

DRAFTING BINDING FINANCIAL AGREEMENTS UNDER THE FAMILY LAW ACT 1975
(Cth) AND FAMILY COURT ACT 1997 (WA)

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1. Introduction

In the year 2000 the *Family Law Act 1975* (Commonwealth) (“FLA”) was amended to include Part VIIIA, governing Financial Agreements. The purpose of Part VIIIA was to oust the jurisdiction of the Family Court to make property adjustment orders. These provisions finally enabled married spouses to enter into Binding Financial Agreements (“BFAs”) at various stages of their relationship. In 2008, Division 4 of Part VIIIAB was inserted to allow de facto spouses to do the same. In Western Australia, married spouses who want to enter into a BFA fall under Part VIIIA of the FLA. However, de facto spouses fall under Division 3 of Part 5A of the *Family Court Act 1997* (Western Australia) (“FCA”).

Parties often elect to enter into BFAs because:

- a. They choose how to deal with their assets if they separate, rather than have this imposed by a court;
- b. It takes significantly less time and cost to prepare a BFA than to litigate;
- c. Court’s approval of the BFA before it is executed is not needed;
- d. The terms of the BFA remain confidential unless there are future related court proceedings; and
- e. How the parties elect to deal with their assets after separation does not need to be just and equitable.²

Since the introduction of these new provisions, a number of applications have been made to the courts to enforce or set aside BFAs.³ Numerous BFAs were set aside, and some parties who were financially worse off after the court decision, sued the lawyers who drafted the

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² See section 79(2) of the *Family Law Act 1975* (Cth) which provides that a court cannot adjust parties’ property interests unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. See also Staindl, Paul and Bradley, Lisa. 2008. “Financial agreements: Risks, responsibilities and rewards”. *Current Family Law*, 13(2): 64.

³ Feary, Grant. 2015. “Risk watch: The risks to lawyers of pre-nup agreements”. *Bulletin* (Law Society of South Australia), 37(9): 23p. 23; Papadakis, Marianna. 2015. “Pre-nuptial agreements too risky for lawyers”. *Australian Financial Review*, 23 July 2015, accessed at <http://www.afr.com/business/legal/prenups-too-risky-for-lawyers-20150520-gh61gj>.

BFA to recover their losses.⁴ For these reasons, some lawyers advise their clients not to enter into BFAs, and refuse to draft BFAs altogether.⁵

The fact that BFAs have at times been set aside, and legal action may have been taken against lawyers who drafted them, should not deter lawyers from providing this vital service. Disputes over contracts date back to English decisions in the 1600's.⁶ Clients suing their lawyers for drafting contracts which did not stand up in court is not a new phenomenon. Further, parties who seek to set aside BFAs generally do so because they are no longer happy with the division of the assets, not because of an error in the BFA (unless the error makes a provision inoperable). Parties may look for a way to set aside the BFA, similarly to looking for a ground to appeal a decision they are not satisfied with. Consequently, even if there are no obvious errors in a BFA, parties may still attempt to set it aside.

By keeping up to date with legislative changes and new case law, updating precedents, paying attention to detail, and being diligent, lawyers can be competent and confident in drafting and advising on BFAs despite potential future claims.⁷ In fact, failing to advise clients of BFAs as a potential for asset protection may itself leave the lawyer open to potential liability claims.⁸

This paper discusses the legislative requirements for drafting BFAs, and provides useful strategies that may be incorporated into lawyers' practice in order to continue to provide this vital service to their clients.

2. Types of BFAs

Part VIIIA of the *FLA*, Division 4 of Part VIIIAB of the *FLA*, and Division 3 of Part 5A of the *FCA*, provide for BFAs in the following circumstances:

⁴ See, for example, *F Firm & Ruane and Ors* (2014) FLC 93-611 and *Schacht v Thompson & Ano* (No. 3) [2013] NSWSC 316 (the damages awarded were reduced on appeal in *Thompson & Anor t/as Staunton and Thompson Lawyers v Schacht* [2014] NSWCA 247).

