

Business & Separation



What you need to know



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1. HOW WILL A SEPARATION AFFECT ME?

- Are you a business owner thinking of separating from your partner?
- Are you struggling through a property settlement trying to resolve issues involving a business?
- Does your ex-partner have a business that has incurred significant debt that you are worried you may be liable for?

If you have answered yes to any of the above questions then this booklet is for you. Having a family business can add many complexities to a separation or divorce.



Case Example

Take George for example.

For the last few years he and his wife Jane have owned a small ice-cream shop at the local shopping centre. George does most of the work in the business. George and Jane have decided to separate and they agree George should keep the business. Jane wants to be paid half the value of the business but Jane thinks the business is worth a lot more than George does.

The business makes a net profit each year of \$70,000.00 but George works over 70 hours per week in the business. He only gets paid a modest salary of \$30,000.00 per year. George says that if he had to pay someone to do the work he does the business would make no profit.

Jane says the business is worth over \$150,000.00. George disagrees and says the business has virtually no value as it barely makes enough to compensate him for the hours he puts in.

George and Jane are finding it hard to settle their property matters because they can't agree about the value of the business.

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Solution

Fortunately, there is a solution. George and Jane need an independent valuer to assess the value of their business. The valuer will collect a range of information about the business as well as looking at the financial statements of the business. He or she will then come up with a value for the business based on his/her expert knowledge and research.

In the above example, once George and Jane have been provided with the valuation they can use it to help them come up with a resolution to their problem.

Working out the value of a business however, isn't the only problem separating couples can experience. If you're not careful, arguments over a business can add thousands to your legal bill or cause the settlement process to drag on much longer than it should.

In this booklet, we will cover some of the problems commonly experienced and provide practical tips to help resolve these difficulties in a timely and cost effective manner.

We are sharing our knowledge built up over many years of practice, so you can avoid the common pitfalls that can arise when separating with a business.



2. DO I NEED LEGAL ADVICE?

“You don’t know what you don’t know” is a common saying but it certainly rings true when property settlements involving businesses are concerned.

Example

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Fred and Wilma are a classic example. Fred and Wilma are directors and shareholders in a family company that operates a cement business. They both drive cars owned by the business. Fred says that some time ago his accountant set up a trust that somehow involves the business. He thinks it has something to do with saving tax but he doesn’t really understand how everything works.

When he and Wilma decided to separate he just wanted to keep everything simple and not get lawyers or accountants involved. Fred and Wilma agree:

- Fred will keep the business and have Wilma’s share transferred to him;
- Wilma will keep the family home they own together;
- Wilma will keep “her” car and Fred will keep “his” car;
- The business’ financial statements show a loan from the company to Wilma of \$20,000. Fred and Wilma agree they will just wipe this loan as neither really understand how the loan came about anyway.

¹ The F & W Family Trust



Fred thinks he can save a bit of money by doing all the transfers himself. It is costing Wilma around \$8,000.00 in stamp duty to have the house transferred to herself. He has agreed to pay half. He doesn't worry about doing up any formal agreement because he didn't want to spend any extra money.

Six months later, Wilma gets a letter from the Australian Tax Office saying she owes a lot of money in tax. She doesn't think she should have to pay anything because Fred kept the business and it previously paid all their tax. Fred thought everything was finalised and doesn't see why he should not have to negotiate further with Wilma or pay bills for her.

Wilma sees a lawyer who has told her that because no formal agreement was ever drawn up, she can still file proceedings in court for a property settlement. The business has been doing well so Wilma wants more money out of the business and for Fred to pay her tax debt. She was also told that if she saw a lawyer and had a binding financial agreement or consent orders drawn up initially, they would not have spent \$8,000.00 in stamp duty when the house was transferred to her.

The moral of the story?

An expert who regularly practises in family law will be aware of many hidden nasties that may arise in a property settlement. Even if something seems straight forward it is best to get legal advice BEFORE you make any decisions.

It is also important to get financial advice before agreeing to a property settlement to make sure you are fully aware of any tax implications that may arise as a result of your settlement. Getting timely advice now, can save you thousands (if not more) in the long run.



3. BUSINESS STRUCTURES



Businesses can be set up in many different ways. Some of the main types of structures we see are as follows:

Sole Trader – this is simply a business owner operating a business under his/her own name or under a registered business name.

- Any income made by the business is treated as taxable income of the business owner.
- The business and owner are not regarded as separate entities. Any assets of the business are regarded as assets of the actual owner.
- This structure is simple to set up and operate and has fewer technical or reporting requirements than other structures.



Partnership – A partnership is a business structure that involves a number of people who carry on a business together. In our first example, Jane and George may well have operated under a partnership structure.

