

Overview of Binding Financial Agreements

Parties who agree on issues of property settlement and spousal maintenance can have their agreement finalised by way of a consent order or Binding Financial Agreement. A Binding Financial Agreement is the only option for couples who have not yet separated and can be made by couples who are:

- intending to marry;
- intending to live in a de facto relationship;
- are married and not separated;
- are living in a de facto relationship and not separated;
- are married and separated but not divorced;
- were living in a de facto relationship and have separated; or
- are divorced.

Solicitor's obligations in the making of Binding Financial Agreements, both in respect of married and de facto spouses have changed. Some of the changes may apply retrospectively. "Past agreements may or may not be open to challenge, depending on the date the agreement was signed" warned Mr Antonious Abdelshahied, Lawyer with **Michael Sing Lawyers Pty Ltd**.

Old Requirements for Binding Financial Agreements

For a financial agreement to be binding, the agreement must meet the specific requirements of the Act. In order to satisfy the requirements, the agreement must:

- be in writing;
- be signed by both parties;
- be between parties:
 - who are contemplating entering into a marriage with each other;
 - who are contemplating entering into a de facto relationship with each other;
 - to a marriage;
 - while in a de facto relationship;
 - to the former marriage;
 - to the former de facto relationship;
- deal with property, financial resources and/or maintenance of the parties;
- include a statement for each party that, before the agreement was signed by that party, independent advice was provided by a legal practitioner to that party regarding:
 - the effect of the agreement on the rights of that party;
 - the advantages and disadvantages, at the time that the advice was provided, to the party making the agreement (**see new requirement below**);
- contain an annexure with a certificate signed by the person providing the independent legal advice stating that the advice was provided (**see new requirement below**);
- not have been terminated or set aside by a court;
- be given to one of the parties and a copy given to the other after being signed;
- include a separation declaration if:
 - the Part VIIIA financial agreement deals with property or financial resources and the parties were legally married but are not divorced;
 - the Part VIIIB financial agreement deals with property or financial resources and the parties were in a de facto relationship.
- include a separation declaration if the parties are splitting superannuation in the financial agreement.

If an agreement does not meet the above requirements, it will not be a financial agreement for the purposes of Part VIIIA or Part VIIIB and will not be binding on either of the parties or the court.

New Requirements for Binding Financial Agreements

The *Federal Justice System (Efficiency Measures) Act 2009* received Royal Assent on 7 December 2009, and commenced on 4 January 2010. This Act amends the *Family Law Act* requirements (set out above).

Any financial agreement between spouses, married or de facto, made on or after 4 January 2010 must meet the following requirements:

1. The agreement is signed by all parties;
2. Before signing the agreement, each party was provided with independent legal advice about the effect of the agreement on the rights of the party and the advantages and disadvantages of making the agreement;
3. Either before, or after, signing the agreement, each spouse was provided with a signed statement stating that the advice was provided;
4. A copy of the statement in paragraph 3 is provided to the other spouse (or their legal representative).

Key Differences from Prior Requirements

Agreements no longer require a certificate from the legal practitioner to be annexed to the agreement. There are no requirements for the form of the certificate. Providing a copy of the statement of advice is sufficient. The advice statement can be provided before or after the agreement was signed.

The agreement does not have to have a statement in the body of the agreement that the parties have received independent legal advice as to prescribed matters.

Substantial Compliance Sufficient

Provided that the agreement is signed, the agreement will still be binding on the parties even if:

- the parties were not provided with independent legal advice;
- the advice statement was not provided to either spouse;

This is *subject* to a new section of the Act which states that, if the above requirements were not met, a Court must be satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made).

"This is a substantial relaxation of the requirements for the agreements, and makes it much less likely that applications will be made for declarations that agreements were not binding, for lack of meeting the formal requirements" says Mr Abdelshahied.

In *Black & Black* (2008), the Full Court adopted a very strict interpretation of the above requirements. The members of the Full Court noted that the agreement did not contain a statement directly acknowledging that the parties received legal advice in relation to the matters set out in s90G (1)(b). In their view, a strict interpretative approach and strict compliance requirements should be applied where legislation ousts the court's jurisdiction to make property settlement orders. Accordingly, the appeal was allowed and financial agreement was set aside and the application for property settlement was remitted for hearing. "This is no longer good law" says Mr Abdelshahied. "In fact, non-compliance with the technical elements of the legislation will not, of itself, result in agreements being non-binding. Agreement can still be set aside in the way that they were able to prior to the changes introduced on 4 January 2010," says Mr Abdelshahied.

Advantages and Disadvantages of Entering into Binding Financial Agreements

The arguments usually advanced in favour of entering a pre-nuptial or pre-cohabitation agreement are that it:

- clarifies initial and ongoing financial contributions of the parties;
- forces parties to sort out priorities such as children versus employment;
- promotes better communication in the long term;
- demonstrates that the parties have no secrets from each other;
- prevents disputes as to the value of assets at the commencement of the relationship or, at least, at the time of entering the agreement;
- removes a source or sources of stress;
- gives greater certainty and control to the parties over their financial affairs; and
- enables speedier resolution of financial matters at the end of a relationship.

On the other hand, the arguments usually advanced against entering a pre-nuptial or pre-cohabitation agreement are that it:

- is a bad or negative start to a marriage or de facto relationship;
- suggests a lack of trust in the other partner;
- suggests a lack of confidence in the marriage or de facto relationship;
- distracts from a religious commitment to permanent marriage;
- removes the romance; and
- encourages instability of marriages or relationships.

Termination of a Binding Financial Agreement

A Binding Financial Agreement can be 'terminated' in two ways. Firstly, parties can enter into another financial agreement, provided that, a specific provision is included in the new agreement stating that the old agreement is terminated. The alternative method is for the parties to enter into a 'termination agreement' pursuant to s90J (married couples) or s90UL (de facto couples). There is also another method that includes the parties incorporating a sunset clause in the agreement that the agreement will terminate in certain circumstances, such as:

- the parties may want the agreement to terminate if they cohabit for more than a certain number of years;
- the parties have a child;
- the parties purchase a home in joint names;
- one party is out of the workforce for a certain period of time due to ill-health, injury, pregnancy or caring for children of the marriage or de facto relationship.

Effect of Death of a Party

When considering whether or not a binding financial agreement is an appropriate way to formalise an agreement, particularly with respect to maintenance, the effect of the death of one of the parties should be considered. A financial agreement continues to operate despite the death of a party to the agreement and is therefore binding on the legal representative of the deceased in relation to all obligations. "In the event that the parties want the agreement to cease upon the death of one or both parties, then this should be specifically provided for in the agreement" warns Mr Abdelshahied.

To obtain legal advice about Binding Financial Agreements or about property and financial matters in Family Law, please contact the Family Law Team at **Michael Sing Lawyers Pty Ltd** in Brisbane (07) 3229 6099 or on the Gold Coast (07) 5597 8888.



Gold Coast Office

9 Ouyan St
 Bundall QLD 4217
 PO Box 9073 GCMC QLD 9726
 T +61 7 5597 8888
 F +61 7 5597 8899

Brisbane Office

Level 10, 410 Queen Street
 Brisbane QLD 4000
 PO Box 3246 Brisbane QLD 4001
 T +61 7 3229 6099
 F +61 7 3226 9001

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