuiper, '"What's mine is mine": A socialist feminist critique of binding financial agreements in Australia' (2021) 34(2) *Australian Journal of Family Law* 129. More generally, for discussion of the law's evolution in this area see: Anthony Dickey, *Financial Agreements Under the Family Law Act*, LexisNexis, 2021; Grant Riethmuller and Robin Smith, *Family Law*, 7th ed, Thomson Reuters, 2022, chapter 32; Adiva Sifris et al, *Family Law in Australia*, 10th ed, LexisNexis, 2021, chapter 16.

[39] *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85, (2018) 56 Fam LR 559. Central to the High Court's decision was the power imbalance existing between the parties and the substantive unfairness of the agreement. Mr Kennedy was in his 60s and had assets of $18-$24m, while Ms Thorne was in her 30s, had no substantial assets, had travelled to Australia to be with Mr Thorne and wanted to have a child with him. The agreement limited her claims against him on separation to $50,000 after 3 years of marriage. Mr Kennedy told Ms Thorne that if she did not sign the agreement then the wedding would not go ahead. Ms Thorne signed the agreements despite advice of an independent solicitor that the agreements were 'entirely inappropriate' and 'the worst that the solicitor had ever seen'.

[40] Sarmas and Fehlberg, n 38.

intact couple relationships.[41] Preservation of financial privacy is likely to be important to signatories, making their recruitment as research participants unlikely. Furthermore, as those who enter prenups seek specifically to avoid the possibility of later FLA dispute, cases are unlikely to reach the courts. It would thus be unwise to rely solely on the Australian reported cases as a reliable indicator of how prenups are being used. More generally, it is well-known that in family law the reported cases provide little indication of how or whether the law is being used by family lawyers and their clients, as most separating couples do not go to court to resolve their disputes[42] and, of those who do, about 85% settle before judicial determination.[43] As a result, the reported cases are likely to present a rather skewed view of the law's operation and prenup cases are unlikely to be an exception, for reasons including those already mentioned, the costs of bringing an application to set aside an agreement, and that the court is only concerned with agreements that one party applies to have set aside.

To tackle these challenges, in 2021 we conducted semi-structured interviews with 40 family law professionals, including professionals who advise on prenups and those who do not. Our approach reflected the reality that 'family lawyers, as the only professionals with whom parties to financial agreements are required to have contact'[44] are the most readily identifiable sources of information about how the legislation is operating. Our aim was to explore professionals' views and practices in relation to prenups. In doing so, we sought to provide systematic evidence of current professional perceptions and practices and to extend understanding of prenups beyond the anecdotal, and the glimpses provided in the reported cases. This paper reports on lawyers' views on the sorts of clients who propose prenups, the extent and nature of power imbalance between the parties, whether parties should be able

[41] Fehlberg and Smyth, 'Binding Pre-Nuptial Agreements in Australia' n 15, 134.

[42] See further: Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System, Final Report,* 2019, [8.9]-[8.10].

[43] Family Court of Australia, *2020-21 Annual Report*, Fig 3.3; equivalent data was not presented in the *Federal Circuit Court, 2020-21 Annual Report*, but the Australian Law Reform Commission's *Family Law for the Future* (2019) put the figure at 70%: [3.58].

[44] Fehlberg and Smyth, 'Binding Pre-Nuptial Agreements in Australia', n 15, 134.

to enter prenups, and concerns regarding their professional liability when acting for parties entering prenups.

II. Methodology

For this study, as for the Fehlberg and Smyth study, [45] recruiting family law practitioners to interview proved extremely difficult – not just because family law professionals are generally time poor and that prenups are a specialist area of family law, but also because, at the time of our fieldwork, family law practice – and life in the broadest sense – was affected significantly by the COVID–19 pandemic. Seeking participants during such a stressful time for everyone pushed the boundaries of good social relations and respondent burden. That as many family law professionals did participate attests to their generosity and genuine interest in the study.

For this project, we used a flexible design with non-probability purposive sampling – that is, rather than attempting to recruit a random sample of lawyers who do family law work, potential participants were recruited through the Family Law Section of the Law Council of Australia, supplemented by snowball sampling (that is, research participants being invited to identify other potential participants) and the research team's professional networks. To be eligible for inclusion, potential participants needed to be practising family law, either as their sole practice area or one of their practice areas. As discussed further below, the final sample comprised 40 family law professionals (23 women, 17 men) in mostly metropolitan and some rural and regional locations across Australia. The majority (*n*=33/40) of participants were solicitors (20 women, 13 men); seven barristers also participated (3 women, 4 men). Most participants were highly experienced family law specialists.

Interviews occurred between March and October 2021. With fieldwork affected by COVID–19 (especially in Victoria), face-to-face, in-person, semi-structured interviews were replaced with COVID-safe data collection methods: primarily Zoom interviews, along with a small number of telephone interviews based on participant preference. Interviews generally lasted about an hour; were audio-recorded with participants' permission; and typically occurred in participants' workplaces (with a minority occurring in participants' homes due to

[45] Ibid, 127.

lockdowns, close contact rules, or convenience). Participants were asked to avoid mentioning any specific client details or cases during the interview that might allow third-party identification.

The interview guide explored several important areas of interest: the types of clients who were being advised about prenups; what advice was being provided; the reasons why some lawyers might not provide such advice; the practice and concerns of lawyers advising on prenups; the reasons why clients may decide not to enter a prenup; and why such agreements may be terminated. Slightly different interview guides were used with solicitors and with barristers given their different roles in the system but the interview guides each essentially addressed the same domains. All interviews were transcribed verbatim through a professional transcription service and checked by members of the team. Participants were also offered the opportunity to check their transcript prior to analysis. Each transcript was deidentified and each participant was assigned a code which identified the State or Territory in which the participant practised and whether they practised as a barrister or solicitor. Ethics approval for the project was obtained from all researchers' institutions.

Table 1 summarises the demographic profile of participants.

