



Binding Financial Agreements – what are they and do I need one?

Mention the word “Pre-Nup” and this automatically conjures images of an “Anna Nicole Smith” type situation where there is an impending marriage and one party is either substantially more financially established than the other or significantly older than the other. However, any legal professional can now tell you that gone are the days where “Pre-nups” or Binding Financial Agreements as they are more commonly referred to in legal circles were reserved strictly for parties in an unequal financial position. These days, more and more people are choosing to have a Binding Financial Agreement drafted either before their marriage, during their marriage or at the conclusion of their marriage to add some certainty to what is often an extremely uncertain area. So what exactly is a Binding Financial Agreement and who needs one?

In simple terms, a Binding Financial Agreement is a document that outlines how the assets, liabilities and Superannuation of parties will be divided up should the marriage or relationship fail. This type of Binding Financial Agreement is typically drawn up at the commencement of a relationship or marriage. In comparison, a Binding Financial Agreement drawn up at the conclusion of a marriage or relationship is mainly used as a means of finalising and formalising a division of property between the parties without having to resort to Court proceedings, which as we all know are not only usually expensive but more often than not result in unwanted hostility between the parties.

While both forms of Binding Financial Agreements have their benefits, the former, namely a Binding Financial Agreement drawn up at the commencement of a relationship or marriage tends to be somewhat more speculative than the one drawn up at the conclusion of a marriage or relationship. The primary reason behind this is that it is near impossible to predict the extent of assets and financial resources the parties’ will acquire during their relationship. While the Agreement initially drawn up by the parties’ legal representatives and agreed to by the parties may suggest one factual scenario, the reality at the conclusion of the marriage may in fact be very different.

There is also a third but less commonly used Binding Financial Agreement, namely a Maintenance Agreement which is typically drawn up after the parties to a marriage separate but before they divorce.

The Advantages

Bearing in mind that the drafting of these Agreements will usually result in a significant cost to the parties, there are certain situations where these Agreements will obviously be more advantageous than others.

These situations typically arise where:

- The parties are in an initial unequal financial position and wish to create some certainty in terms of how their property will be divided should their relationship not last;

- The parties (or one of them) have a substantially large asset base prior to the relationship and/or marriage and wish to protect ownership of these assets and/or financial resources should the relationship fail;
- The parties (or one of them) anticipate acquiring a special asset during their relationship (I.e. An inheritance) and wish to protect ownership of this;
- One party (or both) wishes to protect ownership and/or retention of business interests;
- The parties wish to avoid costly, lengthy and often traumatic litigation if their relationship does not last; and
- The parties have a desire to ensure that there is an Agreement in place which is binding on the estate of their partner/spouse in the event of an untimely death.

Do I need a Binding Financial Agreement?

As stated above, bearing in mind the cost involved in the preparation of such Agreements, there are some people who would potentially obtain the greatest benefit from such an Agreement. These are:

- People entering into their second or subsequent marriage. A Binding Financial Agreement enables these people to avoid the stress and cost associated with the potential breakdown of their subsequent marriage and to continue providing for the children of their past marriage (if any); and
- Couples who utilise Asset Protection Schemes. For example, where a couple puts all their personal assets in the name of the Husband, a Binding Financial Agreement can be drafted acknowledging the Wife's financial interest in these assets regardless of whose name the asset or assets are held in.

Requirements of a Valid Binding Financial Agreement

Prior to January 4 2010, there were significantly more stringent requirements in order for Binding Financial Agreements to be valid under the relevant legislation which was predominantly the *Family Law Act 1975*.

In order for a Binding Financial Agreement to be valid, the Agreement had to satisfy the following criteria:

- Be signed by both parties;
- Contain a statement in relation to both parties (in an Annexure to the Agreement) to the effect that the party to whom the statement relates had been provided, before the signing of the Agreement with independent legal advice from a legal practitioner in terms of the following matters:
 - The effect of the Agreement on the rights of both parties; and
 - Whether or not, at the time the advice was provided it was to the advantage or disadvantage of the party receiving the advice to enter in to the Agreement.
- A Certificate signed by the person providing the independent legal advice had to be annexed to the Agreement confirming the advice was so provided; and
- The Agreement must not previously have been set aside by a Court for lack of validity or certainty.

