RITUALS OF ENGAGEMENT: WHAT HAPPENS TO THE RING WHEN AN ENGAGEMENT IS CALLED OFF?

James Duffy, Elizabeth Dickson and John O’Brien*

ABSTRACT
This article considers the question of who is entitled to keep an engagement ring, when an engagement is ended. The 1926 English High Court decision of Cohen v Sellar has been adopted into Australian common law and provides a clear set of rules as to who is legally entitled to the engagement ring. In more recent times, several courts have questioned the modern relevance of the decision in Cohen v Sellar, culminating in a New South Wales magistrate explicitly refusing to follow this established precedent. This article examines the basis of the decision in Cohen v Sellar, its reception and treatment by Australian courts, and whether societal views regarding the nature of engagement, engagement rings and marriage, mean that the reasoning of the magistrate in Toh v Su is justified – and concludes that it is not.

INTRODUCTION

Whether due to the beauty, the cost, or the sentiment of an engagement ring, it is an asset that people hold valuable. In recent years, Australian popular media has been captured by stories of celebrities who have broken off engagements, but then quarrelled over who is entitled to the engagement ring. James Packer, Mariah Carey, former Australian cricket captain Michael Clarke and Lara Worthington (then Bingle), have all supposedly been involved in disputes surrounding expensive engagement rings. The rule of thumb that a man should

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spend two-three months of annual salary on an engagement ring meant that Packer and Carey were dealing with a 35 carat, 10 million dollar ring, and Clarke and Bingle a 4.7 carat, $200,000 ring. It is hard to tell whether these disputes were real or fabricated (Bingle allegedly flushed her engagement ring down the toilet).\(^2\) Whatever the case, they do raise an interesting question as to who is legally entitled to keep the ring on dissolution of an engagement.

As will be outlined in this article, the law surrounding engagement rings has been quite stable in Australia. Australian courts have adopted the thorough reasoning of Justice McCardie in the 1926 English High Court (King’s Bench Division) decision of *Cohen v Sellar*.\(^3\) It came as a surprise when in 2017, the New South Wales Local Court in *Toh v Su*\(^4\) questioned whether *Cohen v Sellar* still represented good law.\(^5\) The Magistrate did not follow the reasoning in *Cohen v Sellar*, and suggested that a more modern view regarding the treatment of engagement rings was required. This article suggests that there are conceptual difficulties with the substance of the decision in *Toh v Su*, and procedural issues relating to the doctrine of precedent, which mean that this decision should not be adopted by other courts. As a decision of the New South Wales Local Court, the judgment (at present) may not be of great moment. Difficulties will arise however, if other courts in the New South Wales jurisdiction or beyond, adopt the reasoning contained in the judgment.

### II THE STARTING POINT: COHEN V SELLAR

The case of *Cohen v Sellar* was decided in England at a time when breach of promise to marry was a recognised cause of action.\(^6\) Miss Cohen brought an action in the High Court of England at a time when breach of promise to marry was a recognised cause of action. Miss Cohen brought an action in the High Court


\(^3\) [1926] 1 KB 536.

\(^4\) [2017] NSWLC 10.


\(^6\) *Cohen v Sellar* was decided in 1926, although before the 17\(^{\text{th}}\) century, marriage was considered to be a purely ecclesiastical matter, and no action for breach of promise to marry was possible: *Holt v Ward* (1732) 2 Strange 937; *Finlay v Chirney* (1888) 20 QBD 494. This changed during the reign of King Charles I where an action for breach of promise to marry became actionable in the temporal courts. The action was again abolished in England and Wales through the *Law Reform (Miscellaneous Provisions) Act 1970*. This change in law was driven (in part) by a report of the English Law Commission into the action for breach of promise of marriage. The original report can be found at <https://www.lawcom.gov.uk/project/breach-of-promise-of-marriage/>. The
seeking damages on the basis that Mr Sellar had called off the engagement and breached his promise to marry her. At the same time, Sellar had brought a concomitant action in a County Court, seeking to recover the engagement ring from Cohen. The County Court action was subsequently removed to the High Court and became a counterclaim in the proceedings. The jury in the High Court concluded that it was Sellar who was responsible for calling off the engagement. The question of law regarding the counterclaim was decided by McCardie J in the High Court.

Justice McCardie reached his decision through a careful historical analysis of engagement rings. This included analysis of several 16th to 18th century cases, related to gifts (pomanders) and rings given in contemplation of marriage. According to his Honour it was important to identify who called the engagement off, and this would have a bearing on who was entitled to keep the engagement ring. His Honour relied upon the earlier decision of *Jacobs v Davis,* where Justice Shearman stated:

> Though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it.

In *Jacobs v Davis,* the man, and giver of the ring, had broken off the engagement. Justice Shearman found that the female recipient was entitled to keep it.

A neat set of rules was given by McCardie J in his disposition of the case:

1. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it.
2. If a man has, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring.

Given the particular facts of *Cohen v Sellar* (where Sellar broke off the engagement), the first rule was a statement of obiter dictum consistent with the decision in *Jacobs v Davis.* The current position in Australia is that there is no legal cause of action for breach of promise to marry. See section 111A of the *Marriage Act 1961* (Cth).

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7 *Cohen v Sellar* [1926] 1 KB 536, 537-8.
8 *Young v Burrell* (1576) Cary 54; 21 Eng. Rep 29; *Oldenburgh’s Case* Freeman’s K. B. 213; 2 Mod. 140.
9 [1917] 2 KB 532.
10 *Jacobs v Davis* [1917] 2 KB 532, 533.
11 *Jacobs v Davis* [1917] 2 KB 532, 533.
12 *Cohen v Sellar* [1926] 1 KB 536, 547.
13 *Cohen v Sellar* [1926] 1 KB 536, 547: ‘This I hold to be the correct legal view…’
second rule constituted the ratio of the decision. These two rules complement each other and, while not making the connection explicit, focus on the notion of fault – the person at fault in ‘breaking’ the engagement loses any entitlement to the ring.