Table 1. Sample Characteristics (N=40)

	N	%
Draft or advise on BFAs		
Yes	31	78
No/rarely	9	12
Total	*40*	*100*
Sex		
Female	23	58
Male	17	42
Total	*40*	*100*
Years in practice (1-45)		
0-2	2	5
2-5	3	7
6-9	*3*	*7*
10-14	7	18
15-19	3	7
20+	22	55
Total	*40*	*100*
Profession		
Solicitor	33	83
Barrister	7	17
Total	*40*	*100*
State		
NSW	11	30
VIC	5	14

QLD	10	27
WA	4	11
ACT	5	13
TAS	2	5
Total	*40*	*100*
Client base		
Primarily Metropolitan	35	88
Primarily Regional/Rural	3	7
Metropolitan /Regional/Rural	2	5
Total	*40*	*100*

Note. Totals may not sum to 100% due to rounding.

In summary, the final sample comprised: (a) roughly equal numbers of women and men; (b) a largely experienced group of family law professionals (8 out of every 10 participants had 10+ years of experience; over half had 20 years or more experience in family law practice; range: 1–45 years, data not shown); and (c) lawyers who serviced clients primarily residing within metropolitan areas. Our sample was thus closer to that in Thompson's research rather than Hitchings' research in that all our participants were primarily practising in family law and most had a high level of expertise in family law. The relatively large proportion of participants in our study from Queensland and ACT, and relatively low percentage of Victorian participants is notable, and might reflect the respective low and high impacts of COVID-19 on those populations. The vast majority (*n*=31/40) of our participants provided advice or drafted binding financial agreements. This makes sense: potential participants with experience of financial agreements were more likely to volunteer than those who did not have that experience and thus believed they would not have much to add.

Importantly, our data were drawn from a moderately sized non-probability purposive sample. No claim is made that our findings generalise to the broader population of family law practitioners across Australia.

Analytic approach

Thematic analysis formed the basis of our analytic approach for this article. Specifically, the 40 interview transcripts were disaggregated into four sets (Interview #1–10; #11–20 etc), with each set comprising 10 interviews. Each team member was allocated a set of transcripts. Each team member coded 10 interviews in relation to four key questions discussed with participants, namely:

(1) What are the common demographic characteristics of proposers of prenuptial agreements?

(2) Is there often an imbalance of power between the proposer and the other party?

(3) Should parties be able to enter prenuptial agreements? Why/why not?

(4) Concerns about lawyer's own liability/ risks in advising on prenuptial agreements?

Each team member then cross-checked the coding of one other team member.

III Research findings

Our focus in this article is on our findings in relation to the four questions just set out, considered in the context of the previous research considered in Part I.

(1) Demographic characteristics of proposers

Consistent with previous research, our participants described proposers of prenups as falling into three main groups based on their assessment of proposers' motivations and circumstances:

Group 1: High net worth individuals, usually entering their first marriage or de facto relationship, who were seeking to *protect their **own** wealth*

Group 2: Couples who were entering second or later marriages or de facto relationships and:

- At least one of whom was financially 'burnt' the first time and sought to avoid that happening again and/or
- Both of whom wanted to *protect their wealth, often for their **children***

Group 3: Dynastic wealth, such that a party's parents or extended family required them to enter into a prenup to *protect their **family** wealth*

The three groups were neatly summarised as follows:

> Those that I do fall into two broad categories, mainly… well, three really. One is people who are entering into relationships who simply wish to protect their wealth; people who are entering into or are in second or subsequent relationships where they both usually wish to have some certainty as to how their property will be dealt with on their separation or divorce mainly for the protection of their

> children; and the third is where I am advising adult children in high-net-worth families, so where it's a multi-generational type asset protection.' (#10, NSW Solicitor)

However, as the solicitor's reference to 'broadly' suggests, there was some potential for overlap: for example, high net worth individuals could be motivated by a desire to protect their wealth for themselves and for their children, and because they had experienced what they considered to be financially costly relationship separation(s) in the past.

Our findings here both resonate with and extend Fehlberg and Smyth's earlier work, which also considered the characteristics of users of prenups.[46] Specifically, Fehlberg and Smyth found that 'use of pre-nuptial agreements was specific to certain groups', and that use was more likely in relationships with significant asset disparity between the parties, a second marriage for one or both, and the presence of a family asset or business that a party wished to quarantine'.[47]

In contrast, while the participants in our current study identified the same groups, there was much clearer emphasis than in Fehlberg and Smyth's study on the third group, dynastic wealth. Here, our findings resonated to some extent with Hitchings'[48] study and Thompson's study,[49] although in contrast to those studies, which found that dynastic wealth was the predominant group, our participants did not describe this pattern. This possibly reflected the lesser incidence of the super-rich in Australia compared to London and New York City.[50] Dynastic wealth prenups were nevertheless commonly encountered by our participants, particularly those who described their firm as 'top end' or similar. For example,

> In my experience it's not uncommon that the first call I get is from the parent, not the child … [o]f the prenup [agreements I negotiate] … I reckon more than half would be driven by parents. (#31 Victorian Solicitor)

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[46] Unlike the current study, their study did not explore power imbalance and whether prenups should be available to couples entering marriage or a de facto relationship.

[47] Fehlberg and Smyth, 'Binding Pre-Nuptial Agreements in Australia', n 15, 134.

[48] Hitchings, n 20, 31-32.

[49] Thompson, n 27, 79.

[50] Jemima McEvoy, 'Where The Richest Live: The Cities With The Most Billionaires 2022', *Forbes*, April 5, 2022, https://www.forbes.com/sites/jemimamcevoy/2022/04/05/where-the-richest-live-the-cities-with-the-most-billionaires-2022/?sh=2cf7d0c34e09.

We were also interested to explore whether in participants' experience, those proposing a prenup were more commonly male or female,[51] given empirical data regarding Australia's ongoing gender pay gap (currently 14.1 per cent) and wealth gap,[52] along with previous research, suggested to us that men would be more likely than women to be the proposers of prenups.

