

MAY IT PLEASE THE COURT:

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (“**NZLS**”) has been granted leave by this Court to file written submissions (no longer than 15 pages) by 4 March 2026 in order to assist the Court’s consideration of the issues.
2. Having had the benefit of reading the submissions of the parties and the judgments below, it appears that there are three broad issues on appeal: (1) the applicability of Pt 8 of the Property (Relationships) Act 1976 (“**PRA**”) (and the s 61 election process) to s 21 agreements; (2) the ability of spouses¹ (and presumably others) to contract out of intestacy entitlements; and (3) the correct interpretation of the instant s 21 agreement.² NZLS submits on (1) and (2) but not³ (3).
3. In summary, NZLS submits:

Applicability of Pt 8 (and the s 61 election process) to s 21 agreements

- 3.1 The courts below and the parties have proceeded on the premise that, even where spouses have entered into a s 21 agreement that is intended to apply upon death, the survivor is required to make an election under s 61 of the PRA between Option A and Option B.
- 3.2 Whether that premise is correct should be tested. With respect, the premise appears to require judges to force s 21 agreements into a s 61 process that is inapt. After all, the terms of s 21 of the PRA are clear:

¹ The term “spouse(s)” is used generically to refer to all types of relationship to which the PRA applies.

² It appears that the appellants accept that spouses can so structure their affairs that (1) they can conclude a s 21 agreement in order to determine which estate owns their property upon the death of one of them; and (2) they enable succession law (either by will or intestacy provision) to apply to the estate of the first to die: APP#1.12. What the appellants also appear to submit is that the Courts should adopt, nonetheless, a principle of construction of s 21 agreements to the effect that ‘double-dipping’ (the term the appellants use to refer to the structuring just described) should not be countenanced, unless expressly provided for by a s 21 agreement and/or will: APP#1.10. To do otherwise would be to facilitate outcomes that are commercially absurd: APP#1.10. NZLS does not consider that there is a strong basis for adopting such a rule of construction. Rather a Court should construe a s 21 agreement in accordance with ordinary canons of contract construction, having regard of course to the particular factual matrix and the PRA/spousal arrangements context.

³ Subject to what is said in the preceding footnote.

the purpose of a s 21 agreement is to contract out of the PRA insofar as the status, ownership and division of the spouses' property (including future property) is concerned. It is inconsistent with that very purpose to hold that the survivor, who has entered into an agreement to contract out of the death provisions of the PRA, has a right to (and therefore must make) an election between Options A and B. Put another way, where a s 21 agreement deals with the status, ownership and division of the spouses' property (including future property) on the death of one of them, there is no call to engage with those sections of Pt 8 of the PRA that address the status, ownership and division of the spouses' property. NZLS says that the better view of the statutory scheme bears that out; more detailed submissions on this are made later.

3.3 If correct, then the sequence of steps is as follows:

- (a) First, determine whether the s 21 agreement contracts out of all or some provisions of the PRA on status, ownership and division of relationship property on death and, if so, whether in respect of some or all of that property.
- (b) Second, to the extent the s 21 agreement does so contract, then the terms of that agreement govern and there is no cause for the survivor to make an election in respect of the matters that the s 21 agreement covers. (The only exception to this is where the survivor seeks to set aside the agreement. In that case, an application to set aside should be made and notice of election under s 61 will need to be given as per s 87(2)(b) of the PRA (precisely because the whole point of setting aside the s 21 agreement is to enliven the PRA provisions that would otherwise have been contracted out of.))
- (c) Third, to the extent that the s 21 agreement does not deal with division of relationship property on death (or only does so in respect of some of the relationship property), then there is still a role for Pt 8 of the PRA to play: the survivor is required to make an election under s 61 in respect of the matters not covered by the s 21 agreement.

