

## Binding Financial Agreements

### *A general Introduction to:* **Binding Financial Agreements including for Pre-Nuptial Agreements<sup>1</sup>**

#### **What is a BFA?**

A BFA can be made before a marriage, during a marriage or after a marriage. Generally, the agreements set out how a couple's property and financial resources are to be divided in the event of the breakdown of the marriage and the maintenance of either of them during the marriage and/or after the marriage.

- A BFA continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.
- A BFA may be terminated by the parties to the agreement by:
  - ◊ terminating the agreement in a subsequent binding financial agreement; or
  - ◊ making a written agreement (a termination agreement) to that effect.
- A binding financial agreement, is not subject to any duty or charge.

#### **Advantages of a BFA**

- A BFA is the only methodology in Family Law by which an agreement can be entered into in order to close off certain rights.
- A BFA can actually enhance the relationship of parties as it can settle any suspicions that may be present regarding financial issues in the marriage.
- It enables parties to contract out of the rights and entitlements that are provided for under the Family Law Act.
- It can be used before, during or after a marriage.
- It may include matters that are ancillary and incidental to property and maintenance matters, such as partnership or business arrangements.
- A BFA can also be used as an interim arrangement, after separation.
- Parties are able to use a BFA to re-arrange their financial affairs while still married.

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### Considerations before entering into a BFA

- A BFA can be complicated as situations such as the parties having children, separation, a party remarrying or the death of a party need to be considered. However, it has an advantage if these issues are considered and settled in advance.
- A BFA is usually used to contract out of rights and entitlements provided for under the Family Law Act.
- Third parties can not be parties to the agreement.
- The BFA may be set aside in the future on the grounds of unconscionability (unfairness), failure to disclose relevant material, the agreement is void, voidable or unenforceable or a material change in circumstances in relation to the care, welfare and development of a child of the marriage has occurred.
- Your partner must be approached sensitively. A proposed BFA prior to the marriage could if not approached carefully, lead to the end of the engagement.
- In contrast to a court order, a transfer pursuant to a BFA does not have any roll over relief for capital gains tax purposes.

### Binding Financial Agreement as a Prenuptial Agreement

There are many views on the appropriateness of prenuptial agreements. Some hold the view that a prenuptial agreement encourages marital instability because they are providing for separation. There is also the view that as the women is usually in the weaker economic position at the commencement of the marriage, they will then be in a weaker bargaining position. There are, however, many advantages to a prenuptial agreement. It gives the couple the freedom to decide their future financial arrangements on their own terms and will not have to rely on the decision of a court.

This provides for greater certainty between the parties and can in fact encourage marital stability. If a couple does decide to separate in the future, there will be reduced financial and emotional costs.<sup>2</sup>

### Footnotes

- <sup>1</sup> The law as at 1 November 2002.
- <sup>2</sup> Fehlberg, B & Smyth, B (1999) Family Matters No53 Winter A Binding Financial Agreements: Will they help? Australian Institute Of Family Studies.