Binding Financial Agreements

A practical guide for married and de facto couples

What is a financial agreement?

A financial agreement is a private contract made under the Family Law Act 1975 (Cth). If it is binding, it can exclude the Court?s jurisdiction over the financial or property matters covered by the agreement.

These agreements are often called Binding Financial Agreements or BFAs. The legislation uses the term financial agreement and sets different provisions for married and de facto couples.

When can an agreement be made?

- Before marriage or before entering a de facto relationship.
- During a marriage or de facto relationship.
- After separation or divorce, including to record an agreed financial outcome.

What can it address?

Depending on the circumstances and drafting, an agreement may address property, financial resources, liabilities, maintenance and related matters if the relationship breaks down. It can cover all financial matters or only defined assets or issues.

A financial agreement does not determine parenting arrangements or child support merely because those topics are mentioned. Different legal rules apply to children.

Requirements for a binding agreement

Independent legal advice

Each party must receive independent legal advice from their own Australian legal practitioner before signing. The advice must cover the effect of the agreement on that party?s rights and the advantages and disadvantages, at the time the advice is provided, of making the agreement.

Core formal requirements

- The agreement must be in writing and signed by all parties.
- Each party must receive the required independent legal advice before signing.
- Each party must receive a signed statement from their lawyer confirming that the advice was provided.
- A copy of that lawyer?s statement must be given to the other party or their lawyer.
- The agreement must not have been terminated and must not have been set aside by a court.
- The correct statutory provision must be used for the relationship stage and status.

Do not rely on technical rescue provisions

The Act contains limited circumstances in which a court may treat an agreement as binding despite certain defects where it would be unjust and inequitable not to do so. This is not a substitute for careful compliance. A defective agreement can lead to expensive litigation and uncertain outcomes.

Time and genuine choice

Both parties should have adequate time to obtain advice, request changes and make a voluntary decision. Last-minute signing, pressure, unequal bargaining conditions or inadequate understanding can increase the risk of challenge.

Disclosure, drafting and operation

Financial disclosure

Accurate disclosure helps each party understand the bargain and obtain meaningful advice. Fraud can include material non-disclosure, and inadequate disclosure may contribute to a later challenge.

- Assets, liabilities, income, superannuation and financial resources.
- Companies, trusts, partnerships, overseas assets and digital assets.
- Current values, ownership structures, tax issues and contingent liabilities.
- Expected inheritances, gifts or future interests where relevant to the proposed terms.

Drafting issues to consider

- Which existing and future assets are included or excluded.
- How jointly acquired property, debts and improvements will be treated.
- What happens on separation, sale, refinancing, death or insolvency.
- Whether maintenance is addressed and whether the terms satisfy statutory requirements.
- How valuations, tax, transaction costs and implementation deadlines will be handled.
- Review events such as children, illness, relocation, business growth or long passage of time.

After signing

Keep the signed agreement, lawyers? statements and disclosure securely. Follow any implementation steps and avoid later conduct that is inconsistent with the agreement. Review estate planning, superannuation nominations and ownership structures separately.

Challenges, alternatives and preparation

When might an agreement be challenged?

Only a court can determine whether an agreement is binding or should be set aside. Grounds are statutory and fact-specific.

- Fraud, including material non-disclosure or misrepresentation.
- The agreement being void, voidable or unenforceable under contract or equitable principles.
- Unconscionable conduct, duress, undue influence or other serious problems with consent.
- Impracticability caused by circumstances arising after the agreement was made.
- A material change relating to a child where enforcing the agreement would cause hardship.
- Conduct designed to defeat or defraud a creditor, or other grounds provided by the Act.

Financial agreement or consent orders?

After separation, parties may consider either a financial agreement or consent orders. Consent orders are approved by the Court and must be just and equitable. Financial agreements are private contracts and require independent advice for each party. The best option depends on the outcome, risk, timing and desired coverage.

Preparing for advice

- Bring identification, relationship dates and any wedding or separation timetable.
- Prepare a complete schedule of assets, liabilities, income, superannuation and structures.
- Provide valuations, tax records, trust and company documents and existing agreements.
- Identify intended outcomes, non-negotiable concerns and foreseeable life changes.
- Allow enough time for separate advice, negotiation, revision and signing.

Independent advice is essential for both parties

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