Contracting out of non-PRA matters

- 3.4 The purpose of a s 21 agreement is quite specific. It is to “contract[] out of *the provisions of this Act*” that relate to the status, ownership or division of the spouses’ property: s 21(1). Thus, a s 21 agreement proper (1) cannot override other features of the PRA; and (2) cannot deal with non-PRA matters. Proposition (2) does not mean, however, that spouses cannot reach an agreement on non-PRA matters. They might well be able to. But any such agreement is not a s 21 agreement proper.
- 3.5 In regard to the possibility of addressing non-PRA matters:
- (a) First, the extent to which an agreement on matters other than the PRA can be reached is a matter to be determined in light of the terms of any applicable statute or rule of law.
 - (b) Second, it is not unusual for spouses to agree on many matters that go beyond contracting out of the PRA. In the NZLS’ experience, many spouses choose to deal with a wide range of potential claims including, for example, under the Family Protection Act 1955 (“**FPA**”), Administration Act 1969 (“**AA**”), Law Reform (Testamentary Promises) Act 1949 (“**TPA**”), and the Family Proceedings Act 1980 (“**FPA80**”) “in one hit”. It is also not unusual to find that all or some of these matters are dealt with in a single document. (Whether that is best practice is a matter for another day.)⁴ For the purposes of argument, these submissions will refer to a spousal agreement that deals with multiple matters as an “omnibus agreement” (noting that it is common to find the terms of a s 21 agreement incorporated within an omnibus agreement, but equally, many practitioners prefer to set out a s 21 agreement in its own separate document.)
 - (c) Third, since the purpose of a s 21 agreement proper is only to contract out of the provisions of the PRA, it is perfectly permissible for the parties to such an agreement to leave other statutes to apply to their respective estates upon the death of one of them (i.e., to choose not to address the applicability of those other statutes upon death).

⁴ See, for example, K Lenahan & K Lawrence, “Contracting on, contracting out and shaking it all about!” (2026) 26(2) Property Lawyer 4 at pp 5-6.

(d) Fourth, a s 21 agreement is not a will: it does not comply with the requirements of a valid will. Therefore, a s 21 agreement cannot testamentarily “dispose” of the deceased partner’s estate. But a s 21 agreement does permit the spouses to contract with each other as to how the status, ownership and division of “their property (including future property)” is to be dealt with “upon the death of one of them”. That must mean that a s 21 agreement has a role insofar as the determination of the deceased’s estate is concerned. But because a s 21 agreement does not have the status of a will, care needs to be taken in treating it as if it were one.⁵

3.6 Turning to the specific question of whether spouses can agree to contract out of the AA’s intestacy rules prior to the death of one of them, the appellants say this is permissible (APP#1.9), while the respondent says it is not (RESP#2.6). NZLS submits:

(a) First, the principle of individual autonomy would suggest that spouses -- when seeking to address all issues which might arise between them upon the death of either of them -- should not be prevented from reaching an agreement on those matters as part of a package deal. Thus, they ought to be able to reach an overall agreement that addresses matters that include the PRA, FPA, AA, TPA, FPA80 (except to the extent that those statutes provide otherwise⁶).

⁵ Counsel for NZLS notes that the Courts have acknowledged that the requirements of the wills legislation should not be an engine of fraud and have allowed the development of doctrines such as the mutual wills doctrine which permit the enforcement of agreements in respect of post-death dispositions: see A S Butler, “Secret trusts, mutual wills and donationes mortis causa” in A S Butler (ed) *Equity and Trusts in New Zealand* 3rd ed 2025, ch 15.2.

⁶ Obviously if a statute limits that autonomy or only allows that autonomy to be exercised if certain processes are followed (as is the case, for example, for (1) a valid s 21 agreement or (2) a valid will), then the statute must be complied with. There is debate within the legal community as to whether s 57 of the PRA prevents spouses agreeing to contract out of the FPA or TPA by means of an omnibus agreement. If counsel for NZLS is correct that a s 21 agreement can only deal with the status, ownership and / or division of property for the purposes of contracting out of the PRA, then s 57 would simply not speak to the issue. Rather, s 57 would simply confirm that a spouse who elected Option A was not thereby excluded from bringing a TPA or FPA claim against the estate of their spouse once relationship property had been divided under the PRA. There is no need for this Court to address this issue on the appeal. It is simply noted out of care.

