

Matrimonial Property Settlements

What is a matrimonial property settlement?

A matrimonial property settlement is the division of property between two people who are, or were, married after their marriage has ended. They are referred to as 'the parties,' or 'spouses'.

If you were in a relationship that ended, but you were not married, you may have been in a de facto relationship. In that case the law in relation to dividing property is similar, but you should refer to our fact sheet "De Facto Property Settlements."

What is property?

For the purpose of a marital property settlement property is anything that can be owned, such as:

- Real Estate (land and/or houses);
- Businesses and business assets;
- Motor vehicles;
- Bank accounts;
- Company shares;
- Household goods and furniture;
- Tools and other equipment;
- Superannuation; and
- Debts – such as mortgages, personal loans and credit cards.

These are referred to as assets and liabilities.

The value (or estimated value) of all the assets and liabilities owned by both parties is added together and referred to as the "Property Pool." It is sometimes also referred to as the "Asset Pool."

What is a property settlement?

A property settlement is where the parties agree (and/or the Court decides) how to divide the Property Pool.

The law that governs marital property settlements in Australia is the *Family Law Act 1975*.

If the parties can agree about how the property is to be divided, then the division can take place informally, or the parties may apply for Consent Orders, or sign a Binding Financial Agreement (called a BFA).

The benefit of getting a formal settlement is that it makes the division final, and the parties cannot make another application if their financial circumstances change. If the division of property is going to involve the transfer of real estate from one party to another, then a BFA or Orders from the Court will mean that stamp duty on the transfer will not need to be paid.

What are consent orders?

Consent Orders are Orders that are made by the Court at the request of both parties.

The Court will only make the Consent Orders if they are satisfied that the Orders being sought are 'just and equitable' (meaning that the Court believes the Orders are fair to both parties).

An application for Consent Orders is made to the Family Court by filling out an "Application for Consent Orders" form, along with a copy of the Orders that the Court is being asked to make.

What is a binding financial agreement?

A Binding Financial Agreement (BFA) is a written agreement drafted by a lawyer which outlines how the parties have agreed to divide the property. A BFA will only be legally binding if both parties have received independent legal advice before signing the document.

Unlike Orders from the Court, a BFA will be legally enforceable even if it is not fair (just and equitable), so it is important to get legal advice before entering into such an agreement.

What if the parties cannot agree?

It may be helpful to attend mediation to try to reach an agreement about the division of property.

However, if parties to a marriage cannot agree about the division of property, then one party can make an application to the Federal Circuit Court asking the Court to make Property Orders.

An application for Property Orders is made by filing an Initiating Application form, along with a Financial Statement and an Affidavit. An Affidavit is a document outlining the story of the parties' relationship and their contributions to the Property Pool.

Parties who are or were married may make an application for Property Orders any time up until **one year from the date of their divorce**. If more than one year has passed since the date of the divorce, then the Court will need to be asked to 'grant leave' (allow) for an application to be made out of time. The Court may grant leave where it is satisfied that a party will suffer hardship if the application is not allowed.

The person filing the application is called the Applicant and the other party is called the Respondent. Once the Respondent has received a copy of the application, they will be able to file a Response, Financial Statement, and an Affidavit outlining what they say the parties each contributed to the relationship.

The Court usually directs the parties to attend Conciliation as a first step to trying to resolve the matter. Conciliation is a formal dispute resolution process where the parties, their lawyers and a conciliator meet, to try and reach an agreement about the division of the Property Pool.

If the parties still cannot reach an agreement, then the Court may need to decide the matter at a hearing where the Judge will hear from the parties, their

witnesses, and their lawyer if they have one. After hearing from everyone, the Judge will decide what Orders are 'just and equitable.'

NOTE - Property Orders can also be made in the Tasmanian Supreme Court and/or the Magistrates Court under the *Relationships Act 2003* (Tas). The Magistrate or Supreme Court Judge will also consider the parties' contributions to the relationship when making an Order. You should get legal advice to work out which Court is the most appropriate. Most Orders for property settlement are made in the Federal Circuit Court.

How does the court decide if orders are 'just and equitable'?

When the Court is working out what Orders are 'just and equitable' (fair), it takes into consideration the financial and non-financial contributions made by each party to the marriage. It also takes into account any other factors that may mean a party should receive more of the Property Pool (these are called 'future need' factors).

Financial contributions include things like:

- Money put towards purchasing land or a house;
- Mortgage repayments and/or rent;
- Paying for bills, groceries, and petrol;
- Money spent on renovations or building;
- Childcare costs; and
- Purchasing clothes, books and toys for the parties' children.

Non-financial contributions include things like:

- Housework;
- Looking after children;
- Providing care to the other party or members of the other party's family; and
- Work done towards the home, such as painting, renovating or gardening.

'Future need' factors include considerations such as:

- Whether one party is able to earn a lot more than the other party

- Whether one party and/or the other has the ongoing care of children
- Whether either of the parties have health issues and/or a disability
- Whether one party is much older than the other

The Court will weigh up the parties' contributions and future need factors, and decide what percentage each party will receive. The percentage will then be applied to the Property Pool to decide who keeps what.

Sometimes real estate or vehicles will need to be sold to divide the property in a manner that the Court considers fair.

Superannuation also makes up part of the property pool and can be divided between the parties.

Duty of disclosure

When a marriage ends, and one or both parties wishes to make an application for property Orders, they must let the other party know what assets and liabilities (Property) they have. They also need to let the party know what those assets and liabilities are worth. This is referred to as 'full and frank' disclosure.

If a party will not disclose information about all their assets, the Court can be asked to make an Order insisting that they disclose certain information. If a party does not make 'full and frank' disclosure, they can be penalised by the Court. They may receive less from the property settlement, or they may be ordered to pay the other party's legal costs.

If the parties cannot agree about the value of any assets, then that may need to get a valuation to resolve the dispute. For many items, such as household goods, the parties can usually agree to an estimated value.

Contacts

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"Marital Property Settlements" is intended to give general information to people who have or who are contemplating a division of property after their relationship has ended. While we have made every effort to ensure the contents of this document are accurate at the time of publication the law and services do change. Legal and service exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice.

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