Important to our subsequent understanding of *Cohen v Sellar* and the level of specificity of the ratio, Justice McCardie’s decision was supported through principled analogy to the law of contract where fault, or the absence of fault, determined the outcome. The giving of an engagement ring in contemplation of marriage was compared to ‘the law applicable to ordinary contracts’. First, his Honour compared the giving of an engagement ring with a conditional gift:

> The conditions which attach to a gift given in contemplation of marriage must be viewed in relation to the incidents which flow from the engagement itself.

The ‘incident’ expected to flow from an engagement is the marriage of the parties. Consistent with the conditional gift analogy, Justice McCardie found that if marriage occurs after the giving of the ring, then even if it subsequently ends, the recipient of the ring is entitled to keep it. Upon marriage, the condition attached to the giving of the ring is fulfilled and the gift is absolute.

Where the giver of the ring breaks off the engagement, then they will not be entitled to return of the ring and the gift will become absolute. McCardie J analogised the prohibition against reliance on ‘self-induced frustration’ in the context of ‘commercial adventure’ in *Bank Line v Capel* and found it applicable to ‘marital adventure’. His Honour emphasised the point by referencing *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France*:

> It is a principle of law that that no one can in such a case take advantage of the existence of a state of things that he himself has produced.

The application of this law by Justice McCardie supported his decision that Cohen should keep the ring. Sellar gave the engagement ring as a gift conditional on marriage occurring, and the fact that his actions made the marriage impossible meant that he was not entitled to

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14 *Cohen v Sellar* [1926] 1 KB 536, 548.
15 *Cohen v Sellar* [1926] 1 KB 536, 548.
16 *Cohen v Sellar* [1926] 1 KB 536, 549.
17 [1919] AC 435, 452.
18 *Cohen v Sellar* [1926] 1 KB 536, 548.
20 *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* [1919] AC 1, 6.
reclaim it. His breaking of the engagement was a ‘state of things he had himself produced’...a self-induced frustration.\textsuperscript{21}

The effect of frustration upon a commercial agreement is that the parties are freed from any further obligations under the contract.\textsuperscript{22} The situation in Cohen v Sellar was not frustration in a technical legal sense\textsuperscript{23} because there was a default by one of the parties: Sellar refused to proceed with the marriage. In this instance, what had occurred was a self-induced frustration, and case law in both the United Kingdom and Australia supports the conclusion that ‘reliance cannot be placed on a self-induced frustration’.\textsuperscript{24} For Sellar, this meant that as he gave the engagement ring as a gift conditional on marriage occurring, the fact that his actions made the marriage impossible meant that he was not entitled to reclaim the ring.

Frustration was also relevant when Justice McCardie considered (in obiter) what should happen to the ring when the giver dies or, because of a ‘disability recognised by law’ cannot go through with the marriage. His Honour was of the view that in such circumstances, ‘the condition shall be implied, that the gift shall be returned’.\textsuperscript{25} This rule reflects the relevance of fault to the disposition of the ring: if no-one is at fault, the status quo is restored.

Interestingly, his Honour’s dicta ran contrary to the law of frustration (at the time) as stated in decisions such as Krell v Henry\textsuperscript{26} and Chandler v Webster\textsuperscript{27} (the ‘coronation cases’). If the law in those cases applied, then upon the occurrence of the frustrating event (e.g. the death or disability of the giver), the ring would stay with the recipient and the ‘loss lies where it falls’.\textsuperscript{28} Justice McCardie’s decision to treat engagement rings as a special type of transaction, not subject to ‘coronation case’ principles, was arguably validated in hindsight

\textsuperscript{21} Bank Line v Capel [1919] AC 435, 452.
\textsuperscript{22} Scanlan’s New Neon Ltd v Tooheys Ltd (1943) 67 CLR 169, 203. The contract is terminated at the point of frustration and is not void \textit{ab initio} per Mason CJ in Baltic Shipping Co v Dillon (1993) 176 CLR 344, 356.
\textsuperscript{23} In Australia, the test for frustration of a contract was endorsed in the case of Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337. The High Court stated that: ‘Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.’ This description was first given in the case of Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696, 729. It was later cited with approval in Brisbane City Council v Group Projects Pty Ltd (1979) 149 CLR 139, 159-63.
\textsuperscript{24} In the United Kingdom see Cricklewood Property & Investment Trust v Leighton’s Investment Trust [1945] AC 221; Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154. In the Australian context see Dymocks Holdings Pty Ltd v Top Ryde Booksellers Pty Ltd [2000] NSWSC 390, [67]; J Swanton, “The Concept of Self-induced Frustration” (1989) 2 JCL 206.
\textsuperscript{26} [1903] 2 KB 740.
\textsuperscript{27} [1904] 1 KB 493.
\textsuperscript{28} Krell v Henry [1903] 2 KB 740, 752 (per Vaughan Williams LJ).
given the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*. In that case, it was held that rights or liabilities accruing before a frustrating event cannot be enforced if there has been a total failure of consideration. The corollary of this is that a party who has paid an amount or given a conditional gift before a frustrating event may reclaim the money or gift if there is a total failure of consideration from the other party.

Justice McCardie also likened the giving of an engagement ring to the making of a deposit or down payment on a contract. Simply put, in situations where a party does not complete their side of the contract, they lose their deposit. According to the Australian High Court in *Brien v Dwyer*, a deposit is a bond for a party’s performance of the contract. A deposit has a signalling effect that a party is serious and genuine in their desire to carry out a bargain. The deposit sures up the promise from a party, given that they may lose the deposit if they do not proceed with their obligations. As Sellar refused to perform his part of the bargain (getting married), he forfeited his deposit (the engagement ring).

Analogising the rituals of engagement and marriage to the striking of a commercial bargain may appear crass, but it is difficult to fault the logic of the comparison. Both situations involve people, commitment, and forward-looking risk. Sentiment to the side, an engagement ring symbolises a promise to do something in the future…to get married. It is a conditional gift, different in its quality to other gifts exchanged between affectionate couples. As Denna, one of the lead characters in the Patrick Rothfuss novel *The Wise Man’s Fear* states, ‘[t]here is a great difference between a gift given freely, and one that’s meant to tie you to a man.’

