



# Recognition of Common Law Marriage in Selected Foreign Countries

Australia • Fiji • New Zealand

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# **LAW LIBRARY REPORT**

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Directorate of Legal Research  
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## **RECOGNITION OF COMMON LAW MARRIAGE IN SELECTED FOREIGN COUNTRIES**

*This report concerns the countries of Australia, Fiji and New Zealand.*

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## AUSTRALIA

## COMMON LAW MARRIAGE

*Within the Commonwealth of Australia (Australia) 'common law marriages' are considered valid marriages. Additionally Australia recognizes de facto relationships in both Commonwealth and State legislation as well as common law. A 'common law marriage' is a marriage that is "recognized at common law as valid even though performed contrary to the law of the place where the marriage is celebrated."<sup>1</sup> Generally a de facto relationship is defined as a "relationship between a man and a woman who are living together (or who have lived together) as husband and wife on a bona fide domestic basis although not married to each other"<sup>2</sup> however many statutes apply equally to homosexual and heterosexual couples.*

**I. Common law marriage**

Under Australian law a marriage will be considered valid even though performed contrary to the laws where it is celebrated provided the marriage has the express agreement of the parties to be husband and wife and occurs in circumstances where compliance with the local law is not possible, for example, civil registration of a religious marriage where local administration has broken down due to war<sup>3</sup> or where compliance with local laws would be against the participants conscience.<sup>4</sup> An additionally requirement is that the ceremony occur in the presence of an episcopally ordained priest,<sup>5</sup> however, the *obiter* references to common law marriage in the later case of *In the Marriage of Banh* does not include this as a requirement<sup>6</sup> and the unsettled nature of this requirement is identified in *In the Marriage of X* per Watson J at 801-802.<sup>7</sup>

**II. De facto relationships**

De facto relationships are recognized within several Commonwealth statutes. For example, de facto relationships are recognized for the purposes of social security (*Social Security Act 1991* (Cth) – s4), workplace relations (personal and parental leave) (*Workplace Relations Act 1996* (Cth) – s240), family law (*Family Law Act 1975* (Cth) – s60D) and corporations law (*Corporations Act 2001* (Cth) – s9).

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<sup>1</sup> Butterworths *Encyclopaedic Australian Legal Dictionary* (at 11 May 2006) Sydney, Australia.

<sup>2</sup> Nygh, Peter and Butt, Peter (eds) Butterworths *Concise Australian Legal Dictionary* 2<sup>nd</sup> ed (1998) Sydney, Australia.

<sup>3</sup> *Encyclopaedic Australian Legal Dictionary*, (at 11 May 2006), LexisNexis, Sydney, Australia. *In the Marriage of X* (1983) 8 Fam LR 793; *Kuklycz v Kuklycz* [1972] VR 50.

<sup>4</sup> *In the marriage of X* (1983) Fam LR 793.

<sup>5</sup> *Kuklycz v Kuklycz* [1972] VR 50.

<sup>6</sup> *In the Marriage of BANH* (1981) 6 Fam LR 643.

<sup>7</sup> (1983) 8 Fam LR 793.

De facto relationships are recognized in all Australian states and territories for various purposes. For example:

New South Wales – *Property (Relationships) Act 1984* – s4; *Commonwealth Powers (De Facto Relationships) Act 2003* s3

Queensland – *Acts Interpretation Act 1954* (Qld) – s32DA

South Australia – *De Facto Relationships Act 1996* (SA) – s3 (limited to heterosexual couples)

Tasmania – *Relationships Act 2003* (Tas) – s4

Victoria – *Property Law Act 1958* (Vic) – s275 (refers to domestic relationships)

Western Australia – *Interpretation Act 1984* (WA) – s13A

Australian Capital Territory – *Legislation Act 2001* (ACT) – s169

Northern Territory – *De Facto Relationships Act 1991* (NT) - s3A

### **III. Comparison to Black’s Law Dictionary**

Under Australian law a common law marriage requires some form of ceremony or declaration by the participants and may require the presence of an episcopalian ordained priest. Further a common law marriage will only be accepted where the circumstances of the marriage are such that it is not possible for the participants to comply with the local law. This is in contrast to Black’s definition where no ceremony is required and there is no reference to an inability to comply with local laws.

Definitions of de facto relationships will vary across jurisdictions, however, the most significant differences between Australian definitions and the definition of common law marriage employed by Black’s Law Dictionary are:

1. Same sex relationships. Most Australian jurisdictions do not limit de facto relationships to heterosexual couples New South Wales, Queensland, Tasmania, Victoria, Western Australia, Australian Capital Territory and the Northern Territory recognizes same sex de facto relationships. South Australia does not recognize same sex de facto couples.