- Partnerships are governed by the relevant law depending on the state in which the business operates. In Queensland, partnerships are governed by the *Partnership Act 1891*.
- A partnership is like a sole trader in that the partnership is not a separate legal entity from the owners.
- A partnership tax return is required to be lodged with the ATO each year.
- Many partnerships will have a partnership agreement which sets out the terms of the partnership although this is not compulsory. Many husband and wife teams (such as George and Jane) may not have a partnership agreement.





Company– In Australia, a company is set up once it is registered with the Australian Securities and Investments Commission (ASIC). It is governed by the Corporations Act 2001.

- The big difference between companies and previous structures mentioned is that a company is its own legal entity separate from its directors and owners (i.e. its shareholders).
- The main advantage of registering a company is that shareholders of the company have limited liability towards the debts of the company. For instance, if a shareholder has 10 shares in the company valued at \$1 each, then the maximum liability for that shareholder is \$10.
- Each company must have its own set of rules set out in its Constitution. These may be the standard rules set out in the Corporations Act.
- A company may be public (i.e. listed on the stock exchange) or a proprietary (private) company. Proprietary companies must have Pty Ltd at the end of their name.
- A company will generally have one or more directors, a secretary and shareholders. The shareholders can also be individuals or another company. Shareholders are entitled to the profits and ultimately the assets of the business.
- Directors make decisions on behalf of the company, and are responsible for ensuring the company complies with all its legal obligations. There are detailed laws about the duties of directors and penalties can apply if directors breach their legal duties.
- As a company is a separate entity to its shareholders, payments to shareholders, or other benefits such as forgiveness of a debt, or transfer of an asset owned by the company to the shareholder, may mean the shareholder is liable to pay tax as result of receiving the payment or benefit. In the Fred and Wilma example above, the company's loan to Wilma has been wiped and as a result Wilma has received a benefit. The Australian Taxation Office (ATO) want Wilma to pay tax on the \$20,000.00 benefit she received (even though it was only on paper).



Trust – Essentially a trust is an obligation imposed on someone (a trustee) – to hold property or other assets for the benefit of others (the beneficiaries).

- A trust requires a formal trust deed to be drawn up that outlines how the trust operates. The deed will also set out who is the trustee, who are the beneficiaries and who has power to change things like the trustee. The trustee can either be a person(s) or a company. The trustee is legally responsible for the operation of the trust.
- A trust may be a
 - *discretionary/family trust* or
 - *a unit trust*.
- In a unit trust each beneficiary is entitled to a set percent (or unit) of the trust property.
- In a discretionary or family trust, there is no fixed percent or ratio that each beneficiary is entitled to receive. The trustee decides which beneficiaries will receive a benefit from the trust and how much. This type of trust is often used by families for tax effective distribution of assets and income. The trustee (or the person with power to remove the trustee and appoint a new trustee) generally has control over the trust. That person(s) decides who gets what benefit from the trust.

In family law matters it may be clear that one or both parties have control of a discretionary trust so the trust assets may be included as assets of the parties in the property settlement. In some cases, however, it will not be possible to prove a party has the necessary control over the trust and accordingly the court will have to determine how the trust's assets are taken into account in the property settlement, if at all.



Example 1

Let's use Fred and Wilma as an example and assume they are both Trustees of the F&W Family Trust. The trust deed also says that jointly Fred and Wilma can appoint new Trustees if they so decide. Assume the beneficiaries of the trust are Fred, Wilma and all of their children. It's easy to see that the trust is really a structure controlled by Fred and Wilma and the assets of the trust would be included in their property settlement.



Example 2

In our next example, assume that Mr Homer J Simpson is a beneficiary of the Mona Simpson Family Trust. The other beneficiaries of the trust are Homer's children and a number of environmental organisations. From time to time Homer has received payments from the trust but he never knows when he might get a payment. He is not the trustee of the trust and the trustee deed does not give him any power to change the trustee. Essentially, Homer has no control over the trust and is unlikely a court would determine that the assets of the trust are his or that they should be included in his assets under any property settlement.

Basically, in each case it will depend on the facts of the case as to whether assets of a trust should be included as assets of the parties in a property settlement.



Self- Managed Super Funds (SMSF) – A SMSF is a special type of trust set up for the sole purpose of providing retirement benefits to its members (the beneficiaries). Generally, there are less than 5 members and each member is a trustee of the fund or a director of the trustee company.

The trustee invests the fund's assets for the benefit of members. There are strict super and tax laws that apply to SMSFs. It is very important the fund is set up correctly so that it qualifies for tax concessions and avoids penalties. Strict rules also apply about record keeping of SMSFs and the investments that a SMSF can make. There are many restrictions on the circumstances under which a SMSF can borrow including that the loan must be a limited recourse loan. (This is a debt in which the creditor has limited claims on the loan in the event of default).

Separating with a SMSF can be a minefield. It is imperative you get professional advice about the best way a division of assets can be achieved.