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29 [1943] AC 32.
31 The decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 has been approved by the High Court of Australia in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.
33 *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342. The High Court of Australia referred to the judgment in *Hall v Burnell* [1911] 2 Ch 551: ‘[i]n the absence of an express contractual stipulation to the contrary, a vendor terminating a contract for default by the purchaser in completion is entitled to retain the deposit, as an implied term upon which the deposit was provided’.
III APPLICATION OF COHEN v SELAR IN AUSTRALIAN COURTS

The principles flowing from Cohen v Sellar were first applied in an Australian court in the 1975 decision of Davies v Messner. In that case, Davies and Messner were engaged to be married. Davies purchased a parcel of land and transferred the title of that land to Messner in contemplation of marriage. Justice Mitchell sitting as a single judge in the Supreme Court of South Australia held that the land was a conditional gift, and that the condition (marriage) had failed as Messner (the defendant) had called off the engagement. As a result, Davies was entitled to have the land transferred back into his name. Cohen v Sellar was cited in the judgment to justify this conclusion, and even though the principles from the case were not explicitly mentioned, the result meant that they were impliedly relied upon. With respect to the development of principle in this area, Davies v Messner arguably built on the ratio in Cohen v Sellar by extending the rule to any gift given in contemplation of marriage, as opposed to just engagement rings. As a consequence, the law could be stated as follows:

If a woman who has received a gift in contemplation of marriage refuses to fulfil the conditions of the gift, she must return it. If a man has, without recognised legal justification, refused to carry out his promise of marriage, he cannot demand the return of the conditional gift.

The decision of the Western Australian Court of Appeal in Kais v Turvey, supported an extended interpretation of Cohen v Sellar principles. The appellant (Kais) and respondent were a de facto couple and became engaged a short time after moving in together. The appellant paid out the home loan owed by the respondent on the property, as well as paying for other improvements. Turvey terminated the engagement, and Kais sought a declaration that Turvey held the property on trust for both of them.

The Court of Appeal acknowledged that where a man contributes to mortgage payments of a wife (or intended wife), there is a presumption that these payments are a gift. The Court

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38 (1994) 17 Fam LR 498.
held that such a gift is not necessarily an absolute gift, and suggested that it may represent a conditional gift as in the case of a gift given in contemplation of marriage. The example of an engagement ring in *Cohen v Sellar* was specifically identified as a gift given in contemplation of marriage.\(^{40}\) For the purpose of this article, it is important to note that the Court of Appeal explicitly stated that ‘a gift made in contemplation of marriage falls into the class of conditional gifts’.\(^{41}\) The law applicable to conditional gifts has been explained by the High Court of Australia in *Muschinski v Dodds*:\(^{42}\)

A condition annexed to a gift may be of either of two kinds: a condition involving a forfeiture for non-fulfilment or a condition creating merely a personal obligation to fulfil it. A donee who takes a gift to which a condition of the latter kind is annexed incurs an equitable obligation to perform the condition… A condition which creates a personal obligation may be enforced in equity by an order for compensation or, where appropriate, by a decree of specific performance [citations omitted].\(^{43}\)

*Kais v Turvey* is an important case in developing *Cohen v Sellar* principles in Australia, because it confirms that an engagement ring, given in contemplation of marriage, is properly classified as a conditional gift. This means that if the condition is not fulfilled, the party at fault would forfeit the ring due to the non-fulfilment of the condition. This remedy would be actionable at common law. Alternatively, an action may lie in equity, where the party at fault has not fulfilled their personal obligation to satisfy the condition of the gift (ie get married).

An appropriate equitable remedy in this case would be compensation (the innocent party is entitled to keep the ring) rather than specific performance of the condition (forcing people to get married).\(^{44}\) *Cohen v Sellar* was premised on a common law recovery of an engagement ring and did not contemplate an equitable cause of action. Both actions (common law and equity) to claim/reclaim an engagement ring would be very similar in nature,\(^{45}\) and forensic decisions regarding court jurisdiction and the application of broader equitable principles (e.g.

\(^{40}\) *Kais v Turvey* (1994) 17 Fam LR 498, 499-500.

\(^{41}\) *Kais v Turvey* (1994) 17 Fam LR 498, 500, 504.

\(^{42}\) (1985) 160 CLR 583.

\(^{43}\) *Muschinski v Dodds* (1985) 160 CLR 583, 605-6.

\(^{44}\) *Muschinski v Dodds* (1985) 160 CLR 583, 606. In *Cohen v Sellar*, Justice McCardie suggested that before the passing of Lord Hardwicke’s Act (*Marriage Act 1753*), the church could use the power of specific performance to force a party to honour their promise to marry another. According to a report of the Law Commission of England, this statement is ‘highly questionable’. Prior to Lord Hardwicke’s Act, the church had power to compel solemnization of marriage before a member of the clergy, where the marriage had previously been entered into without the presence of a priest or deacon. See *The Law Commission, Breach of Promise of Marriage*, Report No 26 (1969) 2.

\(^{45}\) According to Chief Justice Malcolm in *Kais v Turvey* (1994) 17 Fam LR 498, 501-502: ‘In my opinion, it probably does not matter whether this case is regarded as one of a conditional gift which has failed or as one of a constructive trust. Indeed, on the basis of modern analysis, the obligation to return a gift following the failure of a condition may well be regarded as simply an example of the imposition of a constructive trust on the ground that retention of the benefit of a gift made in contemplation of marriage would be unconscionable’.
the clean hands doctrine) may dictate the procedural track of a plaintiff seeking to claim an engagement ring.