⁵ Farar, Dennis. 2012. "Prenuptial agreements: ...where angels fear to tread". *Ethos: Official Publication of the Law Society of the Australian Capital Territory*, 225: 29; Staindl and Bradley, above n 2, p. 68. See also the webpage of Friedman Lurie Singh & D'Angelo, a Perth law firm, which explains why they do not do BFAs, at <https://www.flsd.com.au/binding-financial-agreements-why-we-dont-do-them>, and a similar article published by Prime Lawyers on their website, at <https://www.primelawyers.com.au/family-law/property-settlement/pitfalls-of-binding-financial-agreements>.

⁶ *Nichols v Raynbred* (1616) Hob 88; 80 ER 238 (Court of King's Bench); *Kingston v Preston* (1773) 2 Doug 689; 99 ER 437 (Court of King's Bench); *The Government of Newfoundland v The Newfoundland Railway Co* (1888) 13 App Cas 199 (Privy Council).

⁷ Dowd, Justin and Harland, Alexandra. 2008. "Bound by strict compliance". *Law Society Journal*, 46(2): 60; Staindl and Bradley, above n 2, p. 68.

⁸ Staindl and Bradley, above n 2, p. 68.

- a. People who are contemplating entering into marriage. This is called a **Financial Agreement pursuant to section 90B of the *FLA***;⁹
- b. Parties who are married and have not separated or divorced. This is called a **Financial Agreement pursuant to section 90C of the *FLA***;¹⁰
- c. Parties who are married and have separated but not yet divorced. This is also called a **Financial Agreement pursuant to section 90C of the *FLA***;¹¹
- d. Parties who were married and have divorced. This is called a **Financial Agreement pursuant to section 90D of the *FLA***;¹²
- e. People who are contemplating entering into a de facto relationship and do not intend to marry. This is called a **Part VIIIAB Financial Agreement pursuant to section 90UB of the *FLA***, or a **Financial Agreement pursuant to section 205ZN of the *FCA*** for de facto spouses in WA;¹³
- f. Parties who are in a de facto relationship and have not separated. This is called a **Part VIIIAB Financial Agreement pursuant to section 90UC of the *FLA***, and a **Financial Agreement pursuant to section 205ZO of the *FCA*** for de facto spouses in WA;¹⁴
- g. De facto spouses who have separated. This is called a **Part VIIIAB Financial Agreement pursuant to section 90UD of the *FLA***, and a **Financial Agreement pursuant to section 205ZP of the *FCA*** for de facto spouses in WA;¹⁵ and
- h. Parties who have executed a BFA and wish to terminate it. This is called a **Termination Agreement pursuant to section 90J of the *FLA*** for married spouses, a **Termination Agreement pursuant to section 90UL of the *FLA*** for de facto spouses, and a **Termination Agreement pursuant to section 205ZU of the *FCA*** for de facto spouses in WA.¹⁶

The above list may appear overwhelming, particularly when clients seek advice on which BFA they should have, and when lawyers note that the requirements for each type of BFA differ. Some differences are minor. For example, a clause may be worded slightly differently in the *FLA* and in the *FCA*, but still have the same meaning. More significant differences include the *FLA* requiring a separation certificate to be signed by the parties, when the *FCA* does not. These differences will be discussed below. Lawyers need not feel

⁹ *FLA* s 90B.

¹⁰ *FLA* ss 90C(1)(2) and (2A).

¹¹ *Ibid.*

¹² *FLA* s 90D.

¹³ *FLA* s 90UB; *FLC* s 205ZN.

¹⁴ *FLA* s 90UC; *FLC* s 205ZO.

¹⁵ *FLA* s 90UD; *FLC* s 205ZP.

¹⁶ *FLA* ss 90J and 90UL; *FLC* s 205ZU.

overwhelmed when considering the types of BFAs. A checklist for each type of BFA, and the legal advice that is to be provided, will simplify a lawyer's task.

For example, one of the first points on a checklist should be the parties' current relationship status. Next, if the parties are not married, they need to be asked whether, at that time of the consultation, they intend to marry. These two questions will pinpoint which BFA the parties should have drawn up. However, because clients' intentions do at times change, they should be advised that if they do not intend to marry, but later do, a new BFA should then be entered into. This advice should be provided verbally and in writing.

Further, until same sex couples can legally marry in Australia, their status, for the purpose of a BFA, is that of de facto spouses. Same sex couples will therefore be entering into a BFA for de facto spouses contemplating a relationship, already in a relationship, or those that have separated. Whether or not a new BFA should be entered into if they are later able to marry will depend on the provisions of any amending legislation.

