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Binding Financial Agreements

*Four reasons why you might need one
and common misconceptions*

A ‘binding financial agreement’, or ‘financial agreement’, is a binding legal agreement concerning financial arrangements should a marriage or de facto relationship break down.

A financial agreement can be entered into before a marriage or de facto relationship, during the marriage or de facto relationship, or after separation and divorce. Financial Agreements entered into before a marriage or de facto relationship are commonly referred to as a [‘prenuptial agreement’](#) but in Australia, legally it is known as a ‘financial agreement’.

These agreements can cover topics such as financial support, financial settlement or any other incidental issues. There are a number of requirements to be met in order for this agreement to be a legal document and binding for both parties, including that you both must have signed the agreement and received independent legal advice from a legal practitioner about the effect of the agreement on your rights and about the advantages and disadvantages, at the time the advice was provided, to you.



When can you enter into a BFA?

BFAs can be entered into:

- before the commencement of a de facto relationship or marriage;
- during the de facto relationship or marriage (postnuptial agreement); or
- after it has broken down – a binding financial agreement after separation.

What are the benefits of signing a BFA?

There are many advantages to settling an agreement without going to court if this is possible in your circumstance.

Advantages include:

- Dramatically decreasing the financial and emotional costs of legal proceedings.
- You are also able to make your own decisions.
- Your relationship with your ex-partner is likely to work better, especially if there are shared children involved.

A prenup is an excellent idea for several reasons. If divorce occurs, it can:

- Protect one party's business from being divided or controlled by a former spouse.
- Limit the amount of spousal support payable to the other party.
- Protect the financial interests of people with substantial wealth.
- Protect the inheritance rights of any children or grandchildren that exist from previous marriages or relationships. [Read more about grandparents' rights here.](#)
- Help your marriage start with clear intentions and expectations, allowing you to go forward without worry.

Four reasons to get a prenup, even if you don't consider yourself rich

A prenuptial agreement, known legally as a Binding Financial Agreement (BFA) in Australia, is not exclusive to the wealthy and famous. And nor should it be!

1. You can protect what's important to you and your future assets!

Even if you don't have a lot of money now, you still may have valued assets you want to protect – like a beloved pet!

It is also protection for gifts you may receive in the future or assets you will acquire to ensure that you retain them as part of a financial settlement.

2. It's like an insurance policy

Think about it as an insurance policy against the risk of separation occurring and a divorce settlement being out of your control. A BFA, carefully drafted, can give you certainty about the future while giving you flexibility about how you acquire assets in the future.

3. You have transparency about your financial positions from the start

A BFA requires disclosure of your assets and financial circumstances to take place. Doing this as you embark on a relationship sets you, as a couple, up for open and transparent ongoing conversations about finances moving forward.

For example, a BFA can help specify who owns any existing debt or debt incurred during the marriage.

4. Your property settlement is done!

Suppose the worst happens, and your relationship breaks down. In that case, you don't need to worry about going through the formalities of documenting a property settlement at the time of separation – you've done it in advance in your prenup.

By having the binding financial agreement already in place, you'll save yourself the monetary and emotional stress that may come with having to resolve taking legal action via the [court system](#).

Common misconceptions about BFA's:

Are BFA's enforceable and are they effective?

"Prenups" or "Financial Agreements" (as they are formally referred to in Australia) are legally binding so long as they comply with the legal requirements set out in the Family Law Act 1975 (Cth) ("the Act") and the principles established by case law.

The Act provides that a BFA will be binding if, and only if:

1. The financial agreement is signed by all parties;
2. Before signing the agreement, all parties to the agreement sought independent legal advice as to the legal effect of the agreement;
3. Signed statements are provided by the independent legal practitioners of each party stating that advice was given in relation to the financial agreement; and
4. The statements of each of the independent legal practitioners are provided to the other parties.
5. The agreement has not been terminated and has not been set aside by a court.

What is the average cost of a BFA?

In Australia, the cost of a financial agreement will vary depending on the time required for legal practitioners to draft the BFA, advise their respective clients in relation to the financial agreement and duly execute the financial agreement. The cost of obtaining a financial agreement can be relatively low provided all parties agree to reasonable terms.

Do both parties require different lawyers?

It is mandatory that each person has their own individual legal representation.

How long does it take to draw up the BFA?

The average time to finalise a BFA 1-3 months.

BFA Checklist

- ☐ Ask your partner in advance if you are planning to obtain a BFA. Some BFA's may be challenged as invalid if they are drawn up and signed within 30 days of the wedding. This short notice may be argued as coercion. It is best to ask your partner at least 6 months prior to nuptials or if you are de facto, during the 2 year co-habitation period.
- ☐ Ensure you have knowledge of your financial circumstances and collate supporting documents:
 - ☐ Birth certificate
 - ☐ Marriage certificate (if already married)
 - ☐ Any loans (either personal or business related)
 - ☐ Any credit cards or debt
 - ☐ Assets, shares or cryptocurrency
 - ☐ Bank accounts
 - ☐ Vehicles
 - ☐ Superannuation
 - ☐ Mortgages and/or rental agreements
 - ☐ Businesses you share or run
 - ☐ Other benefits or inheritances
 - ☐ Any family trust deeds
- ☐ Ensure you have an accurate timeline on when the relationship commenced. You will be required to inform your family lawyer the date you starting living together (if you have).
- ☐ Consider how you wish the various assets, liabilities and financial resources to be dealt with during the course of the marriage or de facto relationship and what should happen to them in the event of the breakdown of the relationship. Consider what, if any, effect children would have on the proposed division of the assets in the event that the relationship should break down.
- ☐ Contact Watts McCray Lawyers to engage a family lawyer. From here, we can discuss your specific circumstances and begin to draft your Binding Financial Agreement.

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ABOUT WATTS MCCRAY LAWYERS

As a specialist and leading provider of Family Law services in Australia, Watts McCray Lawyers understand Family Law and the way the various Courts function. Our Family Lawyers, many of whom are Accredited Specialists, are well placed to provide clients with the best possible representation in all manner of Family Law cases.