In the Queensland jurisdiction, there have been at least three cases that have referred to *Cohen v Sellar*. In the case of *Ikeuchi v Liu*, Justice Muir sitting in the trial division of the Supreme Court held that:

> Where a gift is made in contemplation of marriage by a person to his or her intended, the gift, as a general proposition, is regarded as conditional and the property is returnable if the engagement is terminated, at least where the termination is initiated by the donee, or by mutual consent.\(^{47}\)

This statement by Justice Muir was accompanied with a footnote to *Cohen v Sellar*. It can be implied from this statement that if the engagement was terminated by the giver of the engagement ring, the donee would not be required to return the ring. Interestingly, his Honour referred to a previous statement by McPherson SPJ in *Jenkins v Wynen*\(^{48}\) (Queensland Supreme Court trial division), who had questioned the authority of *Cohen v Sellar* in Australia, given the enactment of s 111A of the *Marriage Act 1961 (Cth)* (‘*Marriage Act*’). Section 111A of the *Marriage Act* reads:

**111A Abolition of action for breach of promise**

(1) A person is not entitled to recover damages from another person by reason only of the fact that that other person has failed to perform a promise, undertaking or engagement to marry the first-mentioned person.

(2) This section does not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if this section had not been enacted.

Unfortunately, Justice McPherson did not explain how or why this section of the *Marriage Act* would impact upon *Cohen v Sellar* principles, and it was not important to the ultimate decision reached in *Jenkins v Wynen*. His Honour simply stated that ‘the abolition by s. 111A of the *Marriage Act 1961 (Cth)* of the action for damages for breach of promise of marriage now makes the basis of the decision in *Cohen v. Sellar* [1926] 1 K.B. 536 of

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\(^{46}\) [2001] QSC 54.

\(^{47}\) *Ikeuchi v Liu* [2001] QSC 54, [109].

doubtful validity.’ Before the recent New South Wales case of Soh v Tu, this brief, undeveloped statement by Justice McPherson had been the only piece of case law to cast doubt on the ongoing application of Cohen v Sellar principles in Australia. As will be discussed in part IV of this article, the statement by McPherson SPJ was used by Magistrate Brender in Toh v Su to question the authority of Cohen v Sellar in Australia, and ultimately refuse to follow it as a precedent.

These decisions by the Supreme Court of Queensland (Trial Division) preceded one relevant decision from the Queensland Court of Appeal. In the case of TV v Hax, the applicant and respondent were in dispute over land and an engagement ring, after their engagement had been terminated. According to the trial judge, Cohen v Sellar principles dictated the result of the case. The trial judge noted that:

ordinarily, when a woman breaks an engagement after a man has given her an engagement ring, she returns the ring to him. But if the man breaks the engagement without recognised legal justification, he cannot claim the return of the ring.

It was ultimately concluded by the trial judge that it was the applicant (male) who terminated the engagement, and on that basis, he was unable to claim the return of the ring. The decision of the trial judge was appealed on numerous grounds, one of them being that the applicant was not responsible for the failure of the engagement. According to the Queensland Court of Appeal, the applicant had not provided any reasons as to why the primary judge was mistaken as to who called off the engagement. Importantly, the Queensland Court of Appeal stated that there was no error in the legal reasoning surrounding who was entitled to keep the engagement ring. This statement was important, because it provided another direct endorsement of Cohen v Sellar principles from a state appellate court.

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49 Jenkins v Wynen [1992] 1 Qd R 40, 47. Note that Justice McPherson’s statement does not account for the express preservation of the common law in respect of gifts given in contemplation of marriage in s 111A(2).
51 TV v Hax [2009] QCA 401, [19].
52 TV v Hax [2009] QCA 401, [22]. The Queensland Court of Appeal noted that ‘[t]he circumstances of the parties’ separation and the applicant’s behaviour generally, both before and after the separation, convinced the judge that their marriage did not proceed because of the applicant’s conduct.’ A determination of “fault” was clearly accepted by the trial judge (and subsequently the court of appeal) as being relevant to entitlement to keep the ring.
53 TV v Hax [2009] QCA 401, [43].
Finally, two more recent decisions of the Supreme Court of New South Wales have considered the relevance of *Cohen v Sellar* principles in Australia. In the case of *Papathanasopoulos v Vacopoulos*, the couple exchanged engagement rings at a party on 6 August 2005. On the evening of 16 August 2005 in front of the Papathanasopoulos (‘Pappas’) family, Pappas said to Vacopoulos, ‘the wedding is off, here take the ring, I don’t want it.’ The case was complicated by Vacopoulos’ response, when he said, ‘I do not want the ring it is a gift for you, you can keep it.’ At first instance, Vacopoulos brought an action in the Local Court seeking recovery of the engagement ring (or its value). Unfortunately, Pappas had asked her father to throw out all of the items Vacopoulos had given her into the garbage (including the ring). The Magistrate held that as Pappas had terminated the engagement, Vacopoulos was entitled to recover the value of the ring ($15,250 - it was never found).

Pappas appealed the decision of the Magistrate, based on the words and actions of Vacopolous. There was no attempt to avoid *Cohen v Sellar* principles; rather Pappas claimed that the conditional gift of the engagement ring was made unconditional, when Vacopolous told her to keep the ring as a gift. Justice Smart in the New South Wales Supreme Court did not accept this argument, although the case might be viewed as a marginal one. His Honour accepted the finding by the Magistrate that the words of Vacopoulos were used as a ploy to try and preserve the relationship, and did not have the effect of transforming a conditional gift to an unconditional one. The key for the Magistrate, and ultimately Justice Smart, was to put the statement by Vacopolous in context and attempt to understand what was meant by it.