In response, ten of our 40 participants answered that proposers were more likely to be male, and no participants answered that proposers were more likely to be female. Consistent with Thompson's study,[53] our participants commonly spoke of the unmoneyed party who was asked to sign a prenup as female. However, most participants answered that a full response to whether proposers were more likely to be male depended on which of the three groups referred to earlier the proposed prenup fell into.

Regarding the group comprising high net wealth individuals protecting their own wealth (Group 1), most participants commented that the proposers were commonly male. For example:

> I think, at the risk of being very general in my response, the party who tends to have the greater financial resources by gender tends to be the male. Now, I'm not saying that I haven't done financial agreements where the situation has been the reverse, where the party with the greater financial resource is actually the woman (#37, WA Solicitor)

Another participant (#29, Victorian Barrister) also confirmed that men were generally more likely to propose prenups but stated that there was much more equality of the gender of the proposer where both parties are embarking on subsequent relationships (Group 2), saying, '80 to 90 [percent] male, but the second, third relationship stage, I'd pretty much say 50-50'. For this group (Group 2), proposers appeared likely to be more evenly placed economically and in their desire for an agreement. This is consistent with conclusions drawn in Fehlberg

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[51] We did also ask participants about whether they had advised or drafted agreements for non-heterosexual couples. Several, mainly metropolitan, participants had done so, but usually infrequently.

[52] Workplace Gender Equality Agency, The Gender Pay Gap, available at: https://www.wgea.gov.au/the-gender-pay-gap; CoreLogic, 2022 Women and Property Report – one year on, available for download at: https://www.corelogic.com.au/news-research/reports/women-and-property-22.

[53] Thompson, n 27, 81.

and Smyth's research and Thompson's research, which indicates that a prenup 'was an option that appeals to some men as well as some women' and it suggests that older women with financial assets who are entering second marriages also make up a small group of proposers.[54]

The dynastic wealth group (Group 3) was characterised by a different gendered dynamic which arose from male control, but less directly. As Participant #12 commented, 'I've completed plenty of these for women who stand to receive an inheritance. But in a weird way, that's still a bloke motivating it, because it's the dad, rather than [the parties]'. Another participant noted:

> Of the prenup [agreements I negotiate] … I reckon more than half would be driven by parents. I have a practice that I won't meet with the parent. I'm more than happy to take the call and speak to them but say you're not going to be my client and I need to speak to your son or daughter. But there's that ongoing conversation about 'Dad wants me to do this'. Typically it's dad. It's very rarely mum. (#31 Victorian Solicitor)

Our findings therefore support Thompson's observation of 'a gender dimension to prenups'.[55] Also similar to her study, participants in our study said that gender dimension was most apparent in cases where a male proposer had accumulated significant wealth.[56]

(2) Power imbalance?

Most participants said that there was often (*n*=19) or sometimes (*n*=12) power imbalance between parties seeking to negotiate prenups. A minority said that there was always power imbalance (*n*=4).

> There's obviously unequal bargaining power... if there wasn't unequal bargaining power then nobody would be asking for an agreement. (#29, Victorian Barrister)

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[54] Fehlberg and Smyth 'Binding Pre-Nuptial Agreements in Australia', n 15, 134 citing B.A. Atwood, 'Ten years later: Lingering concerns about the Uniform Premarital Agreement Act' (1993) 19 Journal of Legislation 127, Brod, n 19 , and H. Nasheri, 'Prenuptial agreements in the United States: A need for closer control?' (1998) 12 International Journal of Law, Policy and the Family 307.

[55] Thompson, n 27, 81.

[56] Ibid 81-82.

This is broadly consistent with the views of the New York attorneys interviewed in Thompson's study, who all identified a power imbalance.[57] Interestingly, two of our participants stated that there was never a power imbalance (*n*=2), and three participants did not express a clear view.

Participants who identified power imbalance as a factor pointed to a number of indicators of imbalance, with wealth disparity being the key indicator:

> [W]here one person's got all the wealth, and the other person has got nothing, that's probably the main one …. if you've got the wealth, you can put the pressure on the person, and say if you don't sign, I'm not going to marry you. (#21, Queensland Solicitor)

Several also referred to the less financially advantaged party's lack of knowledge of the wealthier party's – or family's – financial position:

> I've also seen situations where people, the other party, also has a paucity of knowledge about their new spouse's financial position. So that's a position of vulnerability if you don't understand your spouse's position, but the expectation is that you will go in and you will give up your rights. (#3, ACT Solicitor)

Also often mentioned was the relevance of age and experience, of both parties (in the case of family wealth) or one party (in the case of individual wealth):

> [Y]ou're looking for a difference in age and experience, probably difference in gender, certainly an imbalance in currently existing assets and earning capacities. (#32, Victorian Solicitor)

Several participants referred to the combined effect of age, wealth and gender (most commonly younger women without significant assets and older, wealthier men):

> I suspect there's some vulnerability where maybe the weaker party is younger and maybe hasn't had much life experience. So they're just going to sign up to this thing because they're deeply in love with the other party, without maybe thinking about all of the consequences, even if that's put to them in writing. (#26, Tasmanian Solicitor)

Our participants expressed particular concern for the position of younger women of childbearing age, who were focused on maintaining the relationship and who were unlikely to be able to envisage how their lives might change after having children:

> [Y]ou can never have the wisdom to know what's going to happen in people's lives. If I see a young girl who hasn't got kids yet and there might be a disparity in their asset base, I won't do them. (#15, NSW Solicitor)

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[57] Ibid 80-83.

