
Binding Financial Agreements- A Primer & Reminder

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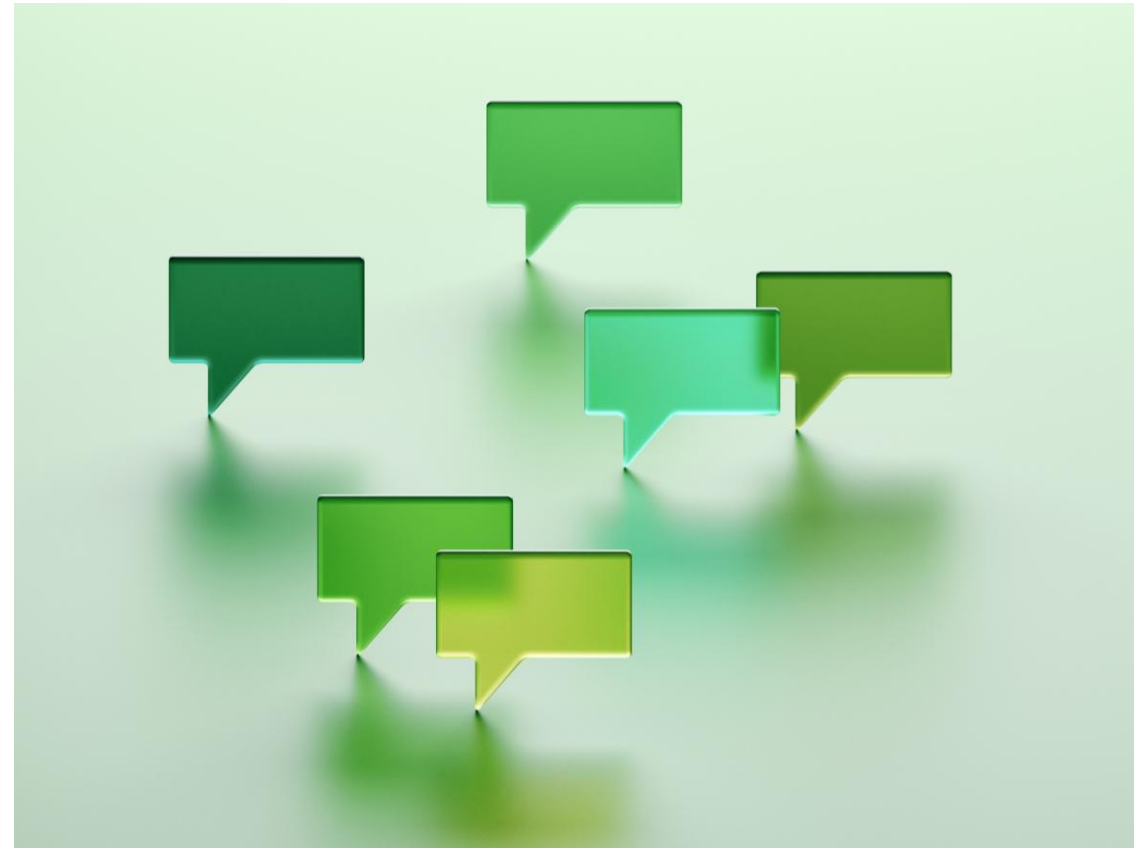
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Agenda

- The “what” and “when” of Financial Agreements
- The bigger question- WHY?
- Scope for creative problem solving
- “Where *art* thou, dear Disclosure?”
- Orders vs Financial Agreements
- Tips including model clauses and Client Care
- Cautionary tales and risk management

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The what and when of Financial Agreements

- Part VIIIA- Financial Agreements (“FA”)
 - - s90B FA before marriage
 - - s90C FA during marriage
 - -s90D FA after divorce order is made
- Part VIIIAB Financial matters relating to de facto relationships, Division 4 Financial Agreements
 - -s90UA Geographical requirement for agreements made in participating jurisdictions
 - - s90UB FA before de facto relationship
 - - s90UC FA during de facto relationship
 - - 90UD Fa after breakdown of a de facto relationship

The what and when, continued ...