In obiter, Justice Smart noted the caveat placed on the rule in *Cohen v Sellar*; that if a man has, *without a recognised legal justification*, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring. His Honour suggested that this caveat

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55 *Papathanasopoulos v Vacopoulos* [2007] NSWSC 502, [5].
56 *Papathanasopoulos v Vacopoulos* [2007] NSWSC 502, [5].
57 An alternative view to that adopted by the Magistrate is that Vacopoulos was serious and genuine when he said to Pappas that she could keep the ring as a gift. The gift of the ring would then become unconditional in nature, and Pappas would be free to do whatever she wished with the ring (including throwing it in the garbage). Given the Magistrate’s finding of fact on this issue, it was appropriate for Justice Smart to accept this finding on appeal. According to Justice Smart at [28], ‘The magistrate did not think that the conversation on this day altered the essential nature of the gift, that is, that it was a gift in contemplation of marriage. That was a view which was open on the evidence.’
should also be extended to women, so that they may also raise a plea of legal justification for refusing to carry out their promise to marry.\(^{58}\) It was not clear from *Cohen v Sellar* what the phrase ‘recognised legal justification’ might include,\(^{59}\) but Justice Smart gave examples of repudiatory conduct on behalf of the male including acts of violence or infidelity. It was suggested by his Honour that if a woman did terminate an engagement with legal justification, she ‘can probably keep the ring’.\(^{60}\) For reasons of fairness and gender equality, this amendment to *Cohen v Sellar* principles is understandable. It was probably envisaged by every Australian court endorsing *Cohen v Sellar*. *Papathanasopoulos v Vacopoulos* however, was the first case to restate the rule recognising a legal justification for a woman to terminate an engagement and keep the engagement ring.

The final case that considered *Cohen v Sellar* before the decision of *Toh v Su* was *Loumbos v Ward*.\(^{61}\) This case was heard before Justice Lindsay in the Equity Division of the New South Wales Supreme Court and involved a man claiming the return of an engagement ring (amongst other things) after a failed engagement. In an animated, narrative judgment, Justice Lindsay had no difficulty accepting that an engagement ring was, *prima facie*, a conditional gift, even though no date for the marriage had been set.\(^{62}\) His Honour concluded as a matter of fact that the engagement ended by mutual consent.\(^{63}\) According to *Cohen v Sellar* principles, this would mean that the engagement ring would ordinarily be returned to the man.

In *Loumbos v Ward* however, the plaintiff via an ‘intemperate email’ said to the defendant that she (the defendant) could sell the engagement ring (along with some wedding rings). In addition, in a face-to-face meeting after the email, the parties agreed to separate, and the plaintiff told the defendant that she could keep the ring. According to Justice Street, the effect of the email communication was that the plaintiff abandoned any ongoing interest he had in the engagement ring.\(^{64}\) Even though the case of *Papathanasopoulos v Vacopoulos* was

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\(^{58}\) *Papathanasopoulos v Vacopoulos* [2007] NSWSC 502, [17], [20].

\(^{59}\) Though lawyers of that time would have understood the scope of the phrase.

\(^{60}\) *Papathanasopoulos v Vacopoulos* [2007] NSWSC 502, [17].

\(^{61}\) [2016] NSWSC 885.

\(^{62}\) *Loumbos v Ward* [2016] NSWSC 885, [44].

\(^{63}\) *Loumbos v Ward* [2016] NSWSC 885, [46]. This was despite the argument from the defendant that it was the plaintiff who terminated the engagement.

\(^{64}\) *Loumbos v Ward* [2016] NSWSC 885, [44].
not referred to, in this instance, the email had the consequence of making a conditional gift, an unconditional one. Accordingly, the female defendant was entitled to keep the ring.

The net effect of the above discussion is that *Cohen v Sellar* principles have been (almost exclusively) adopted by Australian courts, when deciding who may keep gifts conditional upon marriage. Table One captures this information:

Table One: *Decisions that adopt Cohen v Sellar principles in Australia*

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<tr>
<th>Year</th>
<th>Court</th>
<th>Case</th>
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<tbody>
<tr>
<td>1975</td>
<td>South Australian Supreme Court (Trial Division)</td>
<td><em>Davies v Messner</em></td>
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<td>1994</td>
<td>Western Australian Supreme Court (Full Court)</td>
<td><em>Kais v Turvey</em></td>
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<td>2001</td>
<td>Queensland Supreme Court (Trial Division)</td>
<td><em>Ikeuchi v Liu</em></td>
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<td>2007</td>
<td>New South Wales Supreme Court (Single Justice appeal)</td>
<td><em>Papathanasopoulos v Vacopoulos</em></td>
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### IV THE 2017 DECISION OF TOH v SU

Given the adoption of *Cohen v Sellar* principles into Australian common law, it came as a surprise that Magistrate Brender in *Toh v Su* questioned the modern relevance of *Cohen v Sellar* and refused to follow the decision. The case involved Mr Toh proposing to Ms Su on 5 December 2015 and giving her an engagement ring. On 5 March 2016, Toh said to Su (in the presence of a friend) that he no longer wished to marry Su or be in a relationship with her. He also stated that ‘everything that belongs to each party will be returned to each party’.  

Toh brought an action in a New South Wales Local Court (Downing Centre) seeking the return of the engagement ring, as well as several other gifts. Toh sued for the engagement

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65 *Toh v Su* [2017] NSWLC 10, [5].
ring on the basis that it was a gift conditional on marriage, and as the marriage did not go ahead, he was entitled to its return.

If Cohen v Sellar was applied in this case, the result would be that as Mr Toh, without recognised legal justification, refused to carry out his promise of marriage, he could not demand the return of the engagement ring. The Magistrate held however that Mr Toh was unable to reclaim the engagement ring, on the basis that it was an unconditional gift and therefore became the absolute property of Ms Su.\(^{66}\) The fact that the marriage did not go ahead was irrelevant, as there were no conditions attached to the giving of the ring. While his Honour acknowledged that it would be possible to give an engagement ring with conditions (borne from words or conduct), his Honour felt that the default position for any engagement ring is that it should be viewed as a gift given without condition.\(^{67}\)

Magistrate Brender reached this conclusion based on the supposed effect of two pieces of legislation. First, his Honour held that, given the abolition of action for breach of promise to marry in section 111A of the Marriage Act, ‘there is arguably no room for the operation of the rule of recovery [of the engagement ring] in the event the marriage does not proceed.’\(^ {68}\) Second, given the passing of the Family Law Act 1975 (Cth) and the principle of no-fault divorce, his Honour stated that, ‘it would be surprising, given that statute, if the common law still determined legal rights between parties to a proposed marriage by reference to whether or not their conduct in breaking off an engagement was justified or not.’\(^ {69}\)