Similar concerns about this issue were expressed in Thompson's study[58] and Hitchings' study.[59] However, our participants' perceptions of the position of younger women without wealth varied, in some instances reflecting concern and in other instances reflecting a cynical and stereotypical view as to the woman's motives.[60] For example:

> [P]articularly women … are prepared to act so significantly against their own interests under pressure of... It's about... and it is pretty fundamental ... what does it mean to be a woman at that age and what are you allowed to be interested in? And so protecting her own interests in that situation, there's something dirty about it. So, a lot of these women are under an enormous amount of pressure to appear to be the perfect girlfriend. (#31, Victorian Solicitor)

> I know that's a really cynical view, but you see the early 20-year-old and let's stereotype inappropriately, the 20-year-old girl with a 40, 50-year-old bloke, who is worth an absolute squillion, and she'll sign anything, it doesn't matter. She doesn't want that life to end. (#6, NSW Barrister)

Agreements sought by families to preserve dynastic wealth (Group 3) could be – but were not always experienced as – reflective of power imbalance between children and their parents:

> I have one at the moment. ... She's young ... and she'll inherit tens of millions. And Dad has come along to the appointments, but he's there just to get a sense and to share his views. But, ultimately, it's come down to her, but I can see there's a collaborative relationship. They're both on the same page. They're not all like that. These are astute businesspeople and see a relationship as a business transaction. (#26, Tasmanian Solicitor)

> [I]t's an awful lot of pressure put on kids. I did ... financial agreements for ... children of one wealthy family and it was a prerequisite to there being a rearrangement of the family wealth by the father that they all enter into these agreements. ... It's interesting to see the way that different children of the same parent react to that kind of pressure. So, I remember that one of them was 'Yes, absolutely got to do it. I want to protect Dad's wealth'. And at the other end of the spectrum, one who said, 'I can't believe that we're doing this. I'm only doing it because I have to, to make the arrangement work because it can't be just one of us that sticks out. And I'm not interested in Dad's wealth, I don't want it. ... [D]espite all of this, if we separate I'm still going to give her more money.' (#31, Victorian Solicitor)

Residency status was considered important but was not a circumstance commonly encountered among our participants:

> Most of the matters we do are typically from that same cultural background. That said, I have had many financial agreements, the past evolved historically, where I'll have the male and it's a younger immigrant from a past non-English speaking country. And, obviously that's precarious because there's all sorts of Thorne and Kennedy issues there and power imbalance issues there…[We] definitely see those types of matters coming through, but they're not, it's not the majority of our financial agreements. (#22, Queensland Solicitor)

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[58] Ibid, 82.

[59] Hitchings, n 20, 41, 85, 87.

[60] On such stereotypes, see Sharon Thompson, 'In Defence of the "Gold-Digger"' (2016) 6(6) *Onati Socio-Legal Series* 1225.

One participant, however, spoke at some length about power imbalance arising from residency status:

> Often they've come to Australia, they don't have family here, they don't have support networks, they don't have qualifications to get a job. They've come here to marry a person who's promised to financially support them for the rest of their lives so they're solely reliant on the finances of this particular individual who's trying to protect their assets. That's a very significant imbalance of power. I don't draft those type of agreements for the purchased wives, we call them. Unless they have already obtained their permanent residency. Because that lessens the imbalance of power. But even then, by that stage they've actually lived here and established a network of friends and they've got English skills by that point as well generally. So, time passes and that reduces the imbalance of power, but certainly at the beginning stages when they're wanting the prenup I'll say sorry, take your chances at separation with the court process. (#25, Queensland Solicitor)

Some responses conveyed that, in the end, power imbalance arose from one party's - the less financially advantaged party's - greater desire for the relationship to continue:

> I think the main imbalance of power is caused by someone who doesn't want to lose the relationship. I think that's the cruelest one – they really want the relationship so they will do anything. (#15, NSW Solicitor)

> 'If you don't sign the agreement, well, then I'm going to walk away from the relationship'. And that, by definition, has to be a power imbalance… (#28, Victorian Barrister)

> [Power imbalance is usually economic] But also emotional in the sense of the anxiety of people to have this great relationship [in] their life, that they want to be able to move on with and [entering the prenup] is a barrier that's in the way that needs to be dealt with and pushed to one side. So they can get on with the main game as they see it. (#32, Victorian Solicitor)

Power imbalance was further aggravated by haste: *'Is there ink on the wedding dress? Is this being rushed?'* (#26, Tasmanian solicitor).

The range of indicators of power imbalance identified by our participants resonated to some extent with indicators identified by the New York attorneys interviewed by Thompson. They too pointed to wealth disparity as a key indicator, as well as to a combination of factors such as age, experience and family pressure (the latter being linked to wealth).[61] In addition, as indicated earlier, Thompson noted that '[i]n particular, interviewees identified a gender dimension to prenups, even though they were not asked directly whether gender affected the balance of power'. [62]

Participants in our study who identified power imbalance often identified one exception to this: second marriages between older, well-established parties (Group 2). Consistent with

[61] Thompson, n 27, 81.

[62] Ibid.

participants in Fehlberg and Smyth's and Thompson's study, our participants generally expressed fewer concerns regarding prenups entered by older clients entering subsequent marriages compared to younger couples without children who were marrying for the first time:

> There's always some imbalance of power, almost by definition, I think it is one person usually has something that they want to protect, whereas the other person may not have that. Although, with older couples, or people entering into the second marriage without their own asset bases, it's much more equal usually (#32 Victorian solicitor.)

