



ADLV LAW
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SOLUTION BRIEF

Binding Financial Agreement



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01

What is a Binding Financial Agreement?

A 'Binding Financial Agreement' (or 'BFA') is a way for couples to record how they will divide their assets and liabilities if their relationship breaks down, or if their relationship has already broken down.

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What are the benefits of a BFA?

If you are entering a de facto relationship or contemplating marriage, or currently in a relationship, a BFA allows you to make decisions ahead of time and (in most cases) avoid a costly legal dispute later on. A BFA can be entered into either before, during or after a relationship. By entering a BFA it puts you in the driver's seat and gives you a sense of control and certainty about the future.

A BFA can also help to avoid arguments and suspicion between you and your partner about money, because you have the discussions upfront. The BFA process is a very good way to ascertain the expectations and intentions of a couple regarding their finances and, in particular, how their assets would be split if they separate.

A BFA can also help to prevent family infighting between your partner and your children, or your partner and your parents. This is particularly the case if a family member has lent you money and wants to ensure that you solely retain the benefit of those funds if your relationship status changes.

If you have recently ended a relationship and are considering your options for finalising your financial relationship with your partner, a BFA offers greater privacy and flexibility. This is because a BFA does not involve the Court, and therefore can avoid costs and public disclosures. And the terms of a BFA do not need to be considered 'fair', which makes it more flexible than consent orders in the Court.

03

Do you need one?

BFAs are useful and appropriate in many circumstances, particularly given that we are increasingly seeing more people with significant wealth, people marrying at an older age, and more blended families. They can be particularly useful if any of the following apply to you:

- Have significant assets prior to entering a relationship that you want to protect;
- Have a much greater asset pool than your partner;
- Have been married or in a de facto relationship before, and want to protect your assets more carefully for this relationship;
- Have children from a previous relationship and want to protect your assets for their benefit;
- Expect to inherit a lot of money;
- Have been gifted or loaned money from a family member;
- Own or expect to inherit a family farm or business; or
- Have made significant gifts or contributions to your partner before or during your relationship (a BFA can ensure that these are properly taken into account if you separate).

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What can a BFA cover?

A BFA can deal with all aspects of the financial matters and financial relationship of the parties to the agreement, including:

- Splitting property, superannuation and other financial resources of either or both of parties;
or
- Spousal maintenance from one party to the other, either during the relationship, after the breakdown of the relationship, or both.

A BFA does not have to deal with all of the couple's property. A couple can decide to limit a BFA to certain assets, with the remaining assets being dealt with under the Family Law Act 1975 (Cth) ('the

Act'). For many couples contemplating marriage, this is often preferable as they only wish to protect certain assets (perhaps assets they have been gifted or loaned by their family) rather than quarantining everything from their future spouse.

A BFA can only cover financial matters. This means that it cannot cover parenting arrangements (i.e. which parent a child lives with, parental responsibility etc), and will be void to the extent that they attempt to cover those sort of matters. Child support payments and matters relating to the financial care of children also cannot be dealt with through a BFA.

Further, a BFA cannot deal with any property or financial resources that are acquired after the relationship has ended. It can only apply to the property and resources owned at the date the agreement is made, or that is later acquired during the course of the relationship.

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What do I need to do to make a valid BFA?

There are a number of requirements that must be met for a BFA to be binding, including:

- The agreement must be in writing;
- It must refer to the correct section of the Act as being the authority under which it is made;
- It must be signed by both parties, but only after each party was given independent legal advice about its rights; and
- It must be accompanied by a certificate from the lawyer for each party confirming the independent legal advice.

Both parties must make a full disclosure of all of their assets prior to entering into a BFA, and BFAs usually contain a schedule of assets and liabilities of the parties to record what was disclosed. Non-disclosure or inadequate disclosure can be grounds to void a BFA.

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Do you need to involve a lawyer?

Yes. BFAs are complex legal documents and must strictly comply with the legislation. They may also be overturned in the future if they are not prepared correctly.

While you can draft your own agreement (which we generally do not recommend), each party will still need to engage their own lawyer to provide independent legal advice about the agreement and sign the lawyer's certificate of advice. As such, it is often more efficient and cost-effective to get the lawyers involved at the outset.

07

When can a BFA be challenged?

A BFA can be challenged on a number of grounds. However, the presumption will start with the BFA being binding on the parties, unless valid grounds for challenge can be raised by one of the parties.

Most of the grounds for challenge are set out in the Act but include:

- It fails to comply with the statutory requirements;
- There has been some dishonest conduct, such as material non-disclosure of assets;
- The agreement is for an improper purpose, such as trying to defeat creditors;
- The agreement is defective; or
- The circumstances have changed which would make it unfair to hold the parties to what was agreed, for example if the couple have since had a child to whom care needs to be provided and what was agreed under the BFA does not reasonably allow the parties to adequately care for the child.

Common law principles of contract

A BFA is a contract. Therefore, the common law grounds for challenging contracts are also applicable to BFAs, including for example for lack of certainty, mistake, duress, etc. Many of these common law grounds are also incorporated into the Act.

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What happens if I don't have a BFA?

If a couple (either married or de facto) do not have a BFA, then there are essentially three options to resolve their financial relationship when they separate:

- The parties can enter into a BFA;
- The parties can seek consent orders; or
- If the parties cannot agree an outcome, one of the parties must apply to the Court.

We discuss the second two options briefly below.

Consent orders

If the parties agree how to divide their property and the settlement is fair they can complete an application for consent orders. The proposed consent orders are then reviewed by the Court and will be accepted if the proposed orders are just and equitable.

Court proceedings

Where there is no BFA and the parties cannot agree on how to divide the property, one of the parties must apply to the Court for it to determine orders for a property settlement (and spousal maintenance if applicable). There is then a four-pronged process employed by the Court to determine what orders to make:

- Consider whether the proposed order is just and equitable;
- Identify and value the property of the parties;
- Consider the contributions each party has made; and
- Consider the other relevant factors and circumstances of the parties.

Parties must apply to the Court within 12 months from the finalisation of their divorce or within 24 months from the end of their de facto relationship.

What should I do if I want to enter into a BFA?

If you are considering entering a BFA, then this should be discussed with your partner as early as possible. The decision about whether to enter into a BFA can be intimidating and emotionally fraught, so the parties must approach their discussions sensitively and in good faith.

If you decide that a BFA is right for you, you and your partner must each engage a lawyer to work with you through the process of putting a BFA in place.



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TALK TO US

What next?

If you would like to speak to someone about putting in place a BFA, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.

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