Once lawyers determine which BFA parties require, then the requirements for that BFA need to be checked. This is discussed in the following section.

3. Legislative requirements

As already discussed, the applicable legislation is the *FLA* and the *FCA*. The requirements of each BFA are outlined below.

3.1 BFAs pursuant to sections 90B, 90C, 90D of the *FLA*

There are a number of requirements for BFAs pursuant to sections 90B, 90C and 90D of the *FLA*. The first requirements are that:

- a. Parties cannot be spouse parties to any other binding agreement pursuant to these sections and with respect to the same matters;¹⁷
- b. The BFA may be made with one or more other people;¹⁸
- c. The BFA may refer to the division of property and financial resources of the parties after separation or divorce, and maintenance of the parties;¹⁹

¹⁷ *FLA* ss 90B(1), 90C(1) and 90D(1).

¹⁸ *FLA* ss 90B(1)(b), 90C(1)(b) and 90D(1)(b).

¹⁹ *FLA* ss 90B(2), 90C(2) and 90D(2).

- d. The BFA may refer to incidental or ancillary matters, and other matters.²⁰ However, the marriage must have broken down for provisions relating to other matters to be given effect to;²¹ and
- e. If all of the parties to the new BFA executed a previous financial agreement, this BFA terminates the previous one.²²

In addition, the following specific requirements apply:

- f. A separation declaration must be signed by at least one of the parties if the parties are separated but not yet divorced, and must be made pursuant to section 90DA of the *FLA*, which provides the specific wording for the declaration;²³
- g. Provisions relating to maintenance of a party or a child/children must specify which party or child/children the provision is made for, and the amount or value of property attributed to the maintenance;²⁴ and
- h. Parties to the BFA must be able to support themselves without an income tested pension, allowance or benefit.²⁵

A separation declaration must be made if provisions on how the parties' property and financial resources are to be dealt with in case of separation are to be given effect to.²⁶ Only provisions relating to other matters will be given effect to even if a separation declaration is not made.²⁷ Because the main operative parts of a BFA relate to how the parties' assets and financial resources are to be dealt with in case of separation, it is recommended that parties always sign a separation declaration. Although the legislation does not require the separation declaration to be annexed to the BFA, lawyers may elect to make this annexure part of their precedents. The execution of the separation declaration and its annexure to the BFA should be included in the lawyer's checklist.

²⁰ *FLA* ss 90B(3), 90C(3) and 90D(3). Incidental, ancillary and other matters are not defined in the legislation. However, section 4 of the *FLA* defines financial matters to include maintenance of the parties and children, and property. Therefore, incidental, ancillary and other matters will include matters other than maintenance of the parties or children, and property.

²¹ *FLA* s 90DB(2).

²² *FLA* ss 90B(4), 90C(4) and 90D(4).

²³ *FLA* s 90DA.

²⁴ *FLA* s 90E.

²⁵ *FLA* s 90F.

²⁶ *FLA* s 90G.

²⁷ *FLA* s 90G. Incidental, ancillary and other matters are not defined in the legislation. However, financial matters include maintenance of the parties and children, and property. Therefore, incidental, ancillary and other matters will include matters other than maintenance of the parties or children, and property.

Finally, section 90G of the *FLA* provides that the following requirements in relation to execution and independent legal advice must be complied with:

- i. The BFA must be signed by all parties;²⁸
- j. Before signing the BFA, each spouse party must be provided with independent legal advice from a legal practitioner about the effect of the BFA on their rights, and about the advantages and disadvantages of them entering into the BFA;²⁹
- k. Before or after signing the BFA, each spouse party must be provided with a signed statement by the legal practitioner that independent legal advice was provided, and a copy of this statement is to be provided to the other party or their lawyer;³⁰ and
- l. For the BFA to be binding, it must not have been terminated or set aside by a court.³¹

A minor omission in these type of BFAs will not necessarily render the BFA invalid. Although section 90G of the *FLA* states that a BFA is binding on the parties “if, and only if” subsections (a) to (d) are complied with, this is subject to the provisions of subsection (1A). Subsection (1A) provides that a court may make an order that a BFA is binding despite subsections (b), (c) or (ca) of section 90G(1) not having been complied with. *For example*, if the BFA is signed by all parties but a party was not provided with independent legal advice or a signed statement that such advice was given, the BFA may still be binding.³² If the court is satisfied that it would be unjust and inequitable if the BFA was not binding, the court may make an order that it is binding despite the omission, disregarding any changes in circumstances since the BFA was made.³³ Nevertheless, strict compliance with all legislative provisions is recommended.