> The only ones that are ever really fair would be the couple who are embarking on a marriage later in life, who've had an open discussion and are fairly trying, usually, to reassure children, their own children, who are from earlier marriages … don't worry, we've protected the inheritance. (#36, WA Barrister)

For older couples, prenups were commonly seen by participants as providing a sensible option:

> [T]here are people for whom agreements are really helpful and suitable – people on their second marriages, who have established assets and established careers, adult children and no prospect of more children. The reason why those are really suitable is that they give people certainty and importantly they give the children certainty. So it takes a bit of stress out where someone wants to really parts now and they don't want pushback on the children. When you do those ones, the prospects of what might happen in the future, apart from health issues or a major loss of assets, it is reasonably predictable. They can make a really informed decision. (#15, NSW Solicitor)

The two participants who considered that there was no power imbalance reasoned that any power imbalance was resolved by the process of negotiating a financial agreement, including the provision of independent advice:

> [O]ne of the things that we have to be satisfied as an Australian legal practitioner and to sign those certificates is to ensure that there isn't an imbalance in terms of bargaining position… (#18, Queensland Solicitor)

> In terms of the imbalance of bargaining power, often, any sense of that is kind of resolved by the assurance they're getting quality representation on the other side. (#33, Victorian Solicitor)

In contrast, participants who considered that there was often or sometimes power imbalance did not have the same faith that the process could resolve imbalance:

> It depends on how you define balance of power because some people would say that it is balanced by both parties having legal representation which I disagree with. In most circumstances, there is a significant imbalance. (#31, Victorian Solicitor)

Several approaches to address power imbalance were described by participants, regardless of whether they considered that there was always, often, sometimes or never power imbalance. The approaches described included: (a) insisting on disclosure when acting for

the proposer, and in some instances not insisting on disclosure when advising a party presented with an agreement (the reasoning being that the agreement would be easier to set aside in the future); (b) advising parties seeking agreements not to discuss the agreement at home with their partner in case this was construed as pressure; (c) declining to act in relation to agreements proposed shortly before the wedding and suggesting to clients that they come back after the wedding (the 'too soon' deadline commonly being described as after the invitations had been sent out); (d) ensuring that careful and clear independent legal advice was provided; and (e) doing their best to ensure that the agreement was substantively fair. All but (b) were approaches described by participants in Thompson's research[63] and Hitchings' research.[64] While the goals of protecting clients and protecting the lawyers' own interests often coincided, participants were acutely aware of what they considered to be their professional limits. As one participant remarked:

> [A]s long as the correct advice is given and as long as the agreement is correctly executed and as long as the advice provisions are correctly executed... Not much anyone can do really about the imbalances. (#39, WA Solicitor)

(3) Should parties be able to enter prenuptial agreements?

A significant majority of participants (*n*=27) considered that prenups should be an available option for couples; only a small number of participants opposed availability (*n*=7) or were ambivalent on this issue (*n*=5).[65] Interestingly, this pattern was consistent with Hitchings' research,[66] which was conducted in a context where prenups were not legally binding and where enforcement was uncertain, perhaps indicating the powerful influence of the notion of freedom of contract in both legal systems.[67]

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[63] Thompson, n 27, 85-87.

[64] Hitchings, n 20, 50-55, 61-64,68-70, 132.

[65] One (n=1) participant did not provide a clear response to this question.

[66] Hitchings, n 20, 105-106.

[67] Emma Hitchings, 'Official, Operative and Outsider Justice: The Ties That (May Not) Bind in Family Financial Disputes' (2017) 29(4) *Child & Family Law Quarterly* 359.

Among our participants, those who considered that prenups should continue to be an option for couples emphasised the importance of individual choice and autonomy as key values that they considered as underpinning such agreements. As one participant said (while acknowledging the need for safeguards), *'Adult people should be able to arrange their affairs as they choose'* (#2, ACT Solicitor).

Perceived problems with the family law system, including cost and delay, were also cited as reasons for favouring the availability of prenups as a potential means of avoiding engagement with the system. For example:

> At the moment with all of the difficulties in the Family Court, it gives parties knowledge or the security that they're not going to end up in a process that could take three or four years, cost them hundreds of thousands of dollars and still end up with the same outcome as one for which they could provide at the earliest stage of their relationship. (#10, NSW Solicitor).

> [T]here's still a place for them…Unless and until Australia has a properly functioning court system, why not permit people to try and do something better?' (#6, NSW Barrister)

Perceived unfairness of prenups was not a barrier for those who supported their availability. As one participant said, *'Just because an agreement isn't balanced and fair or it's a bad bargain, it doesn't mean that it shouldn't be done'* (#25 Queensland Solicitor).

Participants who opposed the prenup option for couples typically considered that such agreements were open to abuse of women by men. One participant put it this way:

> Personally I think it [the BFA legislation] should just not be there are all. That would be my reform to the legislation. Because it's too open to abuse....I feel like it is another tool for men to oppress women. (#13, NSW Solicitor)

Those in this group also tended to have more faith in the family law system than the previous group. As another participant noted:

> If I never drafted another pre-relationship BFA I would be a happy lawyer… I hate them…. I just don't like the idea that anybody gives up their rights because that's what you're doing… I have quite a bit of faith in the Family Court. I don't know if it's misplaced or not, but I actually have quite a bit of faith in the system. And I worry in particular for women who may be in a position of, if there's imbalance in the relationship, that they are giving up an entitlement to have an independent arbiter look at their situation. (#3, ACT Solicitor)

Participants who were ambivalent on the issue of a prenup option being available to couples spoke of a need to balance choice and vulnerability:

> That's a difficult question for me. On the one hand, I think that the Family law legislation is remedial legislation designed to make sure that a party is not left in a disadvantageous financial position as a consequence of having been in a relationship. So, I'm therefore a little bit uncomfortable with ousting

> a piece of legislation which is meant to be remedial in nature. That said, if you take two people who are giving informed consent to the process are properly advised, then I don't see any reason why they have to choose for themselves a regime which has been chosen by parliament. They are entitled, I would have thought, provided they have sufficient information. That said, relationships are a fascinating thing, people behave in all sorts of ways when they think they're in love, or they, you know… And so, you can have two people who present as highly intelligent, informed etc, and it's very likely that the agreement will be disadvantageous to only one of them… (#7 NSW Barrister)

They also spoke of the need for better court funding:

> I'm generally against private ordering. And I think there's a push for it because it reduces the burden on the state to provide services. And so, ultimately, I think that that impacts on the people that are the most vulnerable. So, I think that the government should just fund the Court. And then they could provide a timely service. (#7, NSW Barrister)

