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risk watch

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Binding Financial Agreements – are they ever really "binding"? – should you even do them?

- By Grant Feary, Senior Solicitor

As practitioners would be well aware, the *Family Law Act 1975 (Cth)* (*"**the Act**"*) allows persons in, or contemplating a marriage or a defacto relationship to enter into agreements providing for the distribution of their assets in the event of the breakdown of their relationship. The relevant provisions are ss 90B – 90D in relation to agreements in contemplation of marriage, during a marriage or after divorce. Sections 90UB – 90UD of the Act contain equivalent provisions for de facto relationships. In general, agreements of this sort are known as *"binding financial agreements"*. Where such an agreement is entered into in contemplation of marriage it is sometimes known as a *"pre-nuptial agreement"*.

Preparing and/or certifying binding financial agreements/pre-nuptial agreements is fraught with risk, and should only be undertaken where enough time is taken to ensure that they are done properly. In many instances the reward to the practitioner may not outweigh the risk.

Importantly, Section 90G of the Act provides that such financial agreements are binding if – **and only if** – they are signed by both parties, and independent legal advice is provided 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 of making the agreement.

According to a recent article in the *Australian Financial Review*[1], many specialist family lawyers are "*refusing to draft pre-nuptial agreements, fearing future complaints from cashed-up divorcees disappointed with an outcome or a court disregarding the [agreements].*"

Cases where the Courts have considered arguments to set aside such agreements include *Black v Black (2008) FLC 92-357, Hoult v Hoult [2013] FamCAFC 109* and, recently, *Parke v Parke [2015] FCCA 1692 (19 June 2015).* Indeed, the Act was amended following *Black v Black* to ensure certainty, however, the amendments did not resolve the difficulties and arguably created further grounds for dispute. The Commonwealth Attorney-General has released an Exposure Draft[2] and a Consultation Paper[3] on this issue. Comments on this Exposure Draft closed on 19 June 2015 but as yet the final form of any proposed amendments is unknown.

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[1] *"Pre-nuptial agreements too risky for lawyers" - Australian Financial Review,* 23 July 2015
[2] *Civil Law and Justice Legislation Amendment Bill 201*5 – Family Law
[3] Consultation Paper – Binding Financial Agreement Amendments *Family Law Act 1975*

What is known, however, is that many claim notifications have been received by Law Claims in this area, and this reflects the experience of professional indemnity insurers in other states. The exposure for lawyers in this area can arise either through drafting the agreement or in providing the independent advice for either party. The agreement will not be binding where it is proved that a client was not aware of the advantages and disadvantages of entering into the agreement at that time.

Professional negligence claims in this area can be unusual in that a lawyer who provides advice could face a claim from either his/her client **or** the other party, because where a document is set aside, the party who would have been better off under the agreement could argue that their loss was caused by the solicitor's failure to provide proper advice.
In some cases where there are substantial assets specialist family lawyers may work with senior counsel to draft financial agreements and to advise generally. Such agreements are likely to be both complex and comprehensive. Legal fees in the tens of thousands of dollars, reflecting both the professional time spent and the risk attached to advising on these documents would no doubt be justified.

Lawyers in general practice, however, will sometimes charge only a few hundred dollars for drafting binding financial agreements, perhaps because of concern the client will be unwilling to pay more, particularly if competitors charge low fees. But is this a decision where the risk outweighs the reward?

A binding financial agreement, which is intended to have the effect of ousting the jurisdiction of the Family Court to make orders with respect to the assets of the parties, is clearly not a document that can or should be quickly explained to a client **even if the assets in question are not particularly substantial**. A significant amount of time will need to be spent with the client discussing the current assets of the parties, the future expectations of the parties (including plans for children) and what will occur if one of the parties becomes seriously ill etc. The permutations are almost endless. Regardless of whether the solicitor's role is to draft the agreement or to provide an independent certificate of advice, time – often substantial time – will need to be taken with the client to obtain information and to explain the advantages and disadvantages of entering into the agreement.

For this job to be done properly it is obvious that significant legal costs will be incurred. If the parties are unwilling to pay appropriate fees for this sort of engagement then the wise thing to do is not to take on this work – the risk will not be worth it.

For solicitors who do provide advice in this area – notwithstanding the warnings contained above – it is critical that there is an awareness of the risk that a claim may be made many years later, after the couple's relationship has broken down. The solicitor will need to demonstrate the advice that was given and the basis upon which it was provided. For this reason it is important to always:

- Make a record of the advice provided (ideally in a detailed letter), including the information and instructions provided by the client; and
- Ensure the documents are kept indefinitely.