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Should you say yup to a prenup?

Young couples are seeking financial agreements amid first-home-buyer woes, but it's not always the right move.



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Wealth reporter

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Family lawyers are seeing more young couples seeking prenuptial agreements as soaring house prices prompt parents to offer financial support – with strings attached.

Between 2002 and mid-2022, the average deposit more than doubled from less than \$50,000 to more than \$100,000, the Productivity Commission has found. It means the average first home buyer deposit is more than 80 per cent of the average annual household disposable income.

As a result, more than one-in-five (21 per cent) first home buyers received some help from the bank of mum and dad, a July survey by Canstar found.



Family lawyer Fiona Reid says there is often external pressure for a prenup agreement. Oscar Colman

"In more recent times, with how difficult it is for young people to get into the property market, we see a lot of family contributions or loans [that parents want to protect]," says Gary Yan, partner and family law specialist at Coote Family Lawyers.

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Much of his work involves drawing up pre-cohabitation or prenuptial agreements. "When young people are acquiring their first property – whether as a couple or if they've entered into a relationship with a property – then they try to protect that as much as possible," says Yan.

Sometimes he'll see couples come in, go away and discuss the potential agreement and decide they don't want it.

"It is a difficult conversation to have with your partner. If there's a commitment to have a marriage that's meant to be for all time, it's hard to go into it and say 'Well, what's mine is mine.'"

It's easier, however, for mum and dad to raise this, he adds. "If one party's parents are giving \$200,000, they'll want to make sure that's protected."

When should you consider a prenup?

Fiona Reid, managing director at Reid Family Lawyers, agrees that as younger people receive more financial assistance from their families, there's often external pressure to put an agreement in place.

Most couples will seek a prenup if there is a significant imbalance in assets, if there are children involved or if they have experienced a family court dispute in a previous relationship, says Reid.

"They want to protect their assets for their children, and they don't want to go down that path of litigation which is stressful and expensive. It causes irreparable damage to the relationships between people in most cases."

Drafted properly – meaning the prenup ticks the technical and legal requirements, such as both parties having received independent legal advice – it should stand up in court.

However, it can be overturned if a court finds: there was a fraud occurring at the time the prenup was drawn up; a failure to disclose a financial position; if it was drawn up to beat a separate creditor; or, if by respecting the prenup, it causes hardship to a child in the relationship.

If a prenup doesn't sufficiently consider potential changes in circumstances – such as the loss of a job, assets or the introduction of a child – it can be voided. Prenups signed under duress – for example [one foisted upon a partner mere days before the wedding](#) – will raise eyebrows too.

"Family court judges have a very wide discretion to determine cases, so when we're advising clients, we basically say, 'We will do everything we can to make sure this is binding, but at the end of the day, we can't give you a guarantee because it's not ratified by a court,'" says Reid.

Critically, just because a prenup is technically unfair doesn't mean it will be thrown out either. That's where independent legal advice comes in, says Reid.

And it's also where it can get fraught. After all, what do you say when your lawyer tells you that the prenup your partner wants you to sign is actually a dud deal?

Not always the right choice

In most instances, Reid would steer young couples away from getting a prenup. She adds that financial agreements don't need to be drawn up before a marriage and can occur at any time including after a divorce.

For example, if years down the track, the relationship is looking shaky and one partner believes they may soon receive an inheritance, a financial agreement can be drawn up then.

"[But] if there are two people coming into a relationship with a car, a little bit of super and \$10,000 in the bank, you wouldn't go to the trouble [of getting a prenup]," she says.

Parents wishing to protect financial support used to purchase a property can also protect that without a prenup, says Yan.

A loan agreement – which makes it clear that money provided is a loan rather than a gift – can be one way of protecting funds. But it's much better to draw up this sort of agreement when the loan is being advanced, rather than at separation.

And, as Reid says: "If it's a loan, it's a loan."

"If you say this is a loan, but there are no repayments made, no agreements, nothing's been registered on the title of the property, it's very hard to prove to a court that the intention of the person who gave the money was that it was a loan," she says.

Protecting a financial sum like this in a prenup isn't always watertight, says Reid. That's because over the course of a 20-year relationship, for example, a court may well consider that one partner's initial contribution was offset by the other partner's contribution to the family unit over time.