Some also spoke of the need for court review of financial agreements. For example, #36 (WA Barrister) suggested that the federal government *'abolish that part of the Act'* and bring back what were the previous s 86 and s 87 agreements.[68] They commented that a benefit of this would be there would be a register of agreements as often *'you can't find them'*. Another participant suggested that rather than abolishing Part VIIIA they would:

> [J]ust put it in that it can be reviewed by the court….in cases that warrant it. …there is a place for them, because if people can enter into the agreement, and know that it's something that they couldn't have possibly contemplated happen, then the court can step in, and it's not a problem. Or that, you know, it just doesn't turn out the way it was supposed to. Then the BFA is a proper record of what they wanted to do. What their assets were, and what their intentions were and that could be enormous help to the court. (#38, WA Solicitor)

Similarly, a NSW solicitor suggested that there should be 'court oversight' and agreements should be set aside on the basis that they were not '*just and equitable at the time of drafting'*:

> I think that there would be some validity to asking a registrar to sign off on binding financial agreements before they're otherwise signed up. And registered, for example. And then that way, someone has made a determination that it's appropriate. Someone's asked questions. It means that the ability to challenge them in the future would be virtually zero and that would give a lot more confidence. It means that a lot more of them might occur and it means that they'd likely be a lot fairer. (#16, NSW solicitor)

A further participant observed that 'Because they're not reported, they're not registered … we don't know what's going on; how bad or good they are' (#38, WA Solicitor). This participant did not favour abolishing prenups but would make them subject to court review in some cases ('*I'd just put it in that it can be reviewed by the court…but it's only to be exercised in cases that warrant it'*) and registration so they don't get lost *('I've mentioned to you two*

[68] See further n 6 and accompanying text.

cases, where, just the mere whereabouts and existence of the thing was an issue. Well, that's just nuts'). Another participant who also supported court approval said that while this step *'adds cost'*:

> It provides a level of scrutiny which means… which does create certainty. So, if the court were to scrutinise the agreement at the outset, then you would imagine that you would have less examples of people entering into agreements by, you know, undue influence and unconscionable conduct…. I mean, you could require that the court look at the agreement like they used to approve Section 87 agreements. It doesn't have to accord with Section 79 and 75/2, it just has to be entered into in a way which is procedurally sound. (#7, NSW Barrister)

(4) Lawyers' concerns about their own liability/ risks in advising on prenups

The concerns of participants in relation to prenups were wide-ranging, including concerns for clients, concerns about the fairness of agreements generally, concerns about private ordering in family law, concerns about billing, and concerns about other practitioners drafting and advising on agreements. We focus here on participants' concerns about their own risks and potential professional liability, which emerged as a clearer theme in our study than in previous research.

Writing in 2012, John Wade termed these risks the 'perils of prenuptial financial agreements':

> Legal practitioners in Australia who draft financial agreements before (s90B; 90UB) or during a marriage or relationship (s90C; 90UC) have a high risk of exposure to professional negligence. Vigilance, protocols and expertise only reduce the risk; it is never eliminated. That is why a number of experienced and smart family lawyers in Australia will never draft pre-nuptial (s90B; 90UB) or "during relationship" agreements. They send their clients to more naive or risk-taking lawyers.[69]

Our participants echoed these concerns. For example, participant #29 (Victorian Barrister) said, *'I am told, although I don't know, that there are some firms who simply refuse to do the prenup ones. Because they say look, I just can't be bothered having the fight with the insurers in 5, 10, 15 years' time'*. Participant #2 (ACT solicitor) commented that they *'know anecdotally from some of the big players in Sydney that they won't do them. … They say it's not worth the risk… Probably pretty smart, frankly'*. The same participant commented that *'if I was a small*

[69] John Wade, 'The Perils of Prenuptial Financial Agreements: Effectiveness and Professional Negligence.' (2012) 22(3) *Australian Family Lawyer* 24, 24 .

practitioner, or in a small firm, you wouldn't want to be doing this stuff, I don't think'. A Victorian solicitor acknowledged that they received *'a lot of matters referred … by Sydney practitioners, because of their reluctance to do financial agreements'* (#32). Another participant considered that this reluctance was linked to fears of future liability: *'My understanding, well, rephrase, my experience is that the reluctance for practitioners to draft financial agreements is the liability with exposing themselves many years down the track.'* (#22, Queensland Solicitor).

While most participants in our study were still acting for clients who wished to enter prenups (*n*=31/40), almost all expressed concerns about the risks of doing so:

> …you're exposed to an incredible amount of risk. … And it's really something I do because, I think, I'm very interested in them. I think they're legally speaking quite fascinating…. But if the government decided to get rid of them, it's not going to bankrupt our firm. It might even save us from a lawsuit. (#34, Victorian Solicitor)

Participants commonly commented that this area of practice was the one area where they feared being sued.[70] One stated that *'Lawcover [the NSW professional indemnity insurers] …they've certainly indicated that the rise in claims in family law is almost directly attributable to binding financial agreements'* (#16, NSW solicitor). Another who said that they tended to act *'for the money'* and therefore tended to draft prenups rather than advise on them, commented that prenup work is a *'massive risk'* for lawyers (#12, NSW solicitor). Comments that appeared fatalistic were made by several participants, such as, *'no-one gets out alive, no-one escapes'* (#38, WA solicitor) or, '*when somebody drafts a BFA, I tell them to notify their insurer, because there's bound to be a claim'*. (#36, WA Barrister). Another commented:

> [I]t's only a matter of time… I think it's true, that almost every financial agreement will be the subject of litigation….Because someone will always be unhappy. It's the nature of the beast' (#6, NSW Barrister)

Participants were highly aware that there was an added risk of professional negligence claims in relation to advising or drafting FLA financial agreements because they could face a claim from either their own client or the other party. If the agreement was set aside, then the party who would have benefited from the agreement could argue that their subsequent loss was caused by the lawyer's failure to provide proper advice:

[70] See Hitchings n 20, 40.

