

# Binding Financial Agreements

*Financial agreements are becoming increasingly common, enabling couples to decide now how they want to deal with their property and financial resources in the event of separation.*

## Contact Us

If you need further assistance or advice, please do not hesitate to contact our team on (03) 9843 2100.

## What is a Financial Agreement?

A Financial Agreement is a private contract entered into between either a soon to be, current or former couple that governs the financial relationship between the couple. They are also known as 'Pre-nup' or 'Continuing relationship' or 'Post-nup' agreements. They address how the property and financial resources of a relationship are dealt with at separation.

Financial Agreements remove the power of the Federal Circuit and Family Court of Australia (**the Court**) to make orders in relation to all financial matters to which the agreement applies, in the event a couple separates.

## What are the different types of Financial Agreements?

You can enter into a Financial Agreement in the following circumstances:

1. Prior to the commencement of a de facto relationship or marriage;
2. During a de facto relationship or marriage; or
3. Following separation or divorce.

## Why have a Financial Agreement before or during a relationship?

Common reasons people enter into financial agreements before or during a relationship include:

1. To protect assets accumulated prior to the relationship. This is particularly relevant to second relationships and where someone wants to protect assets for their children from a former relationship.
2. To protect current and future inheritances, gifts and family wealth from claim by the other person.
3. To provide certainty about a couple's financial arrangements in the event of separation in the future. This can reduce

the cost and stress associated with negotiating or litigating financial matters at separation.

4. To gain more control over the outcome at separation because if the financial agreement is binding the Court does not have power to make orders for a property settlement or the payment of spousal maintenance.

## How does a Financial Agreement work?

Financial Agreements are designed to regulate and determine the impact of separation on the entirety of the couple's financial relationship (i.e. they deal with all assets, liabilities, superannuation and financial resources of the relationship). A common approach is to divide property and financial resources into categories; the couple's "separate property and financial resources" which are kept excluded from claim by each other in the event of separation and "joint property and financial resources" which are agreed to be divided in the event of separation. There can also be agreed upon additional payments from one person to the other, depending on the circumstances.

Alternatively, financial agreements can be limited in scope, such as Inheritance Protection Agreements. The significance and value of inheritance protection agreements is that they specifically deal with possible or expected inheritances or gifts and exclude them for the sole benefit of one person. All other property and financial resources are then divided following separation pursuant to the *Family Law Act 1975* (Cth).

## Binding Financial Agreements *continued*

### What are the requirements of a Financial Agreement?

Given Financial Agreements take away the power of the Court to make orders, there are strict legal requirements under the *Family Law Act 1975 (Cth)* that must be met when entering into one.

These include, each person receiving independent legal advice from an Australian lawyer about the effect of the financial agreement on that person's rights and about the advantages and disadvantages, at the time the advice was provided, of making the agreement. The parties must also disclose their respective financial positions to each other, to ensure they are entering into the agreement fully informed of the rights they are giving up.

Other technical requirements include:

- the agreement must be signed by both parties;
- each party's lawyer must sign a statement stating the requisite written advice was provided and copies of those statements provided to each party or lawyer; and
- the agreement has not been set aside or terminated by a Court.

### When does a Financial Agreement become binding?

There is a distinction between when the Financial Agreement becomes binding versus when it comes into effect. The agreement is binding from the date that it is signed by the parties and their lawyers. It does not come into effect unless the parties separate and upon the signing of a statement called a Separation Declaration.

In relation to spousal maintenance, the Court may still have the power to make an order for maintenance if it is satisfied that, when the agreement came into effect the circumstances of a party were such that, taking into account the terms of the agreement, that person was unable to support themselves without an income tested pension, allowance or benefit.

### When does a Financial Agreement end?

A financial agreement can only come to an end if:

1. The parties enter into another financial agreement that states the previous agreement is terminated;
2. If the parties enter into a Termination Agreement; or
3. The agreement is set aside by the Court.

A financial agreement, once signed, will be considered binding. There are specific grounds under which a party can argue for the agreement to be set aside. However, to set aside such an agreement is a difficult and costly process. The question whether an agreement is valid, enforceable or effective is determined by the Court.

### How can Moores help?

At Moores, we prepare Financial Agreements as well as inheritance protection agreements for all types of relationships. The law in relation to Financial Agreements is complex. They must be drafted in accordance with the legal requirements under the legislation and each agreement needs to be carefully tailored to the circumstances of the relationship.

We are well versed in the approach and negotiation of Financial Agreements and would welcome a discussion with you or your clients at any time about the benefits of entering into a Financial Agreement.

We recognise that negotiating pre nuptial and continuing relationship agreements requires sensitivity and approach the process with care, respecting our client's ongoing relationship with their partner or spouse.