

Financial Agreements

The parties to a marriage or de facto relationship can enter into a financial agreement *prior* to or *during* their marriage or de facto relationship or *after* a divorce or the breakdown of their de facto relationship. Financial agreements are regulated by Part VIIIA of the *Family Law Act* in relation to marriages and Part VIIIAB of the *Family Law Act* in relation to de facto relationships.

Financial agreements are a tool to enable couples to plan ahead providing an agreed outcome in the event of a future breakdown in their relationship or to record an agreement following the breakdown of their relationship.

Financial agreements can cover:

1. How, in the event of the breakdown of the marriage or de facto relationship, all or any of the property or financial resources of the parties are to be dealt with. In relation to marriages this includes the property and financial resources held by the spouse parties at the time when the agreement was made or at a later time and during the marriage but prior to divorce. In relation to de facto relationships the property and financial resources that may be covered are those held by the spouse parties at the time when the agreement was made or at a later time and during the de facto relationship but prior to separation.
2. The maintenance of the parties during the marriage or relationship or after.
3. Ancillary or other matters.

Financial agreements entered into *before* a marriage or de facto relationship, or *during* the currency of such marriage or de facto relationship, are a useful tool to enable the parties to determine in advance the manner in which the property and financial resources of their marriage or de facto relationship are to be distributed should there be a future breakdown of that marriage or de facto relationship. Such financial agreements come into effect in the event of a separation only.



Financial agreements can also be utilised to record agreements regarding the property settlement and spousal maintenance of parties *after* a separation has occurred. Financial agreements may be used as an alternative to a Consent Order obtained through the Federal Circuit and Family Court of Australia. The question of whether a party should use a financial agreement, or a consent order is a complex one and parties should consult with their solicitor as to what is appropriate for them in their circumstances including considerations of expediency, costs and time factors. In determining whether to approve Consent Orders, courts exercising jurisdiction under the *Family Law Act* are required to assess whether a property settlement agreement is “just and equitable” within the meaning of the Act. Financial agreements provide a means of finalising property settlement matters without the scrutiny of the court. They are a useful tool where confidentiality is required, where the terms of the agreement require flexibility not available in a court order or in certain complex matters. Significant care needs to be taken to ensure enforceability.

Financial agreements also have a valuable role to play as the only method of finalising agreements regarding spousal maintenance. Agreements in relation to spousal maintenance cannot be resolved finally by way of a Consent Order of the Court. A financial agreement can operate to record the terms of an agreement in relation to spousal maintenance including an agreement to exclude claims in relation to spousal maintenance.

When are Financial Agreements Binding?

The *Family Law Act* provides clear requirements that must be satisfied before a financial agreement will be binding. A failure to meet these requirements can result in an unenforceable financial agreement. Most importantly each party to a financial agreement must be represented by an independent legal practitioner. That independent legal practitioner must provide a certificate as to that party having provided independent legal advice “*about the effects of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided to that party of making the agreement*”.

Care required in preparation and execution of Financial Agreement

Financial agreements need to be prepared carefully after detailed instructions and with close attention to detail. Each document is unique. Scrupulous care needs to be taken to ensure any financial agreement prepared will adequately meet the needs of the client now and into the future and also to ensure that the necessary legal requirements are met to ensure enforceability. Poorly prepared financial agreements or insufficient advice can cause unnecessary and costly litigation.

At Adelta Legal, our family law practitioners have extensive expertise in this specialised area.



Ian Charman

Accredited Family Law Specialist



Tom Hawkes

Consultant



Catherine Hokin

Consultant



Catherine Leis

Senior Associate



Level 3, 104 Frome Street
Adelaide SA 5000, Australia