3.2 BFAs pursuant to sections 90UB, 90UC and 90UD of the *FLA*

The requirements for BFAs pursuant to sections 90UB, 90UC, and 90UD of the *FLA* are the same as those discussed above, with slight variations. These requirements are:

- a. Parties cannot be spouse parties to any other binding agreement pursuant to these sections and with respect to the same matters;³⁴
- b. The BFA may be made with one or more other people;³⁵

²⁸ *FLA* s 90G(1)(a).

²⁹ *FLA* s 90G(1)(b).

³⁰ *FLA* ss 90G(1)(c) and (ca).

³¹ *FLA* s 90G(1)(d).

³² *FLA* ss 90G(1A)(1B)(1C) and (2).

³³ *Ibid.*

³⁴ *FLA* ss 90UB(1), 90UC(1) and 90UD(1).

³⁵ *FLA* ss 90UB(1)(c), 90UC(1)(c) and 90UD(1)(c).

- c. The BFA may refer to the division of property and financial resources of the parties after separation, and maintenance of the parties;³⁶
- d. The BFA may refer to incidental or ancillary matters (but not to other matters), and the relationship must have broken down for the provisions relating to incidental and ancillary matters to take effect;³⁷ and
- e. If all of the parties to the new BFA executed a previous financial agreement, this BFA terminates the previous one.³⁸

In addition, the following specific requirements apply:

- f. A separation declaration must be signed by at least one of the parties if the parties have separated, and must be made pursuant to section 90UF of the *FLA*, which provides the specific wording for the declaration;³⁹
- g. Provisions relating to maintenance of a party or a child/children must specify which party or child/children the provision is made for, and the amount or value of property attributed to the maintenance.⁴⁰ Although Part VIIIAB BFAs are not made with respect to child maintenance, such provisions may be included in the same document for child support or other non-Part VIIIAB purposes (except agreements made in non-referring States that become Part VIIIAB BFAs);⁴¹ and
- h. Parties to the BFA must be able to support themselves without an income tested pension, allowance or benefit.⁴²

It is recommended that these types of BFAs also always include a separation declaration, although this is not specifically required by legislation.

An additional provision in these type of BFAs is that Agreements made in non-referring States may become Part VIIIAB financial agreements.⁴³

Finally, section 90UJ of the *FLA* provides that the following requirements in relation to execution and independent legal advice must be complied with:

³⁶ *FLA* ss 90UB(2), 90UC(2) and 90UD(2).

³⁷ *FLA* ss 90UB(3), 90UC(3), 90UD(3) and 90UG. Incidental and, ancillary matters are not defined in the legislation. However, section 4 of the *FLA* defines financial matters include maintenance of the parties and children, and property. Therefore, incidental and ancillary matters will include matters other than maintenance of the parties or children, and property

³⁸ *FLA* ss 90UB(4), 90UC(4) and 90UD(4).

³⁹ *FLA* s 90UF.

⁴⁰ *FLA* s 90UH.

⁴¹ *Ibid.*

⁴² *FLA* s 90UI.

⁴³ *FLA* s 90UE.

- i. The BFA must be signed by all parties;⁴⁴
- j. Before signing the BFA, each spouse party must be provided with independent legal advice from a legal practitioner about the effect of the BFA on their rights, and about the advantages and disadvantages of them entering in to the BFA;⁴⁵
- k. Before or after signing the BFA, each spouse party must be provided with a signed statement by the legal practitioner that independent legal advice was provided, and a copy of this statement is to be provided to the other party or their lawyer;⁴⁶ and
- l. For the BFA to be binding, it must not have been terminated or set aside by a court.⁴⁷

A minor omission in these type of BFAs will also not necessarily render the BFA invalid. Section 90UJ mirrors section 90G in that a BFA is binding on the parties “if, and only if” subsections (a) to (d) are complied with. This is also subject to the provisions of subsection (1A), which provides that a court may make an order that a BFA is binding despite subsections (b), (c) or (ca) of section 90UJ(1) not having been complied with.⁴⁸ Again, despite this provision, strict compliance with legislative requirements is recommended.

