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John is principal at JB Solicitors. He has worked in a variety of legal matters and has over 10 years' experience in family law and commercial litigation. He is often called upon to provide expertise in matters that have an international element involving complex company, trust, partnership and valuation issues. John is a nationally accredited family law mediator and arbitrator.

What is a binding financial agreement?

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Due to the influence of American television, most people have heard of a pre-nuptial agreement or 'prenup', but surprisingly many have not heard of a 'binding financial agreement'. However, a binding financial agreement and a pre-nuptial agreement are in fact the same thing—a 'prenup' is simply an informal name for a binding financial agreement.

What exactly is a binding financial agreement?

A binding financial agreement is a legally binding document under the *Family Law Act 1975* (Family Law Act) that outlines how a couple's assets will be distributed upon the breakdown of their marriage or de facto relationship. A binding financial agreement can also include provisions for spousal maintenance.

Sections 90B–90KA of the Family Law Act deal with financial agreements by parties to a marriage, while sections 90UA–90UN deal with financial agreements by parties to a de facto relationship.

Pre-nuptial binding financial agreements may contain information about:

- Assets and debts
- Joint and personally owned belongings
- Spousal maintenance
- Expectations of any gifts and/or inheritances
- Insurance coverage
- How any property will be split
- What is covered in each party's Will in the event of their death?

A binding financial agreement is somewhat similar to orders made by the Family Court of Australia or the Federal Circuit Court of Australia regarding the distribution of the property of a relationship. There are however some key differences that are outlined throughout this paper.

When can you enter into a binding financial agreement?

A person can enter into a binding financial agreement:

- prior to marriage or the commencement of a de facto relationship
- following the breakdown of the marriage or de facto relationship—if made after marriage, the binding financial agreement must be made within 12 months of an order of divorce
- during the marriage or de facto relationship.

How are binding financial agreements legislated in Australia?

The factors that must be considered when forming pre-nuptial agreements are covered under section 90G(1) of the Family Law Act. Any agreements formed will only become legally binding if the following conditions are met:

- the agreement is signed by all parties
- before signing the agreement, each party seeks independent legal

advice from a legal practitioner about the effect of the pre-nuptial agreement on their legal rights
- before signing the agreement, each spouse receives a signed statement from a legal practitioner stating that they have received legal advice
- the signed statement from the legal practitioner has been served to the other spouse or legal practitioner of the other spouse, and
- the agreement has not been terminated or set aside by the court.

What are the benefits of a binding financial agreement?

Transparency & clarity—binding financial agreements entered into prior to or during a relationship provide each party with certainty and a clear understanding of how their property will be distributed in the unfortunate event that their relationship breaks down.

Flexibility—binding financial agreements give parties the flexibility to decide for themselves how they want their assets to be distributed and set out the basis for the distribution of the assets.

Protection—in the event of a second or subsequent marriage, a binding financial agreement will ensure that an individual's assets go to their children rather than the children of a new spouse.

Cost—agreements entered into after separation are an alternative way to resolve property settlement matters without involving the courts. This can be far more cost-effective than lengthy and stressful court proceedings.

Speed—binding financial agreements can be prepared and executed quicker than applications to the courts for consent orders, as there is often a significant delay between the filing of the proposed orders and the documents being approved and sealed by the court.

What are the requirements of a binding financial agreement?

There are a number of procedural requirements for a binding financial agreement to be valid including:
- that the agreement is signed by both parties
- that each party has obtained independent legal advice with respect to the advantages and disadvantages of entering into the agreement
- that the agreement contains a statement signed by each party confirming that they have received that advice, together with a statement signed by each legal representative that they have provided the advice
- that the agreement has not been terminated by the parties or set aside by a court exercising its jurisdiction under the Family Law Act.

When can a binding financial agreement be set aside?

Even if all the procedural requirements for a binding financial agreement have been met, there are still limited circumstances in which they can be set aside, including:
- where a party was forced to enter into the agreement or entered into the agreement under duress or undue influence
- where a party acted fraudulently in relation to the entering of the agreement
- where there has been unconscionable conduct by one of the parties to the agreement
- where there has been a significant change in circumstances in relation to a child of the relationship
- where the intent of the agreement was to avoid a party or parties having to make payment to a creditor
- where the agreement is unenforceable or invalid due to incompleteness, mistake or uncertainty.

Are binding financial agreements worthwhile?

Case Study 1. *Thorne V Kennedy* [2017] HCA 49

This case demonstrates the court's strict approach in setting aside binding financial agreements which have been entered into unconscionably.