- Conceptually, we can think of FA's as “front end” or “back end”
- Recognise that a FA is a type of contract created under a statute
- Therefore, contractual elements and principles are relevant, eg, voluntariness, offer and acceptance, consideration, duress
- Can you have a FA before marriage combined with a FA before or during a de facto relationship?
- ANSWER: YES ! Note however the need for material facts, ie, genuine contemplation of marriage

See Piper & Mueller (2015) FLC 93-686

Formal requirements- Part VIII Financial Agreements



- In order of batting, and not a complete list (ie, review yourselves)
- - s90DA Need for separation declaration for certain provisions of financial agreement to take effect
- - s90F Certain provisions in agreements
- (1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
- (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.

Formal requirements, continued

- s90G When financial agreements are binding (know this section “inside out”!)
- Core elements are that the agreement is signed by all parties, each party was provided with independent legal advice from a legal practitioner about the effect 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 and either before or after signing the agreement each spouse party was provided with a signed statement by the legal practitioner stating that the advice about the latter “prescribed matters” was providing to that party “(whether or not the statement is annexed to the agreement)” and a copy of the lawyer’s statement is given to the other spouse party or their lawyer.
- The “bad old days...” FA’s set aside because of errors with a formal requirement. See Myer J’s reasons in *Daubert & Daubert* [2024] FedCFamC2F 1065 for the relevant caselaw history.
- What was the solution?

Formal requirements, Parliament saves the match

The introduction of s90G (1A), that commenced on 4 January 2010:

- (1A) A financial agreement is binding on the parties to the agreement if:
 - (a) the agreement is signed by all parties; and
 - (b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and
 - (c) a court is 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); and
 - (d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and
 - (e) the agreement has not been terminated and has not been set aside by a court.



Formal requirements, continued

The next most important section is:

- Section 90K Circumstances in which court may set aside a financial agreement or termination agreement
- In summary the Court “*may*” make an order setting aside a FA or a termination agreement “if, and only if, the Court is satisfied that (a) the agreement was obtained by fraud (including non-disclosure of a material matter)” or purpose to defraud or defeat a creditor (note the history of the Jodee Rich case), reckless disregard of a creditor/s, purpose to defraud or reckless disregard of interests of another person who is in a de facto relationship with a spouse party, agreement void, voidable, unenforceable, unconscionable conduct in respect of the making of the FA, or later circumstances make it impracticable for part or all of the FA to be carried out, OR
- the “Biggie” under s90K (1)(d) hardship to a child or to a party having caring responsibility for a child.

Let's look closely at the “hardship to a child or carer” exception

s90K (1)(d) states: since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside;...

AND, s90K (2) states:

- (2) For the purposes of paragraph (1)(d), a person has caring responsibility for a child if:
- (a) the person is a parent of the child with whom the child lives; or
 - (b) a parenting order provides that:
 - (i) the child is to live with the person; or
 - (ii) the person has parental responsibility for the child.

The bigger question- WHY? Why do people ask lawyers about Financial Agreements

- What are your experiences please? (Jump on the chat, you're in to bat...)



Observations on the “Why” question

Recurring themes and reasons are:

- - Asset protection and asset preservation before or during relationship (including business interests)
- - The rise of “blended families” and planning for inter-generational wealth transfer
- - The growth in the loan book of “the Bank of Mum and Dad/ Mum and Mum/ Dad and Dad”
- - Trauma from a previous divorce or relationship breakdown
- - Preference for “private settlements”

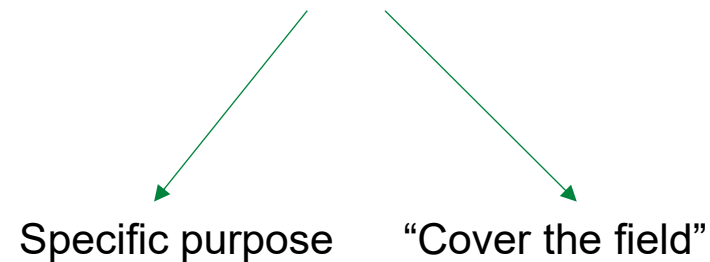
Merging the why, what and how questions for front end agreements