The first criticism that can be made of his Honour’s judgment is that there are jumps in logical reasoning. It is not clear why the enactment of s111A of the Marriage Act abolishing the action of breach of promise to marry should affect a decision as to who should keep an engagement ring. It is simply suggested as a matter of fact, that it does. One possibility is that the Magistrate was concerned (despite the presence of s 111A(2), considered in the next paragraph) with the ‘deposit or pledge’ analogy of an engagement ring. If one party breaches their promise to marry they forfeit the deposit of the ring. Breach of promise to marry was previously recognised as a legal wrong, with attendant legal consequences regarding the loss

\(^{66}\) Toh v Su [2017] NSWLC 10, [18].
\(^{67}\) Toh v Su [2017] NSWLC 10, [23].
\(^{68}\) Toh v Su [2017] NSWLC 10, [16].
\(^{69}\) Toh v Su [2017] NSWLC 10, [10].
of a deposit. Given the abolition of action for breach of promise to marry, it could be argued that since there is no legal obligation to honour a promise of marriage, you should not be liable to lose a deposit if you default on your promise. If this was the concern of the Magistrate, it was also a concern shared by the Ontario Law Commission in Canada. The Commission recommended that an action for breach of promise to marry be abolished in Canada. With respect to conditional gifts like engagement rings, the Commission stated, the possibility of the exchange of heirlooms and securities and other items of considerable value in contemplation of marriage is very real. The Commission feels that it would be anomalous to retain the idea of contractual fault as a bar to the recovery of a conditional gift, if the contractual foundation of the engagement itself is not present.

Comparative law and case law aside, treating an engagement ring as an unconditional gift would seem inconsistent with the current wording of section 111A of the Marriage Act. Subsection (2) states that the abolition of the ‘breach of promise’ action in subsection (1) ‘does not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if this section had not been enacted.’ An action brought for recovery of an engagement ring in Australia prior to the enactment of s111A(1) would be subject to common law Cohen v Sellar principles.

Cases such as Kais v Turvey, Papathanasopoulos v Vacopoulos and Loumbos v Ward all make it clear that an engagement ring is properly characterised as a conditional gift. It is difficult to understand how the fundamental nature of this gift can be changed by abolishing a separate (though somewhat related) cause of action in breach of promise to marry. Whatever reasoning informed Magistrate Brender’s decision, it does not account for the clear intention of the Commonwealth Parliament in 1975, as contained in s 111A(2), that the law relevant to the disposition of gifts given in contemplation of marriage is undisturbed by the abolition of the action for breach of promise in section 111A(1).

The contemporary meaning and symbolism of an engagement ring is a social question. On that basis, it would seem more appropriate for the Commonwealth parliament to decide how such a gift should be characterised, and the attendant consequences that flow from such a

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71 Ibid 15. It is important to note that even if this reasoning is accepted, an engagement ring is still considered to be a conditional gift. It is not viewed as an unconditional gift. The only difference in approach to Cohen v Sellar is that ‘no weight would be attached to considerations of whether or not the donor was responsible for the termination of the engagement, or whether or not such termination was legally justified.’
characterisation for those who terminate an engagement.\textsuperscript{72} Similar legislation from different countries around the world highlight how this task could be achieved.

In England and Wales, the \textit{Law Reform (Miscellaneous Provisions) Act 1970} (UK) removed any cause of action for breach of promise to marry. The British Parliament acted upon a 1969 report by the English Law Commission,\textsuperscript{73} suggesting that the action be removed. As a separate question, the Law Commission (and subsequently the Parliament) dealt with the legal entitlement to gifts conditional upon marriage, where the marriage did not proceed.

Section 1(1) of the Act removed any action for breach of promise to marry:

An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall be brought in England and Wales for breach of such an agreement, whatever the law applicable to such an agreement.

Section 3 of the Act deals with gifts given in contemplation of marriage:

(1) A party to an agreement to marry who makes a gift of property to the other party to the agreement on the condition (express or implied) that it shall be returned if the agreement is

\textsuperscript{72} The constitutional ability for the Commonwealth Parliament to legislate such subject matter is by no means certain. One view is that an engagement ring, as a gift given in contemplation of marriage, could be characterised within the marriage head of power in \textit{Australian Constitution} s 51(xxi). An alternative view is that any legislative rule to confer a special status on certain types of personal property would impact on property law and tort law (as trespass actions such as detinue are often used by ex-fiancés seeking the return of the engagement ring). This would be outside of the Commonwealth’s power. This doubt was identified in \textit{Public Trustee v Kukula} (1990) 14 Fam LR 97, 100, where Handley JA of the Supreme Court of NSW stated the following obiter dictum in relation to the Commonwealth’s abolition of the ‘breach of promise’ action:

The case is further complicated by the fact that the Commonwealth Parliament in its wisdom abolished or purported to abolish the cause of action for breach of promise of marriage by s 111A of the Marriage Act inserted by Act 209 of 1976. This legislation was presumably enacted pursuant to the power conferred on the parliament by s 51(xxi) of the Commonwealth Constitution to make laws with respect to marriage. It is not self-evident that this power authorises the abolition of the cause of action for breach of promise. However since the validity of the section was not challenged before us, the appeal must be decided on the basis that the cause of action has been abolished.

The insertion of s 111A into the Marriage Act was ostensibly done to ‘uphold the institution of marriage’ by allowing couples to break off an engagement without paying damages (achieving the policy goal of the Liberal government to reduce the high rates of divorce which had come about from no-fault divorce introduced by the previous ALP government): \textit{Commonwealth, Parliamentary Debates, House of Representatives}, 3 June 1976, 2942 (Bob Ellicott, Attorney-General); \textit{Commonwealth, Parliamentary Debates, House of Representatives}, 19 August 1976, 412 (Reginald Birney).

