

Binding Financial Agreement (BFA)

Secure your financial future



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1

What is a “prenup”?

In Australia, we refer to “prenups” as “Binding Financial Agreements” or “BFAs” for short. De facto and same sex couples can also enter into BFAs.

A “prenup” is a colloquial American term referring to an agreement entered into by people who are proposing to marry. The aim is to preclude either of them going to the Family Court if they ever separate. Agreement is reached now, stating how in the “good times” each person’s assets will be divided and how their debts will be repaid if the parties’ split.

Unlike prenups, there are, in broad terms, 3 types of BFAs:

1. Agreements entered into before marriage
2. Agreements entered into during marriage
3. Agreements entered into after a divorce order is made

A BFA if effective, ousts the Court’s jurisdiction with respect to financial matters or resources expressly dealt with in the agreement. So, if you and your partner sign a BFA prior to marriage and later divorce, your partner cannot make a claim on your property if that property was specifically excluded in the BFA.

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Do I need a BFA?

A common misconception is that BFAs are only for wealthy people. However, people of all ages and economic means can benefit from a BFA. We recommend thinking about the following questions:

1. Do you own any real estate?
2. Do you own more than \$50,000 in assets?
3. Do you earn more than \$100,000 per year?
4. Do you own any business or part of a business?
5. Does your will name beneficiaries other than your current life partner?
6. Do you have children from this or a previous relationship?
7. Have you recently received or expect to receive a significant inheritance in the near future?
8. Do you have more than \$50,000 in accumulated superannuation?

If you answered “yes” to any of the above, you should consider a BFA. However, even if you answered no to all of the above questions, a BFA can still be used to protect future assets you may acquire.

Working out how to divide property between parties following the breakdown of a relationship can be extremely painful. Parties can spend thousands of dollars on legal fees and years in the family court system. The advantage of a BFA is that it can provide you with some certainty as to the outcome, dramatically reduce the emotional impact and protect your most valuable assets and expedite the process following separation.



3

Special Categories

The problem with lots of BFAs is that they are so one sided in drafting and judges don't like being excluded, that smart lawyers find ways to get them invalidated. Drafting is key and must be done very carefully.

A. "Silver Nups"

A distinct category of BFA is becoming very popular. People with grown up children who divorced some time ago are entering new relationships. Often there is a disparity of wealth or children of each new spouse are agreed to take that spouse's assets. These BFA's are straightforward and give very significant piece of mind to each generation.

B. Parent Loans for Sydney Real Estate

Most first home buyers struggle financially to break into the Sydney property market. Often girlfriend and boyfriend or young partners pool money. More importantly though, parents of one child regularly (up to 50% of housing in 2018 say many commentators) put in substantial sums. But is the older generation protected? What if boyfriend and girlfriend breakup? Was it a gift or a loan? A "carve out" BFA is often the answer, limiting the ex partner of the young person taking a share of their parents money on a breakup. Wealth protection is important.

C. Small Business Financing

Financial institutions are demanding more and more often that customers in business with either spouse or with another family, particularly small partnerships, have future planning in place. The cost to a small business of one partner in the grip of an emotional and time consuming family law fight is obvious and financiers are more astute now. They want processes in place in advance.

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Why do BFA's fail?

- ▶ Poor drafting by lawyers. The legislation provides a checklist of what goes in the agreement and each year new cases show additional essential elements.
- ▶ Lack of transparency from each spouse setting out in the document all their assets and liabilities for the other spouse.
- ▶ Rushing! A BFA signed close to a marriage commitment ceremony or birth of a child will be more aggressively scrutinised by a Judge if one spouse challenges it later.
- ▶ In equality of bargaining power – if one spouse has no asset/speaks poor English/doesn't have their own lawyer advise them on terms then such agreements are at great risk of being invalid.

If you are thinking about getting a BFA or want some further clarification, please do not hesitate to get in touch with our family law team. We are experts in drafting them and court battles about their validity.



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