"After a long marriage, that initial contribution loses some of its significance or value over time," she says.

Tricia Peters, collaborative financial planner at family law firm MELCA, says there are few issues as "perennial and big" in family law as young couples whose parents have given them money. MELCA has a goal of supporting separating couples without going to court.

In Peters' experience, part of the challenge in dividing assets is that traditional divorce settlements are adversarial by nature. It's often better for all parties involved to have a collaborative approach to finances for the duration of the relationship and its conclusion.

"We try to have a more interest-based discussion, where they acknowledge that they got the money, they acknowledge what it means to each of them to have the money and what it means to the family and the ongoing family relationship.

"They make decisions about whether [a parental gift or loan] is ... something they want to acknowledge by giving some money back to the parents or weighing some of the settlement on the side of the person whose parents put in," she says.

At several thousands of dollars per person, and generally no less than \$5000 each, couples need to think hard about what they're hoping to achieve by drawing up a prenup, she adds.

Instead, couples could consider seeing a financial counsellor or adviser who can help them understand their own attitudes towards money and build a [healthy financial relationship](#).

"Different attitudes and money personalities play a very big part in marriages continuing to be happy or not," says Peters.

"But that sort of stuff could be teased out by a skilled couples' counsellor, [so couples] talk about how they want to treat each other."

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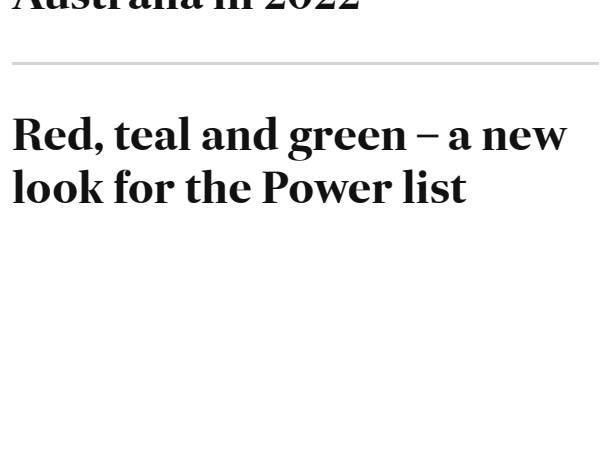
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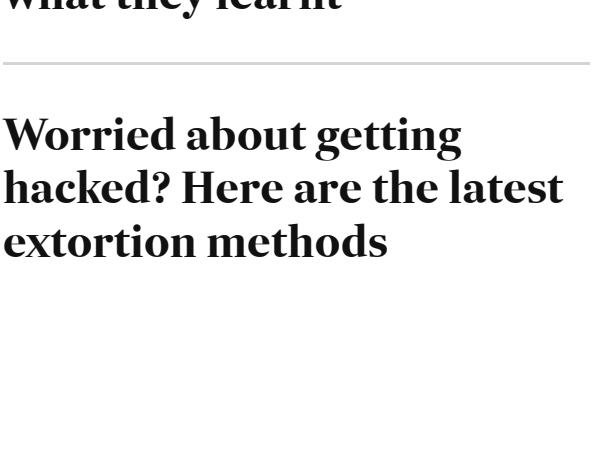
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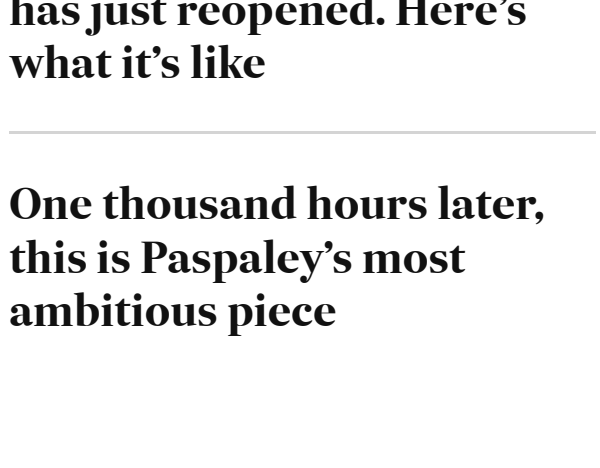
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