- (b) Second, where the statute is silent, the question of whether spouses can contract in respect of such matters needs to be addressed by reference to the principle of autonomy within the context of any relevant public policy considerations that arise out of the statutory purposes.
- (c) Third, the respondent has framed the particular issue of contracting out of the AA as being a disclaimer issue (arguing that (1) disclaimer is governed exclusively by s 81 of the AA; (2) the terms of s 81 of the AA are not satisfied here; (3) disclaimer is unavailable in advance of death: RESP#9.9-9.10). But NZLS queries whether disclaimer is the correct lens to be applied here. After all disclaimer is a unilateral declinature of a gift; here what is in issue is whether -- assuming *arguendo* that the instant agreement addresses intestacy entitlements -- a (bilateral) agreement (made for valuable consideration) should be given effect to. The law of contract, rather than the law of gifting, should apply.
- (d) Fourth, if (contrary to the view just expressed) the respondent is right to say that disclaimer is the correct lens to be applied, then presumably the respondent is right to say that since pre-death disclaimer of testamentary entitlement is not permissible at common law (nor under s 81 of the AA), disclaimer of intestacy entitlement should not be allowed pre-death (RESP#9.10)⁷ There is obvious force to this argument (assuming the correctness of the respondent's premise (which NZLS does not share) viz the law of contract does not operate in this field).
- (e) Fifth, the reasons given by Woodhouse J in *Warrender v Warrender* ("**Warrender**") for allowing spouses to contract out of intestacy entitlements appear persuasive:⁸ it is not obvious why a spouse (or any other person for that matter) should not be allowed to contract out of any intestacy entitlements pre-death. That said, it would appear that one matter that Woodhouse J did not consider in *Warrender* is whether the law of contract is inapplicable and the only available lens is the disclaimer

⁷ In the context of estate administration, disclaimer of provision in a will or under the intestacy provisions is expressly available after death in accordance with the terms of s 81 of the AA. The common law is clear that there can be no pre-death disclaimer of testamentary provision. This certainly raises doubt as to whether there can be pre-death disclaimer of intestacy.

⁸ *Warrender v Warrender* [2013] NZHC 787.

lens. All of this suggests that this Court should address the issue on a comprehensive basis.

Construction of the instant omnibus agreement

- 3.7 NZLS does not submit on the proper interpretation of the instant agreement. That is a matter for the parties to address alone.

Understanding the context

4. It is estimated that approximately 1,500 people die intestate each year in New Zealand.⁹ As regards the ubiquity of s 21 agreements, the (limited) available evidence suggests that they have been historically rare, albeit more common in the context of second relationships.¹⁰ The death provisions of the PRA were introduced by the 2001 amendments (which inserted new Pt 8 of the PRA). There is an uneasy interplay between general PRA principles and the general law of succession, which has been the subject of academic and expert law reform commentary. In addition, many practitioners specialise either in PRA (and general family law) or in estate and trusts law. This can result in a particular lens being applied to a s 21 agreement depending on the practitioner's specialisation. This appeal gives this Court an opportunity to assist in clarifying how the two areas of specialisation can and need to work together when spouses seek to enter into a comprehensive contracting out arrangement (assuming *arguendo* that that is what was attempted here and noting further in that regard that it is a matter of contention between the parties).

Statutory schemes: some preliminary points

5. The parties have dealt with the statutory schemes at some length and NZLS will not repeat their efforts here.
6. Important preliminary points to be drawn from their analyses include:

⁹ T Parker, "Explained: What happens if you die without a will?" NZ Herald 16 September 2018 (referring to a then recent research report completed by Perpetual Guardian); K Wesley, "No will, no peace", Stuff, 15 September 2025.