2. Dissolution. Under Australian law there is no requirement that a de facto relationship be dissolved only by annulment, divorce or death.

3. A de facto relationship may not be given the full rights and responsibilities of a ceremonial marriage.

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### FIJI

#### *Executive Summary*

*The Republic of the Fiji Islands (Fiji) may recognize common law marriages as English common law in force on 2 January 1875 continues in force in Fiji subject to the appropriateness of these laws for local circumstances.<sup>1</sup> However the operation of the Marriage Act [CAP 50] (Fiji) may prevent the recognition of common law marriages. Fiji recognizes de facto relationships for the purpose of family law legislation.*

#### **I. Common law**

Section 24 of the *Supreme Court Act* Chap 13 (Fiji) provides that, subject to “circumstances of Fiji and its inhabitants.. and subject to any existing or future Act of the Parliament of Fiji” the “the common law, the rules of equity and the statutes of general application” in force in England on 2 January 1875 are applicable in Fiji.

The applicable law in England at this period would have been the common law and the *Marriage Act* 1823 (UK). The current Fiji legislation regarding marriage is the *Marriage Act* [CAP 50] (Fiji).

The *Marriage Act* (Fiji) addresses the solemnization of marriages and provides that such solemnized marriages are deemed to be valid marriages.<sup>2</sup> It does not refer to common law marriages nor state that only marriages in accordance with the *Marriage Act* are valid. Section 19(2) of the *Marriage Act* [CAP 50] (Fiji) states that “..any person shall knowingly and wilfully marry without a certificate for marriage.. the marriage of such person shall be null and void.” Therefore it is unclear if a person marrying in ignorance that their certificate was invalid or non-existent would be considered married at common law. It is arguable that such a person would be married via the operation of English common law pre-1875 however, I am unable to locate any case law that would affirm the validity of such marriages under Fiji law.

#### **II. De Facto Relationships**

Section 42 of the *Family Law Act* 2003 (Fiji) defines ‘family’ to include those in de facto relationships. A de facto relationship is defined as a “... relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other”.<sup>3</sup>

#### **III. Comparison to Black’s Law Dictionary**

If common law marriage based on English common law pre-1875 was found to be applicable within Fiji then the requirements for such a marriage would be based on the English precedents of *Reg. v*

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<sup>1</sup> *Supreme Court Act* CAP13 (Fiji).

<sup>2</sup> *Marriage Act* CAP 50 (Fiji) s38.

<sup>3</sup> *Family Law Act* 2003 (Fiji) s42(1).

*Millis* (1843) E.R 844 and *Catterall v Catterall* (1847) 1 Rob. Ecc. 580. While *Reg. v Millis* required the presence of an episcopalian ordained priest this was not required in *Catterall v Catterall*.<sup>4</sup> Therefore it is arguable that if accepted in Fiji a common law marriage may occur provided the parties to the marriage give consent to become man and wife regardless of whether or not an episcopalian priest is present.<sup>5</sup> This is in contrast to the definition employed in Black's where there is no requirement for a ceremony or for the presence of a minister.

The definition of de facto relationship used within the *Family Law Act 2003* (Fiji) is closer to the definition employed by Black's but in this instance the definition of de facto is only relevant for certain provisions of the *Family Law Act* and therefore can not be considered to have the same rights and responsibilities of a ceremonial marriage.

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<sup>4</sup> As reported by Hall, J, 'Common Law Marriage' (1987) *Cambridge Law Journal* 46(1) p.106-121.

<sup>5</sup> see Hall, J, 'Common Law Marriage' (1987) *Cambridge Law Journal* 46(1) p106 at p.120. No biographical information on author is known.



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## NEW ZEALAND

*Executive Summary*

*New Zealand may recognize common law marriages as valid marriages under New Zealand law where marriage involves both an express intention to be married and occurs under circumstances where it is impossible to comply with the local laws governing marriages.<sup>1</sup> Additionally New Zealand recognizes de facto relationships and civil unions. Generally de facto relationships are not considered marriages<sup>2</sup> however they are recognized for the purposes of the division of property,<sup>3</sup> guardianship of children,<sup>4</sup> and discrimination.<sup>5</sup> Additionally de facto relationships and relationships ‘in the nature of marriage’ are recognized for the purposes of social security. Civil unions are similar to ceremonial marriage being solemnized registered unions between two persons whether of the same or different sex.*

