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LawTalk Blog



A Binding Financial Agreement (Pre-nup) is there to protect your assets

Author: [Ryan Thomas](#)

Email: enquiry@andersons.com.au

Phone: 08 8238 6625

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We receive frequent enquiries from people wanting to protect their assets from claims from current or future partners. What they need is a [Binding Financial Agreement](#) (commonly referred to on US television, as a pre-nup).

The enquiries range from queries about setting up “rental agreements” with their partner, setting up family trusts or drafting financial agreements under the *Family Law Act* (the “Act”).

The law in Australia on Binding Financial Agreements (“BFA”) has developed extensively since the introduction of the Act in 1975 and there is very limited scope to protect your assets from a claim from a de facto partner or spouse if you separate, unless you have a BFA.

“There is a lot of incorrect information in the public arena regarding Binding Financial Agreements.”

The Act sets out the mechanism for parties to try and protect their assets from a claim from a future de facto partner or spouse by using a BFA. It allows parties to decide how their assets would be divided in the event of a separation. These agreements can also cover spousal maintenance.

There is a lot of incorrect information in the public arena regarding BFA’s. In particular there have been a number of high profile cases where the agreements have either been found not to be binding or set aside by a court. In those cases this has allowed the

former partner to make a claim on the other partner's assets. This has led to a belief by some members of the public that such agreements are "not worth the paper they are written on".

Despite those cases which have received significant publicity, such as the [Grant Hackett](#) case, there are many more instances where BFA's have achieved their purposes and the parties have been bound by the terms.

Who can have a Binding Financial Agreement?

Binding financial agreements are available for both married couples and de facto couples. For protecting assets, they can be entered into before the marriage or relationship or during the marriage or relationship but before separation as the parties are agreeing how their assets will be divided in the event of a separation.

BFA's entered into before marriage, are colloquially referred to as "Pre-Nuptial Agreements". BFA's can also be used by parties after separation to formalise their property settlement.

In order for the BFA to be binding it must comply with the provisions of the Act in s90G for married couples and s90UJ for de facto couples. In particular each party needs to have their own independent lawyer to advise them in respect to the agreement.

Our view is that when an agreement is carefully drafted and each of the parties engages an experienced family lawyer to provide them with the requisite legal advice, that these agreements are a very useful tool in the protection of assets. We are finding that people are more and more frequently looking to use these agreements to protect their assets.

Some examples where a Binding Financial Agreement can be of particular importance or benefit are:

1. Second marriages or relationships where the parties each have their own assets and grown children. In this case the agreement serves to protect each party's assets from a claim from their new partner and to preserve their wealth for their children from the first marriage or relationship.
2. Where a party has a significant business interest and seeks to exclude that asset, to protect the business from a claim from the other party.
3. Where a party anticipates receiving a significant inheritance that they seek to exclude from a claim from their partner or spouse.
4. In cases where there is a significant disparity in the party's financial positions.

If you would like to discuss whether a Binding Financial Agreement is appropriate in your circumstances, contact [Ryan Thomas](#), Partner in the [Family Law](#) team at Andersons.

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