¹⁰ Borrin Foundation research found that only 10% of participants had entered into a formal contracting out agreement: "Prenuptial/Contracting Out Agreements", N Taylor & M Gallop, November 2022 Research Highlights 5, at pp 3 and 7.

PRA

- 6.1 Parliamentary speeches made in the early days of the PRA may have limited relevance to the interpretation of the Act as it now stands.
- 6.2 A search for complete coherence on the face of the statutory language and statutory scheme of the PRA may be elusive. As a result, there may well be a need for the courts to patch up Parliament's handiwork, doing the best they can by reference to the purposes of the PRA, the broad outline of the PRA scheme, the application of "common sense" with regard to the complexity of modern relationships, the principles of party autonomy and family connection; all tempered by recognition that the PRA is social legislation which, while entitled to a large, liberal and generous interpretation, must nonetheless be approached on the basis that it is – broadly speaking – Parliament's job to determine what is fair and just in the division of relationship property and the provision that ought to be made to family members out of an intestate's estate.¹¹

AA

- 6.3 If a person dies without an operative will or with a will that only operates in respect of some of their estate, then they die intestate or partially intestate, and the default distribution rules in the AA apply mutatis mutandis.
- 6.4 Section 77 of the AA sets out how an intestate estate is to be distributed. It does so by reference to the people the intestate leaves behind. There are eight categories of person(s) and the provision made for those depends upon which category a particular individual falls within. Putting to one side any election under the PRA and the effect of the s 21 agreement, category 2 applies (surviving de facto partner and issue) here. This would mean Ms Wilton is entitled to take Mr Rimmer's personal chattels absolutely and the residue of Mr Rimmer's estate is divided such that Ms Wilton receives the amount prescribed by the Administration (Prescribed Amounts) Regulations 2009 (\$155,000) and

¹¹ The Law Commission has noted [2017] Part 8 PRA is not perfect and is complex: [APP FN 63].

anything that remains of the residue is held on trust as to one-third for Ms Wilton and as to two-thirds statutory trusts for Mr Rimmer's issue.

6.5 Nothing in the AA deals expressly with the relationship between Pt 3 entitlements and either (1) the entitlements that a spouse has under the PRA, nor (2) a s 21 agreement. However, s 76(3) of the PRA provides that a survivor who elects Option A has no Pt 3 entitlements.

6.6 It is possible for a spouse (or anyone else for that matter) to disclaim their AA entitlements: s 81 AA. Disclaimer under s 81 AA can only occur post-death: s 81(1). Section 81 is not exhaustive of whether (and if so, how) a spouse can disclaim their AA entitlements: s 81(6) AA. One alternative method of disclaimer is, obviously, electing Option A under s 61 PRA: s 76(3) PRA.

7. A person's estate consists of the property to which they are entitled upon death. To determine the extent of an estate, the administrator must have regard to principles and rules of property, contract, PRA and other law.
8. Generally speaking, where a person wishes to make bespoke dispositions of their estate, they should make a will. The requirements for an operative will are set out in the Wills Act 2007. It may be that a s 21 agreement has some testamentary-like operation. This is explored further below.
9. A testator's autonomy is not absolute:
 - 9.1 Election of Option A (where available) can disrupt the operation of the terms of a will: s 76 PRA.
 - 9.2 The failure of a testator to meet their moral duty to family members can lead to orders under the FPA that also disrupt the terms of a will.
 - 9.3 Similarly, unfulfilled testamentary promises can be remedied under the TPA.
 - 9.4 Promises as to mutual wills can be enforced.

10. A s 21 agreement is not a will.¹² But at least on one view of the language of s 21 PRA, it would appear to permit spouses to make arrangements with respect to the status, ownership and/or division of “their property (including future property)” that apply upon the death of one of them (s 21(2)(b)) and that are binding inter se. This comes very close to allowing spouses to make post-death gifts to each other by non-testamentary means.