**I. Common law marriage**

A common law marriage will be recognized as valid in New Zealand where it is impossible or impracticable for the participants to comply with the applicable local laws and where the participants have complied with the requirements for a common law marriage. A common law marriage has minimal formal requirements but does require that the parties clearly intend to be husband and wife. This may be evidenced by the exchange of promises to that effect before witnesses.<sup>6</sup>

**II. De facto relationship, civil unions and relationships in the nature of marriage**

De facto relationships are recognized in statutes for various purposes. For example, the *Property (Relationships) Act 1976 (NZ)* recognizes de facto relationships for the purposes of division of property upon separation or death.<sup>7</sup> In this Act a de facto relationship is defined as a relationship between two persons (whether or not of the same or opposite sex) who are over the age of 18, live

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<sup>1</sup> 9 *Laws of New Zealand Husband and Wife* 9, LexisNexis; *Family Proceedings Act 1980 (NZ)* s31(2).

<sup>2</sup> 9 *Laws of New Zealand Husband and Wife* 9, LexisNexis; *Family Proceedings Act 1980 (NZ)* s31(2).

<sup>3</sup> *Property (Relationships) Act 1976 (NZ)* s2(D)(1)(a)-(c).

<sup>4</sup> *Care of Children Act 2004 (NZ)*.

<sup>5</sup> *Social Security Act 1964 (NZ)* s63, *Human Rights Act 1993* s21(1)(b).

<sup>6</sup> *Julian v Oo* [2001] NZFLR 116 per Ellis J.

<sup>7</sup> *Property (Relationships) Act 1976 (NZ)* s1C.

together as a couple and are not married to or in a civil union.<sup>8</sup> A de facto relationship ceases upon separation or death.<sup>9</sup>

Civil unions are analogous to marriage. The *Civil Union Act 2004* (NZ) provides for the registration and solemnization of civil unions. Civil unions may be entered into by any two persons who are over the age of 17 (or over the age of 16 with the consent of their guardian), not currently married or in a civil union and not related to each other (as specified in the Act).<sup>10</sup> Solemnized civil unions are registered under the *Births, Deaths and Marriages Act 1995* (NZ)<sup>11</sup> and their dissolution is governed by the *Family Proceedings Act 1980* (NZ).<sup>12</sup>

Civil unions and de facto relationships are recognized for, among other things, the purpose of establishing guardianship of children under the *Care of Children Act 2004* (NZ)<sup>13</sup> and as a prohibited ground for discrimination under the *Human Rights Act 1993* (NZ).<sup>14</sup>

The *Social Security Act 1964* (NZ) recognizes civil unions, de facto relationships and relationships that are ‘in the nature of marriage’.<sup>15</sup>

### III. Comparison to Black’s Law Dictionary

Under New Zealand law a common law marriage may be valid provided if the parties clearly intend to be married and the circumstances of the marriage are such that it is not possible to comply with local laws. This is in contrast to the description within Black’s where no ceremony is required and there is no requirement that the participants be unable to comply with local laws.

Under New Zealand law de facto relationships, civil unions and relationships ‘in the nature of marriage’ are recognized under statutes for various purposes. The definitions of de facto relationships, civil unions and relationships ‘in the nature of marriage’ differ however, the most significant differences between these definitions and that of ‘common law marriage’ employed by Black’s Law Dictionary are:

1. Registration. Civil unions, like ceremonial marriages, must be registered.
2. Same-sex relationships. Same sex relationships are recognized for the purposes of civil unions, de facto relationships and ‘relationships in the nature of marriage’.

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<sup>8</sup> *Property (Relationships) Act 1976* (NZ) s2D(1).

<sup>9</sup> *Property (Relationships) Act 1976* (NZ) s4.

<sup>10</sup> *Civil Union Act 2004* (NZ) s4.

<sup>11</sup> *Civil Union Act 2004* (NZ) s4(1)(3).

<sup>12</sup> *Civil Union Act 2004* (NZ) s4(1)(4).

<sup>13</sup> *Care of Children Act 2004* (NZ) s17.

<sup>14</sup> *Human Rights Act 1993* (NZ) s21.

<sup>15</sup> *Social Security Act 1964* (NZ); *Social Security Amendment Act 2005* s6.

3. Dissolution. Under New Zealand law there is no requirement that a de facto relationship or a relationship ‘in the nature of marriage’ be dissolved only by annulment, divorce or death as they may be dissolved via separation.
4. De facto relationships and relationships ‘in the nature of marriage’ may not be given the full rights and responsibilities of a ceremonial marriage.