Facts of the case:
- In 2006 the parties met on a website the purpose of which was to locate potential brides from overseas.
- Ms Thorne was from Eastern Europe and was living overseas at the time, with no substantial assets.
- Mr Kennedy, a divorcee with three adult children, was a Greek-Australian property developer with assets worth between $18-24 million.
- After seven months of online interaction, Ms Thorne moved to Sydney to marry Mr Kennedy.
- Approximately 11 days before their wedding, Mr Kennedy told Ms Thorne that they were going to see a solicitor about signing a pre-nuptial agreement and that the wedding would not go ahead if she did not sign.
- Ms Thorne sought independent legal advice and was advised that the agreement was drawn solely to protect Mr Kennedy's interests and that she should not sign it.
- Ms Thorne understood the advice to be that the agreement was the "worst agreement" the solicitor had ever seen.
- She relied on Mr Kennedy for all things and believed that she had no choice but to enter into the agreement.
- On 26 September 2007, four days before their wedding, the parties signed the pre-nuptial agreement. The agreement contained a clause stating that, within 30 days of signing, a post-nuptial agreement with similar terms would be signed.
- On 16 June 2011, less than four years into the marriage, the parties separated. Ms Thorne commenced proceedings against Mr Kennedy to set aside the two agreements, a property in the amount of $1.1 million and a lump sum spousal maintenance order of $104,000.

The High Court's decision

On appeal to the High Court of Australia, Chief Justice Kiefel, and Justices Bell, Gageler, Keane and Edelman

The quote

Binding financial agreements entered into after separation are an alternative way to resolve property settlement matters without involving the courts.

found that the agreements were void based on unconscionable conduct under section 90K of the Family Law Act. The agreements may have also been made void due to undue influence.

Their Honours outlined six key considerations in setting aside the agreements:

1. The agreements were not subject to negotiation between the parties
2. The emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end the marriage or to end the engagement
3. There was little time for Ms Thorne to undergo careful consideration of the agreements
4. The nature of the parties' relationship
5. The relative financial positions of the parties
6. The independent advice that was received and whether there was time to reflect on that advice.

Further, they found that:

1. Ms Thorne was powerless and had no ability to do anything besides sign the agreements
2. This demonstrated that Mr Kennedy acted unconscionably and wielded undue influence over her decisions
3. The unreasonableness of the agreements was exacerbated by the urgency and the pressure of the upcoming wedding, and that the wedding would not have gone ahead, had she refused to agree to his terms.

Thorne versus Kennedy amassed great media attention and cast doubt as to whether binding financial agreements still hold up in court.

The more recent case of *Frederick & Frederick* [2018] FCCA 1694 provides some insight as to how future courts would deal with this question.

Case Study 2. *Frederick & Frederick* [2018] FCCA 1694

In this case, Ms Frederick sought to set aside a binding financial agreement based on four key factors:

1. That she had limited English
2. That she never saw the financial agreement
3. That she was forced to sign the agreement
4. That the circumstances of their relationship had changed, and the agreement did not consider how the parents were to raise their autistic child.

The court rejected these arguments and stated that the agreement was to remain in place for four reasons:

1. The agreement met the criteria under section 90G of the Family Law Act, specifically that it was signed by both parties, had not been terminated or set aside, and met the requirement that each party receive independent legal advice.
2. There was insufficient evidence to suggest that Ms Frederick did not understand the terms of the agreement, and that the legal advice she received did not explain its effect.
3. The contract was not vitiated by undue influence, as there was evidence demonstrating that improved terms were negotiated against resistance by her husband, and that Ms Frederick knew of the amendments and accepted them.
4. The contract was not vitiated by unconscionable conduct as Ms Frederick in fact understood English and was able to form the view that the financial agreement gave her some protection. Her options were not eliminated or severely confined as was found in *Thorne versus Kennedy.*

Despite their differing outcomes, both cases demonstrate that pre-nuptial agreements must abide by the legal requirements contained in section 90G of the Family Law Act.

Binding financial agreements are still a viable option for those looking to protect their assets—it is simply crucial that they be well-drafted and performed within the parameters of the law and in a timely manner.

When is the right time to sign a pre-nuptial agreement?

Ideally, a pre-nuptial agreement should be signed at least several months before the marriage takes place to reduce complications as the wedding day approaches. This will ensure that both parties have sufficient time to review and negotiate the terms of the agreement to ensure that a fair and mutually agreeable outcome is made. It will also minimise the risk of the other party claiming that they entered into the agreement on the grounds of unconscionable conduct or undue influence. FS