Other Structures – Sometimes a business is divided between various structures. There may be a trading company but the profits are paid into a trust for distribution to beneficiaries. Alternatively, a business that has assets may lease or licence them to a related entity

When parties are discussing a property settlement it is vital that all relevant documents relating to the business(s) are disclosed. This will include trust deeds, partnership agreements, corporate financial statements, company and individual tax returns. This enables the full extent of personal and corporate assets to be understood.



4. DISCLOSURE – WHAT DOCUMENTS NEED TO BE EXCHANGED?

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In all family law matters there is an overriding duty on parties to provide full and frank disclosure. Basically, this means that both parties must give to all other parties, any document that might be relevant to them reaching a decision about their property settlement.

If a party is misleading, fraudulent or otherwise is not open about their financial situation, a Court may take this into account when making a decision.

If the true financial situation is not obvious until after an order is made, or an agreement reached, then it may be possible to set aside the order or agreement because of the non-disclosure of relevant information.



Case Example

Monty Burns is a case on point. Monty decided to separate from his wife Gertrude after 45 years of marriage. Monty is the owner of a large electricity plant and is extremely wealthy. Gertrude has been a devoted wife during the marriage. She stayed at home to raise their son Larry who is now an adult. She also cleaned and maintained the family mansion which was a fulltime job in itself. Gertrude was not involved in running the business and knows little about the true state of Monty's financial affairs.

Monty does not want to give Gertrude any information about his business affairs. Four years ago he started secretly transferring money to a trust fund in the name of Waylon Smithers but held on trust for himself. The trust fund is now worth \$4M.

In his property settlement Monty says that his only assets are his \$2M Mansion and his Electricity plant. Previously the electricity plant was worth several million dollars but now it is only worth \$1M. Monty offers Gertrude \$1.5M to settle. She accepts.

After consent orders are made, Gertrude becomes aware of the secret trust and applies to the Family Court for a new settlement. The Court agrees and awards Gertrude all of the money in trust as well as her original \$1.5M. The Court no longer trusts that Monty does not have other hidden assets and awards Gertrude much more of the known property as a result of Monty's previous dishonesty.

Monty should have known that the duty to disclose commences immediately a family law dispute arises and continues until the case is finalized. This means that all parties are required to consistently provide information and documents to the other parties as they come to hand.

Because Monty tried to hide assets it went against him in his final property settlement.



What type of documents need to be disclosed?

If you have a business or are involved in a business structure, there may be a lot of documents you have to disclose to the other party.

Rule 13.04 of the Family Law Rules says:

1. A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:
 - a. the party's earnings, including income that is paid or assigned to another party, person or legal entity;
 - b. any vested or contingent interest in property;
 - c. any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
 - d. any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
 - e. the party's other financial resources;





f. any trust:

- i. of which the party is the appointor or trustee;
- ii. of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;
- iii. of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;
- iv. over which the party has any direct or indirect power or control;
- v. of which the party has the direct or indirect power to remove or appoint a trustee;
- vi. of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;
- vii. of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or
- viii. over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;

g. any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f), that may affect, defeat or deplete a claim;

- i. in the 12 months immediately before the separation of the parties; or
- ii. since the final separation of the parties; and

h. liabilities and contingent liabilities.

2. Paragraph (1)(g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.

3. In this rule, legal entity means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.



5. VALUING A BUSINESS OR INTEREST IN A BUSINESS

One of the most common points of contention in property settlements involving a business, is the value of the business. We come across many cases where the person not keeping the business perceives the business is worth a lot more than the person who is retaining the business. Generally, the person keeping the business will have to pay out their former partner for their interest in the business. The lower the business is valued, the less that person will have to pay out.

It can be particularly difficult for a person to have an idea about the value of the business if they have not been involved in the day to day running of the business. Our previous example involving George and Jane is a case on point.



What about Trust?

Ever heard of separating partners not trusting their ex-spouse? Can you imagine what might happen when this spills over into business matters?

We have been involved in numerous matters where one spouse believes the other spouse is hiding assets, not fully disclosing the true income of the business, purposely running the business down, etc.

To settle such disputes an independent expert can be appointed to either value the business, to provide a forensic accounting report or both.

Some of the issues alleged that we have come across include:

- Taking cash money and not declaring the full income of the business;
- Intentionally disposing of business assets to family or friends; and
- Running private expenses through the business to decrease taxable income.

(This also may affect the amount of child support payable as child support is generally determined on each party's taxable income. The lower the taxable income, the less child support that person will pay).

The allegation that the business has been taking "cash" money and not recording the takings as income is particularly serious. If this allegation is made and the Court finds it to be true, the Court may decide to report the business owners to the Australia Taxation Office. Guilty parties may eventually be fined or even sent to prison.