However, since 4 January 2004 and the commencement of the *Federal Justice System (Efficiency Measures) Act 2009*, the requirements for an Agreement to be valid and binding on the parties are somewhat less stringent in that any Financial Agreement between spouses made after the commencement of the legislation must comply with the following requirements:

- Be signed by all parties;
- Before signing the Agreement, each party was provided with independent legal advice as to the effect of the Agreement on the rights of the party and the advantages and disadvantages of making the agreement;
- Either before or after signing the Agreement, each spouse was provided with a signed statement confirming the advice was provided; and
- A copy of the statement confirming the advice was provided is exchanged between the parties and/or their legal representatives.

Although the requirements appear to be quite similar, the major difference for Agreements executed after 4 January 2010 is that there is no longer a need for a Certificate from each Solicitor or Lawyer representing the party to be annexed to the Agreement – providing a copy of the statement of advice is now sufficient. This statement is able to be provided either before or after the Agreement was signed by the parties. Further, there is no longer a requirement that there be a statement in the body of the Agreement itself that the parties have received independent legal advice as to the nature and effects of the Agreement on their rights and the advantages and disadvantages of entering into the Agreement.

Practical effects caused by amendments to the Legislation

Perhaps the biggest change brought about by the commencement of the legislation is that substantial compliance with the requirements is now sufficient. What this in essence means is that provided the Agreement is signed by both parties to the Agreement, it will still be binding on the parties irrespective of whether the parties were provided with independent legal advice and whether the advice statement was provided to either spouse.

This is no doubt a significant relaxation of the former requirements which clearly stated that in order for the Agreement to be valid and binding, both parties were required to receive independent legal advice and a statement to this effect had to appear in the body of the Agreement and also, be annexed to the Agreement.

The effect of these changes is that not only does it overturn the ruling of the Full Court in the case of *Black & Black*¹, where the Court ruled that strict compliance with the statutory requirements was essential in order for Binding Financial Agreements to be valid, but also, it means that it is much less likely that Applications will be made to the Court for a Declaration setting aside such Agreements for lack of compliance with the requirements. However, this does not mean that Binding Financial Agreements can no longer be set aside – they can still be set aside in the same way they were prior to the commencement of the amendments on 4 January 2010.

Setting Aside a Binding Financial Agreement

As stated above, despite a relaxation of the rules concerning the validity of Binding Financial Agreements, such Agreements can still be set aside either during its operation by the parties themselves by entering into another written agreement known as a Termination Agreement or alternatively, by the Court. A Court

¹ [2008] FamCAFC 7 (Full Court)

is able to make an Order setting aside a Binding Financial Agreement if and only if, the Court is satisfied that it would be unjust and inequitable for the Agreement to be binding on the parties.

At the time of writing this article, there does not appear to be any guidance from the Courts as to the precise meaning of the phrase “*unjust and inequitable*” and undoubtedly, this will be the topic of future debate and judicial reasoning. However, based on previous decisions and in particular, the reasoning of the Court in the case of *Black & Black*², an Agreement that is “*unjust and inequitable*” will typically arise in circumstances where:

- The Agreement was obtained by fraud (for instance, non-disclosure of material facts such as the true financial position of a party to the agreement);
- The Agreement is void, voidable or unenforceable;
- Circumstances have arisen since the making of the Agreement that would make it impracticable for the Agreement as a whole or a substantial part of the Agreement to be carried out;
- A material change in circumstance has occurred since the making of the Agreement (this relates to circumstances relating to the care, welfare and development of a child of the relationship or marriage) and as a result of the change, the party applying to have the Agreement set aside will suffer economic hardship if the Court does not set aside the Agreement; or
- A party to the Agreement engaged in conduct that was unconscionable taking into account the circumstances involved in the making of the Agreement.

Conclusion

In conclusion, there are obviously circumstances where such Agreements will be more beneficial than others. An important point to note is that Binding Financial Agreements are not a standard document for which there is a template that is able to be applied for each and every situation. Each Agreement is unique and drafted with the particular circumstances of the parties’ to the Agreement in mind. For this reason, it is not recommended that you attempt to draft such an Agreement yourself or purchase a template which seems to be available on an increasing number of internet websites at a bargain price.

If you are considering entering into such an Agreement, we recommend you make an appointment with one of our qualified staff members who will be able to provide you with comprehensive advice concerning the advantages and disadvantages of entering into the Agreement as they apply to your particular case. We will also be able to provide you with a rough estimate as to the cost involved in the preparation of such an Agreement.

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² [2008] FamCAFC 7 (Full Court)

Where do I go from here?

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