

FINANCIAL AGREEMENTS

**5 top tips for preparing financial  
agreements after *Thorne v Kennedy***

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If you think that the law relating to financial agreements changes faster than Australia changes Prime Ministers, you're right. The High Court in *Thorne v Kennedy* (2017) FLC 93-807 added to the complexity. Here are the 5 top tips for preparing financial agreements in the wake of *Thorne v Kennedy*:

1. The stronger party should be prepared to negotiate the terms. A "take it or the relationship ends" approach means that the agreement is more likely to be set aside.
2. There should be time for careful reflection about the terms of the agreement, but the High Court did not say how long this should be. It is likely to vary according to the weaker party's level of education and literacy, the terms of the agreement and other matters.
3. The terms of an agreement which is "a bad bargain" for one of the parties may be relied on to establish that there was undue influence or unconscionable conduct. Why else would they have entered into it? An agreement which gives an outcome which is within the broad range of the broad discretion given under s 79 and s 90SM *Family Law Act* 1975 to make a property settlement order is more likely to withstand scrutiny than one which is "unfair and unreasonable".
4. If an agreement entered into before the commencement of a relationship or a marriage was affected by undue influence or unconscionable conduct, an agreement entered into after the relationship or the marriage commences is likely to be affected by the same vitiating factor.
5. Be wary of false declarations in recitals such as:
  - 5.1 A party is able to support themselves without an income tested pension or benefit when they clearly cannot;
  - 5.2 There has been mutual disclosure when there has not;
  - 5.3 A mutual waiver of the right to disclosure, particularly when the parties have unequal bargaining power.

There is no easy substitute for reading the cases and checking the legislation, but if you follow the above guidelines and check the terms of s 90G(1) *Family Law Act* 1975 (or s 90UJ(1) for de facto couples) as well as the section that the agreement is made under (e.g. s 90B for pre-nuptial agreements), you will be on the right track.