The importance of Process at your firm and with your client interviewing

- - I start by asking the client the simple, open-ended question “why do you want a FA?” or a variation of that question, such as “why are you contemplating a FA?” or “what are you hoping to achieve from having a FA?” These are good, effective questions during the no-obligation 15-minute phone call.
- - During the first paid meeting, I repeat the question, as “what are your 3 objectives here?”
- - You want to get the client to talk- some clients will be chatty and volunteer a lot, others you have to ask more questions. For all, ask the question “what do you know about financial agreements already?” Most people will have gone to Google and of course we now deal with the new librarian, AI.
- - You often have to dispel a number of myths, eg, that a FA can easily be set aside, or that a FA doesn't cost much.

The lawyer as Artisan

- At a relatively early point in the engagement, the lawyer as Artisan emerges.
- There are educational pieces that you provide to your client early on and along the way.
- A useful explanation is the difference between types of FA, described as:



The lawyer as artisan and creative problem solver

In other words, you act as the modern lawyer, identifying the client's needs and interests, and combining your conceptual abilities with your knowledge of the Act and case principles, and your drafting skills.



Orders versus Financial Agreements – at the back end

- Many (most?) family law specialists have a firm preference for orders over a FA. Why?
- Clients may prefer a FA for any one of the following reasons: privacy, quicker, working through issues with creditors or undeclared income and unassessed tax (which must necessarily be disclosed in the FA). There is no “just and equitable requirement” as there is under s79 (2), another potential reason.
- Situations may involve an agreed resolution of the relationship breakdown, business succession and estate planning.
 - Case study: the Farmer and his family
- There is greater ability to be creative with a settlement of property and child support by incorporating a FA and Binding Child Support Agreement in the one document, eg, contra between party A’s property entitlement and provision of lump sum child support to enable party B to keep the family home.

Disclosure and Financial Agreements

Note s71B titled Duty of Disclosure, that states, in part:

- (1) Each party to a proceeding relating to financial or property matters of a marriage (other than proceedings on appeal) has a duty to the court and to each other party to give full and frank disclosure, in a timely manner, of all information and documents relevant to:
 - (a) for a party to the marriage--the issues in the proceeding that relate to financial or property matters of the marriage; or
 - (b) for any other party to the proceeding--so much of the party's financial circumstances as are relevant to the issues in the proceeding that relate to financial or property matters of the marriage.
- (2) The duty under subsection (1) applies from the start of the proceeding and continues until the proceeding is finalised.

Disclosure and Financial Agreements

Note also s71 A titled This Part does not apply to certain matters covered by binding financial agreements which states:

- (1) This Part does not apply to:
 - (a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or
 - (b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.
- (2) Subsection (1) does not apply in relation to proceedings of a kind referred to in paragraph (caa) or (cb) of the definition of matrimonial cause in subsection 4(1).
- (3) Section 71B has effect regardless of subsection (1) of this section.

Disclosure and Financial Agreements

Moving on...

- The Act and the FLR 2021 are silent as to any explicit disclosure requirements under a FA.
- Working backwards, we can conclude, and it is universally accepted, that a back-end FA should contain a detailed list of each party's assets, liabilities and financial resources because of the earlier mentioned grounds for setting aside a FA; those relating to fraud and defeating the interests of creditors.
- Disclosure is of course broader and deeper than simply identifying a "balance sheet."
- The same logic is typically applied when drafting a front-end FA, however, if disclosure is not mandated under the Act, is there room for less than comprehensive disclosure?

Answer: Yes

Case study: The older couple living in separate residences

Model clauses, tips and cautionary tales

Things to look out for or avoid:

- Parties wanting a pre-nuptial agreement in the weeks before their wedding

It is reasonable to ask whether any steps towards obtaining a FA earlier were made. Some lawyers have a policy of not accepting instructions in relation to a s90B agreement if the wedding date is less than 2 or 3 months away. You can inform your client that the same content can be put in a FA after the wedding.