3.3 BFAs pursuant to sections 205ZN, 205ZO and 205ZP of the FCA

The requirements for BFAs pursuant to sections 205ZN, 205ZO and 205ZP of the *FCA* are that:

- a. Parties entering into the BFA cannot be parties to any other binding agreement pursuant to these sections (and with respect to the same matters addressed in the new BFA);⁴⁹
- b. The BFA may refer to the division of property and financial resources of the parties if the relationship breaks down, and maintenance of either party;⁵⁰
- c. The BFA may refer to incidental or ancillary matters;⁵¹ and
- d. If all of the parties to the new BFA executed a previous financial agreement, this BFA terminates the previous one.⁵²

⁴⁴ *FLA* s 90UJ(1)(a).

⁴⁵ *FLA* s 90UJ(1)(b).

⁴⁶ *FLA* ss 90UJ(1)(c) and (ca).

⁴⁷ *FLA* s 90UJ(1)(d).

⁴⁸ *FLA* ss 90G(1A)(1B)(1C) and (2).

⁴⁹ *FCA* ss 205ZN(2)(b), 205ZO(2)(b), and 205ZP(2)(b)

⁵⁰ *Ibid.*

⁵¹ *FCA* ss 205ZN(3), 205ZO(3) and 205ZP(3). Incidental and ancillary matters are not defined in the *FCA*. However, section 205T defines financial matters as those relating to maintenance of the party and child/children, and property. Therefore, incidental and ancillary matters may refer to matters other than those relating to maintenance and property.

⁵² *FCA* ss 205ZN(4), 205ZO(4) and 205ZP(4).

The *FCA* does not require execution, or annexure, of a separation declaration. However, these additional requirements do apply:

- e. Provisions relating to maintenance of a party or a child/children must specify which party or child/children the provision is made for, and the amount or value of property attributed to the maintenance;⁵³ and
- f. Parties to the BFA must be able to support themselves without an income tested pension, allowance or benefit.⁵⁴

Finally, section 205ZS, provides that the BFA is binding in the parties “if, and only if” the following requirements are complied with:

- g. The BFA is signed by all parties;⁵⁵
- h. The BFA contains a statement with respect to each party that they were provided with independent legal advice, before they signed the agreement, about the effect of the BFA on their rights, and the advantages and disadvantages of them entering into the BFA;⁵⁶
- i. The person providing the independent legal advice signs a certificate that the advice was given and annex it to the BFA;⁵⁷
- j. The BFA has not been terminated or set aside by a court;⁵⁸ and
- k. After execution the original BFA is given to one of the parties and a copy given to the other.⁵⁹

The *FCA* does not specify whether or not BFAs can be entered into with one or more parties. The wording of the provisions imply that only the de facto parties can enter into the BFA. For example, it provides that the BFA must be signed by “both parties”.⁶⁰ It does not say “all parties”. To err on the side of caution, only the de facto spouses should enter into the BFA.

Section 205ZS of the *FCA* also does not mirror sections 90G and 90UJ of the *FLA* with respect to the court having the power to hold a BFA valid even if certain provisions are not complied with. However, section 205ZS(3) of the *FCA* provides that a court may make such orders for the enforcement of the BFA that is binding on the parties as it thinks necessary. This may include a circumstance where setting aside a BFA because of a minor error or

⁵³ *FCA* s 205ZQ.

⁵⁴ *FCA* s 205ZR.

⁵⁵ *FCA* s 205ZS(1)(a).

⁵⁶ *FCA* s 205ZS(1)(b).

⁵⁷ *FCA* s 205ZS(1)(c).

⁵⁸ *FCA* s 205ZS(1)(d).

⁵⁹ *FCA* s 205ZS(1)(e).

⁶⁰ *FCA* s 205ZS(1)(a).

omission would otherwise be unjust or inequitable. To prevent this from occurring, strict compliance with legislative provisions is recommended.

Ambiguities in the *FLA* or *FCA* legislative provisions are clarified when courts have the opportunity to interpret them. For this reason, lawyers drafting and advising on BFAs need to keep up to date with recent case law and legislative developments, whether by an electronic subscription for regular email alerts and updates, or by attending CPD events.