The PRA

11. The PRA is an Act which deals with property rights. But it only does so in defined circumstances (within the context of relationships recognised by the PRA) and for very specific purposes (“to provide for a just division of the relationship property between the spouses ... when their relationship ends by separation or death ...”: s 1M(c)). Part 4 sets out how the property of spouses is to be divided when they separate and cannot agree on the matter: s 1G. Part 8 sets out how the property of spouses is to be divided when one of them dies: s 1K. Part 6 deals with the right of spouses to decide themselves how their property is to be divided: s 1I.

Pt 6 PRA

12. NZLS commences its detailed analysis of the PRA by considering Pt 6. That is appropriate since Pt 6 deals with the right of spouses to decide themselves how their property is to be divided, and the contest here concerns whether and to what extent the spouses here have done so.
13. Part 6 is headed “Contracting out”. It is divided into a number of subparts, albeit those subparts are not expressed to be such. The scheme is as follows:
- 13.1 Part 6 contemplates three types of agreements (collectively, “**Pt 6 agreements**”): ss 21-21C. A s 21 agreement is one of those.
- 13.2 Section 21D(1) provides a (non-exhaustive: s 21D(2)) list of matters that a Pt 6 agreement may deal with;

¹² Quaere: though, perhaps, a document could be designed to be both a will and a s 21 agreement.

- 13.3 Section 21E allows regulations to prescribe the model forms of Pt 6 agreements;
 - 13.4 Sections 21F-21H set out the procedural requirements which must be observed in order for a Pt 6 agreement to be enforceable;
 - 13.5 Section 21J sets out the circumstances in which a Court may set aside a Pt 6 agreement if it would cause serious injustice;
 - 13.6 Section 21L provides that Pt 6 agreements can be enforced through remedies available for the enforcement of contracts;
 - 13.7 Section 21O provides that relationship property that is not the subject of a Pt 6 agreement “is subject to the provisions of the [PRA]”;
 - 13.8 Pt 6 agreements cannot be used to defeat creditors: ss 21(3), 21A(2), 21B(5) and 47 of the PRA;
 - 13.9 Pt 6 agreements do not prevent a Court from making orders for the benefit of children of the marriage: s 26(3).
14. As noted, a s 21 agreement is one of three types of Pt 6 agreements.
 15. Section 21 permits spouses:
 - 15.1 to make “any agreement they think fit” (s 21(1));
 - 15.2 with respect to the “status, ownership, and division” (ss 21(1) and 21(2))
 - 15.3 “of their property (including future property)” (s 21(1));
 - 15.4 “upon the death of one of them” and/or during their joint lives (s 21(2));
 - 15.5 “for the purpose of contracting out of the provisions of this Act” (s 21(1));
 16. So:
 - 16.1 Prima facie, spouses have very wide autonomy to make any agreement they wish;
 - 16.2 That agreement is not confined to dealing with relationship property only (rather it can deal with all of “their property (including future property)”

which naturally includes property that would otherwise be classified as relationship property or separate property);

- 16.3 That agreement can provide for the status or ownership or division of the spouses' property where one of the spouses dies;
- 16.4 The purpose of the agreement is to contract out of the provisions of the PRA. As regards this purpose some points must be noted:
- (a) Section 21 confines the reach of a s 21 agreement to contracting out of the PRA, not any other statutory scheme. (Contrast this with the language of ss 21A and 21B.) Whether another statutory scheme is capable of being contracted out of is a matter to be determined by reference to the terms of that legislation, not by reference to the terms of the PRA.
 - (b) The extent to which spouses can contract out of the PRA is limited. Their agreement must relate to the status, ownership or division of their property. This focus explains why there are a number of provisions of the PRA that the parties expressly cannot contract out of (for example, ss 21F, 21J, 26, 47 and 87).
 - (c) These constraints aside, the operating premise must be that a valid s 21 agreement should be treated as an agreement that sits outside the default provision made for the classification of property and the division of relationship property set out in Pts 4 and 8.