> But there's also a prospect for the other spouse to sue the other party's lawyers, in my opinion. … So yes, I think insurance is something I think about in every matter, in terms of our exposure and that's I guess … ultimately an issue for the partners to decide, but yes, it's certainly a concern. (#34, Victorian Solicitor)

Conversely, however, they also appreciated the benefits to their practice of litigation to set aside prenups:

> [T]he technicality …I sort of laugh to myself, that the purpose of these was to avoid litigation, but in fact, there's an entire section of my practice, which is devoted to litigation about them (#29, Victorian Barrister).

Solicitors often expressed concern that claims could arise many years after their drafting and/or advice was given. In language reminiscent of John Wade's' 'hidden land mines'[71] one participant described prenups as, '*ticking time bombs that could go off at any time'* (#34, Victorian Solicitor) while another described them as *'skeletons in the closet'* (#13, NSW Solicitor). When asked whether a prenup that they had acted on had been the subject of a complaint or legal proceedings another participant said:

> No, I don't think so. I'm crossing my fingers that it never happens…. But I live in fear of the day that it will happen because I feel like some people do just want to give it a crack and see if they can get it set aside. (#19, Qld Solicitor)

Another conveyed the anxiety involved in reducing the possibility of future challenges:

> When you're looking at a document that is, you know, hundreds of pages long, I'd be concerned that it could contain errors that you just don't notice when you've read it 12 times. And that error could be the thing that exposes you to liability. So, it's not necessarily lack of expertise, it's unforeseen things that somebody else might suggest later that I ought to have been able to foresee. (#7, NSW Barrister)

A particular concern regarding prenups was 'crystal-ball gazing' where parties – especially women– were young *('generally, the financial position of the party has little to do with the*

[71] Wade, n 69, 24.

provision you make' (#6, NSW Barrister) and some life events could not be predicted, for example, a child with special needs (#8, NSW Solicitor)).

These fears appeared to contribute to understandably defensive practices on behalf of solicitors.[72] For example, one participant commented, *'I'll say it to my client, "You'll sue me in the future when this all goes wrong, so let's get it right"'* (#26, Tasmanian Solicitor). A fear of being sued could also encourage participants to focus more squarely on protecting themselves: *'If clients want to sign it then we can't do anything other than put forward our advice and protect our backsides and let them do what they want'* (#19, Queensland Solicitor). Another participant, a barrister, commented that solicitors tended to refer to barristers to *'spread the insurance risk'*; when the potential liability '*hits an indeterminate threshold in terms of exposure to liability, they will bring it along and get me to advise and tick off on it, to cover themselves from a risk perspective*' (#6, NSW Barrister). Another barrister similarly commented:

> BFAs are the only thing that we can properly get sued for in family law matters. So everyone's wary of it. So it will be a cautious solicitor who wants counsel engaged to help shoulder some of the burden…' (#28, Victorian Counsel)

Despite these concerns, solicitor participants in our study consistently said that they did not usually ask barristers or counsel to review agreements for them. This was not surprising given their own generally high level of expertise and experience.

The concerns regarding risks for lawyers raised by our participants resembled those raised by participants in Fehlberg and Smyth's earlier study but provide more detail. In Fehlberg and Smyth's research, participants' concerns centred around potential professional liability for providing certificates of independent legal advice. Our participants conveyed anxiety regarding liability that could arise many years away, the prospect of being sued by their client or the other party, and the difficulties of 'crystal ball gazing'[73], and defensive practices were at least partly a response to these concerns. Hitchings' research and

[72] See further: John McGinn and Paul Bullock, 'Binding Financial Agreements - Drafting Effective Clauses and When to be Worried - the landscape post Thorne & Kennedy' Paper presented at the 19th National Australian Family Law Conference, Adelaide, 15 August 2022.

[73] See also, Thompson, n 27, 90, 98; Hitchings n 20, 38.

Thompson's research also identified lawyer concern about 'crystal ball gazing', but the concern of being sued was more mixed amongst participants in Hitchings' research[74] (probably due to the diverse nature of her sample, which ranged from top end specialists acutely aware of risk, to high street (generalist) practitioners who had not considered this prospect)[75] and was not discussed in Thompson's research (possibly because independent legal advice is not required in New York State and prenups are so rarely set aside there).[76]

While anecdotally in Australia it has been suggested that many specialist family lawyers are 'refusing to draft prenups, fearing future complaints from cashed-up divorcees disappointed with an outcome or a court disregarding the [agreements]',[77] and this was suggested as a reason for apparently low use of prenups by Fehlberg and Smyth,[78] the majority of our participants continued to draft prenups for clients and to advise clients who were asked to enter an agreement by their partner. This was consistent with the highly skilled and specialist nature of our sample overall. There was, however, concern among our participants regarding lawyers without sufficient experience acting for clients entering financial agreements:

> Well, it's about people practising in a jurisdiction they don't properly understand what's involved. It's hard enough not to make mistakes when you know what you're doing. And it's a real difficulty when you get a badly... a shockingly or badly drafted financial agreement. You spend more time and effort trying to correct it than if you just drafted it yourself. (#35, Victorian Solicitor)

Our findings thus lend some support to the suggestion that lawyers acting in relation to prenups include both those highly experienced in the area and those who lack this and so pose particular risks for their clients.[79]

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[74] Hitchings, n 21, 70-75.

[75] Ibid 8, 10.

[76] Thompson, n 27, 77, 89.

[77] Grant Feary, 'Risk Watch: The Risks to Lawyers of Pre-Nup Agreements' (2015) 37(9) Bulletin (Law Society of South Australia) 23, citing AFR 23/7/2105; Jacky Campbell, 'Binding Financial Agreements Unbound' (2012) 11 *Law Institute Journal* 35.

[78] Fehlberg and Smyth, 'Binding Pre-Nuptial Agreements in Australia', n 15, 135.

[79] Simone Herbert-Lowe, 'Risk: The Risky Business of Advising on Pre-Nuptial Agreements' [2015] (10) *LSJ: Law Society of NSW Journal* 76.