4. Taking instructions and providing independent legal advice

Once the lawyer determines the correct type of BFA for the client and reviews the applicable legislation, further instructions need to be taken. Lawyers will use their time efficiently if the following instructions are obtained from the client as soon as the client retains the firm:

- a. Full names, dates of birth, occupations, and income of the parties;
- b. The parties' current health status and whether they have the responsibility to care for any other persons;
- c. Whether the parties intend to have children, and full names, dates of birth, and living arrangements of the children the parties already have;
- d. The contributions the parties have made or are making to the relationship (financial and non-financial, direct and non-direct);
- e. The parties' current assets, financial resources and liabilities, and their values;
- f. Whether any party is a beneficiary to an estate or life insurance policy, and whether any inheritance or settlements funds are expected to be received;
- g. How the parties intend to manage their finances during the relationship, e.g. whether the parties intend to be solely or jointly responsible for their assets, financial resources, liabilities, and living expenses; and
- h. How the parties intend to deal with their assets, financial resources and liabilities if they were to separate.

Many of these details may appear to be irrelevant to the lawyer and the client. However, details such as the parties' occupations, income, health, and living arrangements of their children are relevant when advising the parties about the advantages and disadvantages of them entering into the BFA. For example, the BFA does not need to take into account the parties' contributions or future needs. However, if the parties were to litigate, the court does need to take these into account to determine what orders should be made.⁶¹ A party may

⁶¹ See for example, sections 79 and 75(2) of the *FLA* and sections 205ZD and 205ZG of the *FCA*.

therefore be better off financially if they were to litigate rather than entering into a BFA. This forms part of the independent legal advice that parties are to receive about their rights, and advantages and disadvantages of entering into the BFA.

This independent legal advice can only be provided if the lawyer estimates what the court is likely to do if the parties were to separate, based on their contributions and future needs.⁶² This can then be compared with how the parties intend to deal with their assets if they were to separate. The following example illustrates:

The husband, aged 30 and in good health, brings an asset pool of \$1,000,000 into the relationship. The wife is also aged 30 and in good health, but has no assets of real value. The husband intends to work and earns \$200,000 per annum. The wife also intends to work, but earns \$30,000 per annum. The BFA is to provide that if the relationship breaks down, the parties will retain those assets they brought into the relationship.

Twenty years later, the parties separate. The husband's assets increased significantly. The wife no longer considers the BFA to be fair, because she made significant non-financial contributions to the husband's assets such as entertaining his clients and being the primary homemaker. She sees a lawyer who advises that although a court is likely to award her more than is provided in the BFA, the BFA met all of the legislative requirements and is valid. The lawyer does not see any grounds on which to seek to set the BFA aside. The wife then states that if she had known that this could eventuate in the future, she would never have signed the BFA. The lawyer then asks her detailed questions about the independent legal advice she received.

It is crucial that lawyers providing independent legal advice consider such possible scenarios and discuss these with the client. It is not possible to foresee the future with great certainty. However, some contingencies are more common than others. For instance, the parties may have children, even though they did not intend to, and one of the parties may become ill and unable to earn an income, even though this was the intention. Clients must be aware that a material change in circumstances (other than those relating to the maintenance of the children of the relationship) will not invalidate the BFA,⁶³ and even though they have no

⁶² Ibid.

⁶³ FLA ss 90K(1)(d) and 90UM(1)(g); FCA s 205ZV(1)(d).

concerns with this now, they may later. This must form part of the independent legal advice that is to be provided.

Lawyers should also consider whether the client is entering into the BFA voluntarily or might be under some form of pressure or duress.⁶⁴ For example, one party may insist on a BFA only a few days before the wedding. This may be considered duress and may invalidate the BFA if such a claim is made in the future.⁶⁵ Other matters clients should be advised about include the effect death of either party has on the BFA,⁶⁶ and that they need to provide full and frank disclosure of their assets, financial resources and liabilities, and their values.⁶⁷ Although there is no statutory requirement for these to be outlined in the BFA, lawyers may choose to do so as an annexure.⁶⁸ This would support the lawyer's contention at a later date that independent legal advice was provided as to the advantages and disadvantages of the BFA, and that it was based on the instructions provided by the client.