Other Parts of the PRA

17. Where both spouses are alive, all of the PRA (other than Part 8) applies to the division of relationship property between them: s 10A. In contrast, where one of the spouses has died, then all of the PRA applies to the division of relationship property between the spouses: s 10B(1). In addition, the Act also applies where one of the spouses has died in the circumstances described in s 10C(a)-(e).
18. Part 8 applies where the relationship has ended because one of the spouses has died: s 55(1). That is the position here. But where the parties have contracted out of the PRA, it is not obvious why Pt 8 in its entirety should be applicable.

19. Where one of the spouses has died, the surviving spouse can choose between Option A or Option B: s 61(1). Option A is to elect to make an application under the PRA for a division of the relationship property; s 61(2). Option B is more complicated. That option involves a decision to elect not to make an application under the Act for a division of the relationship property and, (relevantly here) if the survivor is entitled to a beneficial interest on the intestacy (or partial intestacy) of the deceased spouse, to receive that interest: s 61(3). Once made, the choice of option is, generally speaking, irrevocable: s 67.¹³ The philosophy and logic of the obligation to choose between the two options can be thought of as reflecting a 'no double dipping' approach. But it is important to recall that that approach is simply the default that applies if the spouses have not made a Pt 6 agreement to the contrary.
20. Sections 75-78 of the PRA deal with the effect of electing Option A (i.e. opting for division of relationship property under the PRA).
21. Note, where Option A is elected, the effect is as follows:
 - 21.1 Where the deceased died testate, every testamentary gift to the survivor is treated as having been revoked; the will of the deceased is to be interpreted as if the survivor had died before the deceased spouse and the estate of the deceased spouse must be distributed accordingly: s 76(1);
 - 21.2 Where there is an intestacy or partial intestacy, the survivor has no entitlement under Part 3 AA; s 76(3);
 - 21.3 Section 76 is subject to Court override where that is necessary to avoid injustice: s 77(1).

NZLS submissions on the first two issues

If, as the respondent argues, the s 21 agreement deals comprehensively with property matters upon death, why is a s 61 election even required?

¹³ It is irrevocable unless the Court can be persuaded to set it aside in exceptional circumstances envisaged in s 69(2).

22. Implicit in the arguments of both parties is that Ms Wilton was required to make an election under s 61 even if (as she asserts) the s 21 agreement deals comprehensively with property matters upon death. Is that right?
23. The purpose of a s 21 agreement is to contract out of provisions of the PRA. To determine the extent to which the parties here have done so, the s 21 agreement must be construed. NZLS submits that if the parties have contracted out of the PRA for the purposes of their lifetimes **and** of the death of one of them (as allowed by s 21(2)), then there is no election to be made under s 61. Rather the s 21 agreement applies according to its tenor. That approach is consistent with the language, structure and logic of Pts 6 and 8.
24. First, the whole purpose of a s 21 agreement is to contract out of the PRA provisions on status, ownership and division of the property of the spouses that would otherwise apply on the death of one of them; put another way a s 21 agreement represents the choices that spouses have made (during their lifetimes) as to what is to happen upon the death of one of them. Logic suggests that when the event occurs to which the agreement relates the terms of the agreement bite by dint of that fact alone, not by dint of an election.
25. Second, and conversely, the whole purpose of Pt 8 is to give the spouses a choice between two options when one of them dies. But the notion of choice upon death (Pt 8) is incompatible with the premise of s 21, which is that the spouses are free to, and have, made choices as to what is to happen on death before either of them has died. They had a choice (to make a s 21 agreement) and there is no further opportunity for choice to be made after the death of one of them. Pt 6 plainly was intended to prevail, with Pt 8 being the default only where no Pt 6 agreement applied. (Section 21O is consistent with this view.)
26. Third, it would be quite wrong to allow the survivor to “disown” the s 21 agreement once their spouse had died (other than in circumstances that would justify settling aside the s 21 agreement as envisaged by s 87 which incorporates s 21J). The Court of Appeal implicitly recognised this at [39], but nonetheless attempted to shoe-horn the s 21 agreement into the s 61 election process: [38]-[39]. NZLS submits it is not so much a tight-fit as a no-fit. This tells against the survivor having any option whatsoever. Indeed, it suggests that the survivor is stuck with the choices reflected in the s 21 agreement.