- Parties coming into your office together or the other spouse party being in the background while you are on the phone or by AVL with your client

Clearly, you cannot see the parties together. If the parties arrive at your office together, even if the other spouse waits outside, it may be a red flag. Check that the client has privacy when on the phone or during an online meeting.

Model clauses, tips and cautionary tales

Things to look out for:

- The parties “workshopping” the first rough draft and later drafts

Given the wariness around the findings of unconscionability and duress in equity, and the fact that a contract is being negotiated, the purist view is that Party A who is instructing their lawyer to prepare a draft FA, should work only with their lawyer on the draft “work in progress.” Parties can discuss what they want in or out of their FA, however, looking over the draft together is considered a “wrong ‘un.”



Model clauses, tips and cautionary tales

Model clauses (a few examples)

“Time boxing” the quantum of the cash adjustment payable by the wealthier spouse to the other spouse

1. In the event of a breakdown of the de facto relationship:

1.1 If the de-facto relationship is less than 5 years in duration (calculated from the date of this Agreement until the date of the breakdown of the relationship), Jane shall pay Jo within 60 days of the breakdown of the de facto relationship the Principal Sum calculated as the less of:

(a) \$500,000; or

(b) $\$125,000 \times A = B$

$\$2,000 \times A = C$

$B + C = D$

Where, A= the full number of years that Jo and Jane were in a de facto relationship notionally calculated from the date

Model clauses, continued

of this Financial Agreement to the date of the breakdown of the de facto relationship. Any breakdown of the de facto relationship that occurs on or before 30 June in any year shall be rounded down to the nearest whole year; and any breakdown of the de facto relationship that occurs on or after 1 July in any year shall be rounded up to the nearest whole year.

C= an amount to be adjusted for inflation.

D= the total amount to be paid to Jo.

1.2 If the de-facto relationship is more than 5 years in duration...

[and follow the above formula approach and substitute a higher amount at (a) and the same or a different amount/s under (b).]

Model clauses, continued

Where the front-end FA contains covenants in respect of a mutual release of rights to bring a family provision claim under the Succession Act

The parties agree that nothing contained in this agreement will limit the ability of either of them to subsequently execute a Will conferring property or benefits on the other party. To the extent that any provision of this agreement conflicts with any provision in those Wills, or any Codicils to those Wills, the provision of the Will or Codicil, as the case may be, will prevail.

Where the front-end FA does not contain covenants as to what a party or each party will do in their Will/s

As above AND add: At the same time, the existence of a more beneficial provision in a Will in favour of a party to this Agreement, as compared to the terms under this Agreement, shall not provide a basis for arguing that there has been a variation of this Agreement, abandonment, mutual rescission or the like at law or in equity.

Model clauses, continued

Where the wealthier client wants the ability to make fairer financial provision over time

Include as a recital and/or an operative provision:

The parties agree that nothing in this Agreement prevents either party in the future making a gift to the other party from their Separate Property (within the meaning of Separate Property defined in this Agreement) or from choosing to convert part of their Separate Property into jointly owned property, and any such gift or transfer of property will be recorded in writing in one or more of the registers to be maintained by Jackson under paragraph X as matters incidental to the particular register.

Model clause to lessen the risk of a hardship to child related claim

- 8.1 In the event that the parties have separated and in the event that a material change in circumstances occurs after the making of this agreement, being circumstances relating to the care, welfare and development of a child of the relationship or marriage, and, as a result of the change, the child or Brandy, if Brandy has caring responsibility for the child (as the term “caring responsibility” is defined in section 90K(2) of the Act), would suffer hardship but for the operation of this paragraph, Bill is to pay to Brandy the sum of \$AAA (“the principal sum”) by way of an alteration of property interests between the parties (in addition to any and all other rights and entitlements under this agreement) within 3 months of Bill being informed by Brandy in writing of the said change (hereafter referred to as “the prescribed time” and Brandy’s “written statement”, respectively) subject to the following further provisions:
- (a) Bill shall not be required to sell, transfer or otherwise liquidate his interest in XXXXXXXXXXXX, whether to meet the payment of the principal sum within the prescribed time or as otherwise permitted by subparagraphs b) and c) below;
 - (b) Bill is permitted to meet his obligation in relation to the payment of the principal sum within the prescribed time by obtaining a loan from a commercial lender or any other lender, and Bill shall use his best endeavours to obtain such a loan to discharge his obligation in relation to payment of the principal sum within the prescribed time;