Finally, clients must be advised that for the BFA to be binding, it cannot be entered into by fraud, for the purpose of defrauding or defeating a creditor or with reckless disregard for the interests of the creditor, or for the purpose of defrauding or defeating the interests of the other party to the BFA.⁶⁹

It is recommended that the verbal advice provided to the client is also provided in writing, in plain English, ensuring that the client understands their rights, and advantages and disadvantages of the BFA.⁷⁰ If the client is from a non-English speaking background and the lawyer has concerns about their level of comprehension, an interpreter should be considered.

Although the letters confirming the independent legal advice may be lengthy, and translation may be costly, they will support a lawyer's assertion in any future claims that independent legal advice was provided, and are well worth the effort. It is also advisable that the client signs a copy of the letter of advice, or a receipt of the advice letter, for the lawyer to keep on

⁶⁴ Staindl and Bradley, above n 2, p. 68.

⁶⁵ See, for example, *G v G* (2000) FamCA 1975 where the court took into account the fact that the agreement entered into 2 days before the wedding, *Saintclaire v Saintclaire* [2015] FamCAFC 245 where a BFA entered into 5 months before the wedding was held valid, and a most recent High Court decision finding in favour of the appellant who claimed, among other things, that she was placed under illegitimate pressure and duress to sign an agreement provided to her shortly before the wedding (*Thorne v Kennedy* [2017] HCA 49).

⁶⁶ FLA ss 90H and 90UK; FCA s 205ZT.

⁶⁷ FLA ss 90K(1)(a) and 90UM(1)(a); FCA s 105ZV(1)(a).

⁶⁸ Staindl and Bradley, above n 2, p. 69.

⁶⁹ FLA ss 90K and 90UM; FCA s 205ZV.

⁷⁰ Dowd and Harland, above n 7, p. 63 Staindl and Bradley, above n 2, p. 68.

file.⁷¹ This is particularly important if the advice is that the disadvantages of the BFA outweigh its advantages, and it is therefore not in the client's best interests to sign it.

5. Drafting BFAs

The above discussion recommended that independent legal advice be confirmed in a letter drafted in plain English. The BFA itself should also be drafted in plain English, because the parties may be lay people and need to understand the agreement they are signing.⁷²

Therefore, BFAs should not include archaic words, legalese, legal jargon, or Latin expressions. Instead, simple terminology should be used.⁷³

The BFA should include a title page identifying the type of BFA drafted e.g. "Binding Financial Agreement pursuant to Section 90B of the *Family Law Act 1975 (Commonwealth)*", and the parties to the BFA by their full names (the law firms drafting the BFA may also be included).

A table of contents may be used if the BFA is lengthy. A preamble should be included, identifying the date the BFA is made, the type of BFA, and the parties' full names and addresses. The remainder of the BFA should include the following parts:

- a. Recitals including all relevant background information and parties' intentions;
- b. Definitions or interpretation provisions;
- c. Operative provisions including how the parties intend to deal with their assets, financial resources and liabilities if they separate, and whether or not maintenance will be paid to either party or any children;
- d. General clauses including indemnities and warranties e.g. that the parties have provided full and frank disclosure, are able to support themselves without an income tested pension, and are entering into the BFA voluntarily and not for the purpose of defrauding creditors or the other party; and
- e. Dispute resolution clauses, waiver and severance clauses, clauses relating to payment of legal costs, and independent legal advice clauses.

⁷¹ Staindl and Bradley, above n 2, p. 68.

⁷² Assy, Rabeea. 2011. "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language". *Journal of Law and Society* 38(3), p. 376.

⁷³ Garner, Bryan. 2001. *Legal Writing in Plain English*. University of Chicago Press, USA, p. 35; Nevala, Minna and Palander-Collin. 2005. "Letters and letter writing". *European Journal of English Studies*, 9(1): 4; Stern, George. 2008. "From Officialese to Plain English". *Centre for Continuing Education; The Australian National University*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/app/&id=/93A4792C9FE55AD7CA25714C000AD7C6>.

The BFA should annex appendices itemising the parties' assets, financial resources and liabilities, and the separation certificate. Finally, the BFA should end with signature clauses.