Can spouses contract out of the operation of non-PRA statutes such as the AA (as the respondent alleges has occurred here)? Can spouses (or indeed anyone else) agree to give up their Pt 3 AA entitlements before those entitlements have been triggered?¹⁴

27. NZLS says that those other statutes operate in accordance with their terms unless the spouses (1) are allowed to contract out of those statutes and (2) have successfully done so. So, if spouses have used a s 21 agreement to determine the status, ownership and division of their property on death, but have not addressed what is to happen to their estates upon death then the terms of any will or the default distribution provisions of the AA apply. In each case the Court will have to decide whether in fact the agreement reached between the parties, on its true construction, does or does not extend to the treatment of their estates (noting that a s 21 agreement is not a will but may nonetheless determine what property falls within the estate of the deceased spouse).
28. Turning to Pt 3 of the AA, NZLS agrees with the appellants that spouses (and indeed other persons who could potentially benefit on intestacy) have the right to forego their AA entitlements by a pre-death contracting out agreement. The usual rules as to the provision of consideration and the absence of duress, for example, would apply. No particular method for doing so is prescribed by the AA. Certainly there are no statutory requirements equivalent to s 21F of the PRA. That said, there is no reason in principle why a document that sets out the terms of a s 21 agreement could not be used to do so.¹⁵
29. In support of this position, NZLS adopts the reasoning in *Warrender*.

Is disclaimer the only means to forego Pt 3 AA entitlements?

30. The respondent in effect submits that the only way to forego entitlements under Pt 3 of the AA is to do so by a (post-death) disclaimer. She argues that

¹⁴ Section 81 only operates post-death of the intestate: s 81(1) (“where a successor **has become** entitled under this Act”) (emphasis added). In the case of s 81, the disclaiming party has a crystallised entitlement that they are giving up. The issue in the instant case is whether a type of anticipatory disclaimer is available.

¹⁵ See the cases in App Subs FN 6.

disclaimer is governed exclusively by s 81 of the AA, and s 81 of the AA is not satisfied here.

31. NZLS queries whether disclaimer is the correct or exclusive lens to be applied. Disclaimer is a declination by the putative donee of a proffered gift; it is a unilateral act.¹⁶ Here, what is in issue is different: a (bilateral) agreement (made for valuable consideration) through which the parties have (allegedly) agreed to forego Pt 3 AA (and other statutory) entitlements. Surely, then, the law of contract, rather than of gifting should apply? If so, then the matter turns on the sorts of issues traversed by Woodhouse J in *Warrender*.
32. If (contrary to the view just expressed) the respondent is right to say that disclaimer is the correct lens to be applied, then presumably the respondent would submit that since pre-death disclaimer of testamentary entitlement is not permissible at common law (nor under s 81 of the AA), why should disclaimer of intestacy entitlement be allowed pre-death?¹⁷ There is obvious force to this argument (assuming the premise that the correctness of the respondent's premise viz the law of contract does not operate in this field).
33. As noted earlier, NZLS submits that Woodhouse J's reasons for holding that spouses can contract out of entitlements under Pt 3 of the AA are persuasive: it is not obvious why a spouse should not be allowed to contract out of any intestacy entitlements pre-death. That said, Woodhouse J did not consider whether the law of contract is applicable and the only available lens is the disclaimer lens. This suggests this Court should address the issue on a comprehensive basis.

A S Butler KC
Counsel for NZLS as intervenor

¹⁶ N Crago, "Principles of disclaimer of gifts" (1999) 28 WAL Rev 65 (cited regularly by Australian courts).

¹⁷ In the context of estate administration, disclaimer of provision in a will or under the intestacy provisions is expressly available after death in accordance with the terms of s 81 AA. This certainly raises doubt as to whether there can be pre-death disclaimer of intestacy.