

This article looks at financial agreements between partners as prescribed by the Family Law Act 1975. It discusses pre-nuptial agreements, agreements entered into during marriage and other related agreements, which would be recognised as enforceable by Australian courts.



A. WHAT CAN THE FINANCIAL AGREEMENT COVER?

The agreement may cover:

Property or financial resources before marriage, during marriage, or in the event of a breakdown of marriage [s 90B(2)(a)]; and/or maintenance during marriage, or in the event of a breakdown of marriage [s 90B(2)(b)].

"Property" may include:

- real estate;
- businesses;
- cash and shares;
- cars, wine and art collections;
- life insurance;
- superannuation;
- proceeds of litigation.

"Maintenance" may be expressed in terms of regular payments for a specified period, the payment of certain bills and expenses incurred (such as school fees or rate payments in relation to a residential property), or as a lump sum.

Note that either or both of the parties are entitled to maintenance, although it is usually calculated to be paid from the party with higher earnings to the party with lower income or earnings.

B. PRE-NUPTIAL AGREEMENTS

B.1. WHAT IS REQUIRED FOR A VALID AGREEMENT?

For a pre-nuptial agreement to be considered valid under Section 90B it must:

- Be in writing [s 90B(1)(a)];
- Be expressed to be made under s 90B [s 90B(1)(b)];
- The parties must receive independent legal advice from a legal practitioner prior to entering into the agreement [s 90G(1)(b)];
- The parties must present a statement signed by the provider of the independent legal advice [s 90G(1)(c)] to each other [s 90G(1)(ca)]; and
- The agreement must be signed by both parties [s 90G(1)(a)].

It should be noted that any new financial agreement will have the effect of terminating previous agreements if all the parties to the previous agreement are parties to the new agreement [s 90B(4)].

B.2. CAN THE AGREEMENT BE SET ASIDE BY THE COURT?

Yes, under Section 90K the court can set aside an agreement if it is satisfied that the agreement was:

- Obtained by fraud
- Entered into by one of the parties for the purpose of defrauding or defeating a creditor(s) or another person who is party to a de facto relationship
- Void,



- Unenforceable; or
- Puts the party responsible for the welfare of a child/children to the marriage in a position of hardship.

In considering whether to set an agreement aside, the court will have regard to whether the circumstances of the parties have changed to such an extent since the making of the agreement as to make the agreement unjust.

The courts will have particular regard to the effect of any existing agreement on the welfare of the children of the marriage.

To avoid an agreement being set aside by the court, the parties should consider entering into a new agreement when there is a significant change in circumstances, which may include (but is not limited to):

- The birth of a child;
- A child or children moving out of home or getting married;
- Purchase or sale of a house or unit;
- Purchase or sale of shares or investment assets;
- Purchase or sale of other major assets, such as a motor vehicle;
- The receipt of proceeds of a deceased estate as a beneficiary by one or both of the parties;
- Retrenchment/job loss or retirement of one party or one party not returning to the workforce following maternity or paternity leave; and
- Set up or termination of a new business

C. AGREEMENTS ENTERED INTO DURING MARRIAGE

Under Section 90C, parties can enter into agreements relating to property and maintenance during marriage. Section 90C is in all respects identical to Section 90B (agreements entered into before marriage), except that it applies to agreements entered into after the marriage has taken place.

A new agreement entered into during marriage will terminate any existing pre-nuptial agreement under s 90B or any agreement entered into under s 90C (s 90C(4)). As with pre-nuptial agreements, the agreement may cover "property" of the marriage both during and after marriage.

This includes property acquired by the couple or by each party separately during the marriage. Property may include cash in bank accounts, shares, insurance, cars, homes, businesses, intellectual property and other assets, such as art or wine collections.

The agreement should stipulate clearly what items of property it applies to, as property not covered by the agreement may be dealt with separately by the court in the event of a marital breakdown. Thus, to ensure all assets are covered, the agreement should be reviewed frequently, particularly at the time of sale or purchase of major assets such as the family home. The easiest way to do this is to incorporate a list of property into the agreement by way of an

annexure, therefore making it easy to review.

D. AGREEMENTS ENTERED INTO AFTER MARRIAGE BREAKDOWN

These may be entered into under Section 90D following the breakdown of marriage. Again, these are similar to both pre-nuptial agreements under s 90B and agreements entered into during marriage under s 90C. Financial agreements entered into following the breakdown of marriage have the effect of terminating any existing pre-nuptial agreements or agreements entered into during marriage under ss 90B, 90C. The requirements for a valid agreement under s 90D are the same as those required under ss 90B and 90C.

D.1. WHY ENTER INTO AN AGREEMENT?

- To save court time and money in the event of the breakdown of marriage;
- To ensure each party is provided for sufficiently in the event of a marriage breakdown;
- To ensure each party feels that their own property, which they have brought into the marriage, remains secure from other claims; and
- So that each party feels they have achieved a sense of fairness, have had the opportunity to make their own arrangements and will be protected in the future.

E. DE FACTO PARTNERS

Under recent amendments to the Family Law Act, de facto couples can now make financial agreements under s 90UB (Financial Agreements before De Facto Relationship), s 90UC (Financial Agreements during De Facto Relationship) and s 90UD (Financial Agreements After Breakdown of a De Facto Relationship).

F. WHEN SHOULD THE PARTIES ENTER INTO A FINANCIAL AGREEMENT?

As discussed above, pre-nuptial agreements, those entered into during marriage or those entered into after the dissolution of marriage differ only slightly. However, it is preferable for the protection of each party's separate property that the agreement be entered into earlier rather than later (eg. in contemplation of marriage under s 90B).

Comasters can advise clients on financial agreements between partners.

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