- (c) In the event that Bill cannot obtain a loan from a commercial lender or other lender and pay the principal sum within the prescribed time, Bill is permitted to have an extension of time to pay the principal sum by instalments across a period of 3 years from the date of the prescribed time provided further that :
- (i) a first instalment in the sum of \$Z is paid within 1 month from the date of the prescribed time;
 - (ii) interest shall accrue on the subsequent instalments at the rate of 8 per cent per annum, calculated from the date of the prescribed time until the date of the next payment of the respective instalments due and payable in accordance with the next sub-paragraph (iii);
 - (iii) Bill shall pay the second and final instalment of \$YYYYYYYYY each year on or before the anniversary of the date of the prescribed time, respectively, and interest due thereon.
- (d) The quantum of the principal sum is varied in accordance with paragraph Y below to adjust for inflation (or deflation) over time, and in respect of the recalculation of the quantum of instalments permitted under this paragraph 8.1, such instalments are to be recalculated in a pro rata fashion based on the same time intervals.

- (e) If Bill disputes Brandy's reliance upon a material change in circumstances under paragraph 8.1 being circumstances relating to the care, welfare and development of a child of the relationship or the marriage and Brandy's contention that as a result of the change, the child or Brandy, if Brandy has caring responsibility of the child (as defined under the Act), would suffer hardship, and Bill confirms in writing that he is in dispute about same within 28 days of receiving Brandy's written statement, it is open to the parties or either of them to apply to the Federal Circuit and Family Court of Australia for an order enforcing the terms of the provisions under paragraphs 8.1 to 8.2 of this agreement, and such enforcement application is to be confined to the issue of the enforcement of the provisions under these paragraphs 8.1 to 8.2.

8.2 For the purposes of the operation of paragraph 8.1 above, and this paragraph 8.2, the amount of the principal sum under paragraph 8.1 at the time that paragraph 8.1 might apply is to be determined by adjusting the sum of \$AAA to take account of movements in the Consumer Price Index (CPI, All Groups, Sydney) by reference to the quarterly CPI immediately before the date of this financial agreement as compared to the quarterly CPI immediately before the date of the prescribed time. Further, in the event of any disagreement between the parties as to the calculation of the quantum of the principal sum as adjusted pursuant to this paragraph 8.2, either party may submit a written request to the Chairperson of Resolution Institute to nominate an expert accountant to act as an expert in accordance with, and subject to, the Resolution Institute Expert Determination Rules, and make a determination that is binding on the parties with respect to the quantum of the principal sum as adjusted under the paragraph, and the costs of the nomination charged by the Resolution Institute and the costs of the Expert appointed shall be paid by the parties in equal shares.

Final tips

- Charge appropriately; don't under charge nor over charge- comply with Uniform Law obligations and provide updated disclosure notifications if required before you exceed an estimated amount for costs or expenses.
- Don't draft that the FA is binding on ...and their "assigns".
- I use:

This Deed is binding upon the parties, their legal personal representatives, executors and administrators.

- Avoid repetition in recitals and in the main part.
- Aim for clarity of meaning in every sentence and remove unnecessary words or phrases.
- Consider the use of well drafted ADR clauses. There are no reported cases where they have been litigated however they work in other civil areas and they spare people from litigation.
- Know your limitations; refer on if the matter is too complex or you do not have capacity to do the work within a realistic estimated time frame.
- Use spell check and have another colleague read over the proposed final draft for any slips.

Questions

Is there anything you'd like to know more about?

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