Whether the same connection could be made to engagement rings is not clear. Section 111A(2) retains the right to bring an action to recover gifts given in contemplation of marriage, and in reply to its second reading, Opposition member Lionel Bowen stated:

It is interesting to note that the provision relating to the right to sue for the recovery of gifts may attract a view that it is not a constitutional power. The Constitution itself certainly gives us rights to deal with marriage. But ‘marriage’ is the word it uses and one wonders whether actions in relation to the recovery of gifts will be deemed to be actions in relation to marriage. This raises the interesting question of whether we have the power so to legislate under plactium (xxi) of section 51 of the Constitution because the power seems to be more related to the property factor.

\textit{Commonwealth, Parliamentary Debates, House of Representatives}, 19 August 1976, 410 (Lionel Bowen), also 413 (Reginald Birney), 419 (Maurice Neil).

terminated shall not be prevented from recovering the property by reason only of his having terminated the agreement.

(2) The gift of an engagement ring shall be presumed to be an absolute gift; this presumption, may be rebutted by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason.

The effect of this section 3 in England and Wales is that the decision in Cohen v Sellar no longer represents good law in those countries.\(^{74}\) Perhaps this is what influenced the Magistrate in Toh v Su (and earlier Justice McPherson in Wynen v Jenkins) to question whether Cohen v Sellar was still good law in Australia. It is important to note however, that the law governing entitlement to engagement rings in England and Wales is determined by the clear wording in section 3(2) of the Law Reform (Miscellaneous Provisions) Act 1970 (UK). The law was not changed, by implication, from the wording of section 1 (the equivalent of s 111A(1) of Australia’s Marriage Act) in isolation. This was the implication that the Magistrate sought to draw in Toh v Su, and absent more direct statutory language in the Marriage Act 1961 (Cth), it is argued that it was not a logical implication to make.

The next criticism of the judgment is his Honour’s reliance upon the ‘no-fault’ divorce provisions of the Family Law Act 1975 (Cth). His Honour argued that given fault was no longer relevant to obtaining a divorce (and subsequent property settlements), it should not be relevant to determining property rights upon dissolution of an engagement. At face value, this argument has some appeal, but the analogy breaks down when one considers the status of the engagement ring before, and after, marriage occurs. When a marriage has occurred, an engagement ring is no longer a conditional gift. The gift becomes unconditional, and is the absolute property of the donee (traditionally, a wife). The “no fault” provisions of the Family Law Act simply mean that the issue of who called off the marriage cannot be used as leverage to determine who should keep the engagement ring. The ring may stay with the wife or be returned to the husband as part of a property settlement, but there is no question that, until such time, the wife would be the legal owner of the engagement ring.

\(^{74}\) Whilst the approach of the UK parliament is perfectly clear, section 3(2) of the Law Reform (Miscellaneous Provisions) Act 1970 (UK) has been criticised on the basis that it does not reflect society’s view as to the status of an engagement ring. Professor Bromley has stated that ‘[o]ne would have thought that by current social convention an engagement ring was still regarded as a pledge and that the presumption [in s 3(2)] ought to have been the other way’: Bromley, PM and Lowe, NV, Bromley’s Family Law (Butterworths, 8th ed, 1992) 24.
The situation is different when a marriage does not occur, because the condition on which the engagement ring was given has not eventuated. This means that legal entitlement to the engagement ring is in issue. Based on Cohen v Sellar principles, the idea of fault (who called off the engagement) is important to determining who gets to keep the ring. It would certainly be possible to extricate the notion of “fault” from who is entitled to keep an engagement ring, but this would mean a retreat from Cohen v Sellar principles. The result would be that the engagement ring is returned to the person who gave it, regardless of who called off the engagement. There are many who would consider this a fair result, and in Toh v Su, Mr Toh pleaded his case on this basis. Such a change however, should ultimately come from the legislature, and the overruling of Cohen v Sellar principles in the absence of clear legislative guidance was not an appropriate step for a Magistrate to take.

Looking forward, whether fault should continue to play a role or not in who keeps an engagement ring upon dissolution of an engagement is an interesting social question. No fault divorce is an expedient that makes property settlements simpler and less acrimonious. Whether the policy drivers applicable to no fault divorce should extend to legal entitlements to an engagement ring is a debate worth having, but not a debate that should be decided by a Local Court of New South Wales. In any event, that debate is a different one to whether an engagement ring is a conditional or unconditional gift. This article contends that neither the Marriage Act 1961 (Cth) or the Family Law Act 1975 (Cth), separately or in combination, have the effect of changing the essential nature of an engagement ring, which is a conditional gift.

V TOH V SU AND THE DOCTRINE OF PRECEDENT

Even if the merits of the decision in Toh v Su are accepted, it is argued that the decision was not permissible due to the operation of the doctrine of precedent in Australia.

In the judgment of Toh v Su, the Magistrate referred to the cases of Cohen v Sellar, Davies v Messner, Ikeuchi v Liu, Jenkins v Wynen and Papathanasopoulos v Vacopoulos. No mention was made of Kais v Turvey, TV v Hax or Loumbos v Ward. This fact alone has implications regarding the precedential correctness of the decision, and means that the decision in Toh v
Su was decided per incuriam. As a starting point, if Cohen v Sellar was a stand-alone decision that had not been adopted into Australian law, it would not create a binding precedent upon a Magistrate in New South Wales. There is some conjecture around the precedential value of decisions of the Privy Council and English House of Lords given before 1986, and their effect on Australian courts. This conjecture does not extend to decisions given by the King’s Bench Division of the High Court of Justice (presently the Queen’s Bench Division), which were never binding on Australian courts.

Two of the decisions overlooked by the Magistrate came from the appeal divisions of the Supreme Courts of Western Australia and Queensland. In Kais v Turvey, the Full Court of the Western Australian Supreme Court unambiguously stated that a gift made in contemplation of marriage falls into the class of a conditional gift. The principles from Cohen v Sellar were mentioned and applied in the case. In TV v Hax, the Queensland Court of Appeal approved the reasoning of a trial judge who cited and applied Cohen v Sellar principles in a dispute over an engagement ring. Given these legal rulings by state appellate Courts outside of New South Wales, a Magistrate in a New South Wales Local Court would be bound to follow them, unless they believed that the decisions were ‘clearly or plainly

75 A per incuriam decision is one made through want of care, where a court has overlooked a relevant piece of legislation or case law. Such an oversight must have led to flawed reasoning within the judgment for the per incuriam label to be applied. For a brief overview of per incuriam decisions, see Creyke, Robin et al, Laying Down the Law (LexisNexis Butterworths, 10th ed, 2018) 257. To determine the precedential value of per incuriam decisions in Australia, see Proctor v Jetway Aviation Pty Ltd [1984] 1 NSWLR 166.


