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## Are Prenuptials Valid in Australia?

Recently, a client posed the following question:

'I heard that prenuptial agreements are not valid in Australia, is this true?'

The short answer to this question, is no.

Prenuptials, or Financial Agreements as they are referred to in Australian jurisdictions, are valid, and spouses are free to enter into them at any point in a relationship, as a means of clarifying financial issues between the parties. A Financial Agreement can be entered into in contemplation of a relationship, during, or upon breakdown of a relationship.

However, while parties can enter into Financial Agreements, whether they achieve the intended outcomes when the relationship breaks down depends on whether the parties have complied with the formal requirements for a Financial Agreement as set out in the Family Law Act 1975 (Cth) and the general law of contract.

### Formal requirements under the Act

Section 90G(1) of The Act states that a Financial Agreement is binding on the parties, where:

1. It is signed by all parties;
2. All parties sought independent legal advice as to the legal effect of the agreement;
3. Signed statements are provided by the independent legal practitioners, stating that advice in relation to the effect of the agreement was provide to the party which sought the advice; and
4. The statements provided by the independent legal practitioners are provided to other parties under the agreement.

However, simply complying with these statutory requirements does not, on its own, make a Financial Agreement valid and binding on the parties. There are many circumstances whereby the requirements established in Section 90G(1) have been complied with, yet the Courts may see it fit to set aside a Financial Agreement. An example of this was seen recently in the Federal Circuit Court decision of *Parkes & Parkes* [2014] FCCA 102.

### The Court's power to set aside Financial Agreements

In *Parkes*, the husband approached the wife three days before their wedding, and had asked her to sign a Financial Agreement, otherwise the wedding would be called off. One of the wife's arguments in this case was that although formal requirements had been complied with for a binding Financial Agreement, the husband had exercised duress and undue influence over the wife in giving her the ultimatum, and so the agreement should be set aside. Judge Phipps agreed with the wife, and in setting aside the agreement, relied upon Section 90K(1)(e), which states that a Court may set aside an agreement where it was entered into as a result of 'unconscionable' conduct. Judge Phipps gave much weight to the wife's evidence, noting that being asked to sign a Financial Agreement three days before the wedding was unconscionable, given that all arrangements had already been made and paid for, and guests, including those from interstate, had been invited. Other reasons for setting aside the agreement in this case were based on the operation of Section 90K(1)(d), as children were born of the marriage.

This case stands as a reminder that while formal requirements, as set out in Section 90G, are imperative to the validity of a binding Financial Agreement, there are many circumstances where by the Courts may set aside agreements. It is important to note however, that the individual circumstance of each case will determine if and when a Court will exercise its power under Section 90K to set aside an otherwise valid Financial Agreement.

At Diamond Conway, we have acted for countless clients in relation to Financial Agreements, including clients requiring Financial Agreements to be drafted, clients who have been asked to sign agreements by their partner, as well as clients who wish to have an agreement set aside. Our Family Lawyers are highly experienced in ensuring that Financial Agreements are drafted in a manner which safeguards our clients' financial rights and future security.

If you or your partner are considering a Financial Agreement or already have one in place which no longer reflects the nature of your financial position, our experienced lawyers would be happy to offer you advice that will inform you as to the options that are open to you.

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