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Binding Financial Agreements
Will they meet your client's needs?

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Accountants, financial planners and solicitors have recommended to their clients that they consider Binding Financial Agreements (BFA) as part of their financial planning. These Agreements put in place the distribution of assets intended by an individual, upon breakdown of their marriage.

The Family Law Act has introduced more requirements for Agreements to be deemed Binding.

With the ability to include third parties in the documents, the benefits of BFAs widened the circumstances in which they could be employed. For instance, parents providing assets to children about to marry, have used Agreements to quarantine the assets from becoming part of the pool of assets to be divided by the Court. They have also been widely used by those entering second marriages to ensure their property, brought to the second marriage, remains their property for the benefit of the children of the first marriage.

COMPLIANCE WITH THE FAMILY LAW ACT

The Appeal Court of the Family Court handed down a decision in 2008 that changed the requirement from "substantial compliance" to "strict compliance". That change rendered most, if not all BFAs not binding on the parties, as minor issues of compliance became fatal.

For example, the Act required that, on the signing of an Agreement one party is to retain the original and the other a copy. It is no longer possible for parties to retain counterparts (even though fully executed by both parties). Further to ensure that one party had the original and the other a copy, the Agreement had to be signed in the one place and at the one time by both parties otherwise one party would never know if the other received a copy.

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These requirements added cost to the preparation of BFAs and as a result the number prepared declined. Legislative changes were introduced within twelve months and once again parties entered into BFAs.

Despite the amendments, to ensure a BFA was going to be "binding" on the parties, solicitors continued to meet the former "strict" requirements of the Act. This had the effect of increasing the cost of the preparation of Agreements, but at the benefit of making the Agreement less likely to be challenged, and less likely to be affected by changing Case Law.

Just as there is no simple Will, nor is there a simple Binding Financial Agreement. It must meet the requirements of the Act and developingCase Law.

RECENT CASE LAW AFFECTS BINDING AGREEMENTS

In a series of recent cases, BFAs have been found not to be "binding" on the parties on grounds not previously contemplated. For example, solicitors are required to provide a Certificate to the effect that the party signing the Agreement had been provided with advice which includes the advantages and disadvantages of entering the Agreement.

In the decision of Hoult and Hoult, the Court has now gone behind the Certificate to scrutinise the advice itself to determine if an Agreement was binding. To meet this decision, the advice given will now have to become part of the BFA.

Omar and Bilal now makes it clear that if a party to an Agreement has English as their second language, the Agreement must attach a translation of both the document and the advice given to the person.

It is now questionable whether adequate advice can actually be given in relation to pre-nuptial agreements (Binding Financial Agreements entered before marriage) when that advice has to set out the advantages and disadvantages to a person that may not arise for perhaps ten or twenty years when the relationship breaks down, and the decision as to whether the Agreement is binding may be determined on the original advice.

Just as there is not a "simple" Will, nor is there a simple BFA. Each Agreement must meet all the requirements of the Act and the challenges thrown up by evolving Case Law.

If you or your client thinks a BFA is appropriate, please feel free to contact Neil Jamieson or Susana Staka to further discuss the issues raised in this brief.