When formatting the BFA, the following should be considered:

- a. Use headings and sub-headings to group related materials together in a logical sequence e.g. by subject matter or chronologically;
- b. Double space the BFA and tabulate long clauses for conciseness and clarity;
- c. Number clauses consistently for easy reference and identification; and
- d. Use correct grammar, spelling and punctuation.⁷⁴

When using precedents prepared by others, lawyers should not be afraid to adopt the above suggestions to simplify excerpts of, or the entire BFA, to make it easier to read and understand. These simplified BFAs could then form the lawyer's new precedent base.⁷⁵

Should more lengthy BFAs be necessary because of the parties' complex financial positions, then Counsel could be briefed to draft the BFA, recommend changes to the BFA that has already been drafted, and/or provide advice on the advantages and disadvantages of the client entering into the BFA.⁷⁶ Counsel's advice should be provided to the client and then kept on the client's file.

There can only be one original document. Therefore, parties should sign one original BFA, which would be retained by one party. A copy of the BFA is to be provided to the other party. The lawyers providing independent legal advice should also retain a copy of the BFA on file.

It may be several years before parties separate and turn to the BFA to apply its provisions.⁷⁷ Lawyers who drafted and advised on the BFA may have no recollection of the particular client or the BFA itself. It is therefore imperative that lawyers keep detailed notes on file, including the instructions provided by the client and the advice given. It will be very difficult for a lawyer to recall, let alone prove, verbal advice provided to a client. Therefore, verbal advice should always be confirmed in writing. The client's instructions, file notes, correspondence, legal advice, and the BFA, should all be kept on file. Law firms may have

⁷⁴ Kiernan, Felicity. 1995. "Comprehending Legal Documents". *Law and Justice Foundation of New South Wales*. Accessed 15 July 2015 at <http://www.lawfoundation.net.au/ljf/print/D5E768DA468FBE2CCA25714C0009A914.html>; The Hon Michael Kirby. 2010. "Ten commandments for plain language in law". *Australian Bar Review* 33(1), p. 10; Garner, pp. 37-39.

⁷⁵ Staindl and Bradley, above n 2, p. 68.

⁷⁶ *Ibid.*

⁷⁷ Meyer, Max. 2005. "Binding financial agreements". *Australian Family Lawyer*, 18(3): 13; Staindl and Bradley, above n 2, p. 68

developed internal policies as to the length of time that clients' files are to be kept in archives. These may be in line with statute requirements, or for a longer period of time. Because clients may not turn to the BFA for many years after it is signed, it would be prudent for lawyers to keep these files in archives for a substantially longer period of time than what is required by statute.⁷⁸

6. Conclusion

The introduction in this paper alluded to the fact that some lawyers are reluctant to advise on or draft BFAs because of the possible implications for them if the BFA is later set aside. As discussed in the introduction, this should not deter lawyers from providing this vital service to clients. Decisions setting aside BFAs may identify lawyer's inadvertent errors in drafting BFAs or providing independent legal advice, from which valuable lessons are learnt. However, these decisions may also interpret ambiguous provisions, which may lead to further amendments to the legislation. For example, on 25 November 2015, the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* was introduced in Parliament. It proposed making various amendments to the current *FLA* provisions relating to BFAs to "provide greater clarity and certainty to separating couples attempting to resolve their financial affairs without resorting to a court".⁷⁹

The Bill stated that:

*Financial agreements are an important tool that can be used by couples to make decisions on financial and maintenance matters in the event of a relationship breakdown. The Bill is aimed at strengthening the primary public policy objective underlying the financial agreement provisions, which is to allow prospective, current or former parties to a marriage or de facto relationship to take responsibility for resolving their financial and maintenance matters without involving a court. The Bill would do this by removing existing uncertainties around the requirements for entering, interpreting and enforcing financial agreements.*⁸⁰

Despite a second reading of the Bill, the Bill lapsed at dissolution on 9 May 2016. The Bill may be revived in the future. Until such time, it is imperative that lawyers are well versed in the current provisions and develop precedents and checklists to assist them in drafting

⁷⁸ Down and Harland, above n 7, p. 63.

⁷⁹ *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, at [1]. Smit, Genevieve. (2016). "Financial (dis)agreements: A critical appraisal of the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015", *Family Law Review*. 6: 31.

⁸⁰ *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, at [2].

BFAs.⁸¹ This will ensure not only that the parties execute agreements they actually intended, but that their lawyers fulfil their duties by drafting and advising on BFAs competently. Therefore, if any claims are brought against them by disappointed clients, as is often the case, these claims would have limited, if any, prospects of success.

⁸¹ Dowd and Harland, above n 7, p. 63.

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