IV Conclusions

Our study sought to explore pre or early relationship ('prenup') style financial agreements, with a focus on who is using them and why, and what lawyers think about these agreements. Semi-structured interviews were conducted with 40 family law professionals (33 solicitors; 7 barristers) via Zoom or telephone. Participants were recruited primarily through the Family Law Section of the Law Council of Australia. Most were highly experienced family law specialists.

Our data provide valuable and highly diverse insights on family law professionals' perceived benefits and risks of prenups for clients and themselves. Despite that diversity, four clear findings emerged. First, and consistent with previous research by Fehlberg and Smyth, Hitchings and Thompson, three main groups of proposers were described by participants: (Group 1) wealthy individuals, usually on their first marriage or de facto relationship, who wanted to protect their own wealth; (Group 2) couples entering later marriages or de facto relationships where at least one of whom was financially 'burnt' the first time and sought to avoid that happening again and/or both of whom wanted to protect their wealth, often for their children; and (Group 3) ostensibly, the families of individuals with dynastic wealth who wanted to protect family wealth. Proposers in Group 1 were usually men, whereas men and women were more evenly balanced in Groups 2 and 3 – although fathers played the dominant role and in reality were often the 'real' proposers in Group 3.

Second, and consistent with Thompson's research, most study participants considered that there was an imbalance of power between the parties to financial agreements – often or at least sometimes. The key indicator of imbalance identified by study participants was disparity in the parties' wealth, accompanied by fear by the less wealthy party that the relationship would be over if they did not sign. Also consistent with Thompson's study, our research identified a gender dimension to the balance of power between parties entering prenups. Other relevant factors included differences in age, experience and lack of knowledge of the other's financial position, and insecure residency status. The combined effect of age, wealth and gender, most commonly involving older, wealthy men and younger women without significant assets was often identified as an aspect of power imbalance. Concern was expressed for women of childbearing age who may not have considered that their financial circumstances might change if they have children. Haste in procuring the agreement was

considered to be an aggravating factor. Study participants who considered that power imbalance was often or sometimes present identified a key exception: agreements entered by older, well-established parties on second or later marriages or de facto relationships (Group 2). Such agreements were viewed as generally being relatively equally balanced.

Third, and consistent with Hitchings' research, most participants considered that people should have the option to enter prenups. Participants in our study favouring prenups pointed to the importance of providing for what they considered to be individual choice and autonomy, as well as to perceived shortcomings of the family law system (and therefore the benefits of avoiding it if possible). On the other hand, the small number of participants who opposed the availability of prenups or were ambivalent on this issue expressed concerns about their potential to take away a party's rights or to reinforce abuse of (usually male) power. This group also tended to have more faith in the family law system.

Finally, compared to previous research, our study participants expressed considerable concern and anxiety regarding the risks to them posed by drafting and advising on prenups. The fear of professional negligence claims, potentially well into the future, was common amongst study participants. Of particular concern was the fact that it is impossible to anticipate (and therefore draft in or advise on) all aspects of what might arise in the future in a relationship, and this is particularly so where the parties proposing the agreement are young. Despite these concerns, most of our study participants reported that they continue to engage in prenup advice or drafting work, while noting anecdotal evidence that some of their colleagues had stopped doing so.

Importantly, this research begins to address the problem that two decades since the introduction of legally binding prenuptial agreements in Australia (and 13 years in the case of legislation covering de facto partners), very little empirical data were available on lawyers' perspectives on prenups and on who is using them and why. While our participants conveyed diverse views and practices, perhaps the most striking finding in the research is that while most considered that power imbalance often or sometimes existed between the parties entering prenups, they also supported the continuing availability of prenups based on the perception that they allow for individual choice and autonomy.

We consider that it is difficult to reconcile the view that a prenup can promote the autonomy of *both* parties if power imbalance is a feature of most prenups. Indeed, almost all

our participants acknowledged that the legislative requirements for entry into *FLA* financial agreements, including the requirement that the parties receive independent legal advice before signing, could not remove power imbalance between the parties to prenups. The tension or ambivalence often evident in responses seemed to be due to a personal sense of unease that 'the problem with the prenuptial context is that power imbalance is so ubiquitous',[80] combined with a continuing professional preparedness to facilitate them. Most appeared to resolve this through a pragmatic understanding of the business of conducting a legal practice (many were acting for proposers who were high-end, high-value clients who could always go elsewhere), and a clear understanding of what they considered to be their professional role: if the law allows prenups and does not prevent people from entering unfair agreements, then their role was to provide appropriate advice in accordance with the legislative requirements.

This approach is more likely to serve the interests of proposers of prenups and lawyers. It illustrates Thompson's point that while 'independent legal advice is one way of levelling the playing field when prenuptial agreements are being negotiated … evidence of such advice will not always guarantee a fair agreement'.[81] While independent legal advice may perhaps make fair process for entering agreements more likely, substantively fair agreements (that is, agreements within the range that would be awarded by a court under the *FLA*) are likely to be better achieved by amending the legislation to introduce a requirement of substantive fairness. Such amendment would provide that a financial settlement on relationship separation be within the range of what a court would consider to be just and equitable for FLA s 79/90SM, along with a requirement of court registration and/or scrutiny of agreements, as was suggested by some of our participants. These changes would remove two particularly problematic foundational principles of prenups that underpinned the introduction of Part VIIIA in 2000: 1) that parties should be free to enter an unfair agreement; and (2) the transfer

[80] Thompson, n 27, 103.

[81] Sharon Thompson, 'Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer?' (2011) 4 *International Family Law* 327, 331.

of ‘the significant responsibility of overseeing agreements … from the court to independent advisers’.[82] It is our view that such changes are long overdue.

[82] Fehlberg and Smyth, ‘Why Not?’ n 15, 18; McGinn and Bullock, n 72, 6, suggest that excluding the remedial role of the *FLA* was ‘paid for by the provision of independent advice’.