77 Kais v Turvey (1994) 17 Fam LR 498, 500 (Malcolm CJ) and 504 (Ipp J).


79 TV v Hax [2009] QCA 401, [19], [43].
The High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* held that:

Intermediate appellate Courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.

The law surrounding entitlement to engagement rings in Australia is currently dictated by the common law. The Magistrate did not suggest that either of these early decisions were plainly wrong (they were simply not mentioned). On that basis, the Magistrate was in error in not following the legal principles established in these cases.

Even if there was not appellate authority from other Australian jurisdictions on the issue, the New South Wales Supreme Court decision of *Papathansopoulos v Vacopoulos* was still binding on the Magistrate in *Toh v Su*. The decision applied *Cohen v Sellar* principles, acknowledging that fault was relevant to determining who was entitled to keep the engagement ring on termination of the engagement. As an appeal lies from a decision of a New South Wales Local Court to a single Justice of the Supreme Court, and as the Supreme Court of New South Wales is a superior court of record, the reasoning from

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80 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89. The phrase ‘clearly or plainly wrong’ has been interpreted by the Federal Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 247 ALR 104, 122-123 to mean, ‘The circumstances in which a judge in the exercise of the court’s original jurisdiction might find a decision of a single judge of the court to be “plainly wrong” should be approached with real and deliberative caution and would generally involve that class of case where for one reason or another there is transparent error such as the consideration of an incorrect statutory instrument in the resolution of the controversy; consideration of a provision of a statute in a form not enacted at the relevant date of the events or a failure to consider a provision of an Act relevant to the disposition of the cause, thus causing the analysis to fall into error; a failure to apply having regard to the issues raised by the controversy, a binding decision of a Full Court of this court or the High Court; a failure to apply *a* decision of a Full Court of this court, an intermediate Court of Appeal of another jurisdiction or an authority of the High Court expressing a clear persuasive emphasis of opinion in favour of a particular conclusion (particularly concerning legislation of the Commonwealth Parliament); or some other circumstance that has caused a dispositive adjudication of the controversy to miscarry.’


83 *Local Court Act 2007* (NSW) ss 39, 40. This assumes that the Local Court is sitting in its General Division. If the Local Court is sitting in its Small Claims Division, an appeal would lie to the New South Wales District Court.

84 According to Groves J in *Valentine v Eid* (1992) 27 NSWLR 615, 621-2 ‘The view that *stare decisis* is derived from decisions of superior courts and not wherever a hierarchy can be ascertained appears to be widely held despite the sparsity of judicial commentary.’ A superior court is ‘A higher court of record or general jurisdiction comprising the higher grades of judges. Historically a superior court was one with an inherent and unlimited jurisdiction such as a State Supreme Court.’ Finkelstein et al, *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 612.
Papathanasopoulos should also have been followed in Toh v Su. As Chief Justice Gleeson stated in Lipohar v The Queen:85

The ultimate foundation of precedent which binds any court to statements of principle is, as Barwick CJ put it [in Favelle Mort Ltd v Murray (1976) 133 CLR 580 at 591], “that a court or tribunal higher in the hierarchy of the same juristic system, and thus able to reverse the lower court’s judgment, has laid down that principle as part of the relevant law”.86

VI CONCLUSION

The case of Toh v Su has provided an opportunity to re-examine the law as it relates to engagement rings when a marriage does not take place. The question as to “who gets to keep the engagement ring” is an interesting one, given that intelligent, moral people may have different opinions about whether a ring can be kept, or whether it should be returned, when things go poorly. The law is tasked with reflecting society’s views on the topic, which is difficult, given that modern Australia is grappling with what marriage means as an institution, how important it is, and how it should be defined.87 These questions indirectly impact upon how the law should view engagements to marry, and the legal entitlement to gifts given in contemplation of marriage. In the absence of morally definitive answers to these questions, people look to the law to see how it broadly regulates a failure to proceed with marriage after a promise to do so.

This article has analysed the reception of Cohen v Sellar principles into Australian domestic law, providing a context for the decision given in Toh v Su. The authors have been critical of the approach taken to the engagement ring in Toh v Su, both in terms of the legal reasoning employed, and the lack of adherence to the doctrine of precedent. This should not be seen as a criticism of the magistrate, who like all magistrates, was tasked with providing comprehensive reasons to a difficult legal question in a prohibitive time frame. Given the co-dependence and circularity between what the law says on this issue, and what people think it should say, it would now be opportune for the Commonwealth Parliament to intervene and legislate on the topic. It is contended that an engagement ring is, by its nature, a conditional gift. Other gifts might not possess the innate quality of being conditional, but can still be

87 See, eg, the recently amended definition of the word ‘marriage’ in section 5 of the Marriage Act 1961 (Cth).
understood as conditional gifts through the express or implied agreement of the parties. Legislation could quite simply capture these ideas.

In present day Australia, nothing would dampen the mood of a proposal more than a discussion about the meaning of an engagement ring. In the Scottish context, it has been stated that:

Engagement rings give rise to special difficulties. There could conceivably be evidence of the parties’ express intentions, but this would be unusual. It would be unromantic, even for a Scotsman, to lay down in advance the circumstances in which the ring should be returned.88

In Cohen v Sellar, Justice McCardie mused, ‘It is curious that, after the centuries in which so many engagements to marry have been made in hope, but dissolved in disillusion, the questions now before me have not been long ago determined by direct decision.’89 We would add that in the nearly 100 years since Cohen v Sellar has been decided, it is curious that the law surrounding engagement rings has not been definitively settled.

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89 Cohen v Sellar [1926] 1 KB 536, 541.