Tangible v Intangible Assets

Tangible assets of a business are things you can actually see - for example land, machinery, stock-in-hand. These types of assets may have some re-sale value. Intangible assets are things like goodwill, intellectual property, branding and potential for growth. These items are harder to value which is why an expert valuer is required.



How is a Business or Interest in a Business Valued?

There are several main ways to value a business:

1. Present Value of Expected Returns

a. Capitalisation of future maintainable earnings/ Earnings multiple –

This is one of the most common approaches used to value a business or a majority interest in a business. The operating income or expected return for a specific period of the business is estimated and divided by the capitalisation rate.

Alternatively, the value of the business is quoted as a multiple of future maintainable earnings. The “multiple” is the reciprocal of the capitalisation rate in the above example.

The multiple or capitalisation rate used will depend on various things such as business growth prospects, nature of business, earnings track record, competition, location of the business, contracts in place, business risks etc.

- ### b. Capitalisation of future maintainable dividends –
- this is a common approach to use when valuing a minority interest in a business. The minority owner will usually not be in a position to influence the flow of dividends, investment strategy or future planning of the business. The value of the interest really depends on what return (dividends) the minority interest holder gets from the business.



2. Net Asset backing/Asset Valuation

This is where the assets/ liabilities of the business are valued. The approach might be used where a business is not making profits or the cash flow is less than what could be achieved if the assets were sold and liabilities paid out.

If it is intended a business will be sold as a going concern than the value of the business will be the sale price of the business.

The value to the owner of the business may be different to what the business will sell for. This may be because goodwill of the business is personal to the owner rather than being associated with contracts, methodology and reputation of the business.

A professional firm is a classic example. A partner in an accounting firm may have numerous loyal clients. If he/she changes firms, it is unlikely the other partners of his/her current firm would be prepared to pay him/her on a “value to owner” basis for his/her partnership interest as many clients may ultimately follow him/her to the new firm.





6. WHAT IS A SINGLE EXPERT?

When a dispute arises about the value of an asset a Court can order that a “single expert” be appointed. That person then prepares a “single expert report” outlining what the asset in dispute is worth.

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Generally, each person will be ordered to pay one half of the cost of the valuation.

Strict rules apply about how the single expert is instructed and how the expert discloses his/her report. The rules outline things like how each person communicates with the single expert, and who is liable to pay the expert's fees.

When a single expert is appointed, the expert must be provided with a copy of the relevant rules so he/she is well aware of his/her obligations.

If the matter does not settle before a final trial, there are also particular rules about what expert evidence can be relied upon. Generally, once a single expert has been appointed to value a certain asset, someone else can't go and get another valuation to try and rely on that at a final trial. This may be allowed in very limited circumstances but you need permission of the court first.

Generally, when a single expert valuer is being appointed one party will provide three names and the other party will choose one name from the list.



7. OPTIONS FOR RESOLUTION

The Family Law Court's position is that wherever possible, there should be a clean break between ex-spouses. The logic is that this avoids complications after a property settlement is finalised.

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When a business is involved, there may be several scenarios:

1. Parties may agree that one party will keep the business and the other party receives other assets to offset the value of the business.
2. One party may keep the business but the other party receives payment from the business over time to offset the value of the business. Obviously, for this to work the business needs to be profitable and there needs to be an element of trust between ex-spouses. If only one person is working in the business, the other person may not know what risk the business is undertaking and whether there will be sufficient funds to meet the required payments over time.
3. One party may keep the business and that party borrows money to pay the other out. This would require that the business assets be sufficiently valuable or the earning sufficiently high to encourage a financial institution to lend the necessary money.



4. The parties may agree to sell the business and each share in the sale proceeds.
5. One party may keep the business and bring in another investor. The funds being brought in can then be used to pay off the spouse who will no longer be involved in the business.
6. Both parties continue to operate the business. This alternative can be fraught with difficulties and accordingly it will generally only be considered where:
 - There is no practical alternative; and
 - Both parties have sufficient amount of trust and confidence in the other and believe that continuing to operate the business is in the best interest of both parties.

In such a case, parties may consider putting very detailed obligations in their Consent Orders or Binding Financial Agreement about how the business will continue to be run.

The Agreement may set out how they will manage business affairs into the future, including employment contracts and options to resolve disputes, if and when they arise.

Often this is used as a stop gap measure only until there are sufficient funds for one spouse to buy the other out.

If you are considering retaining a business together with your ex-spouse, then it is imperative you seek financial and legal advice about the pros and cons of doing so.

*** If one party is leaving a business, you may need to include detailed provisions about restraining the other party from setting up a separate business in competition to ensure the value of the business is not lost by the actions of the other spouse.



8. HOW TO AVOID SEXUALLY TRANSMITTED DEBT (STD)

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Whether you are starting a new relationship or finalising a previous one, chances are you won't want to be inadvertently stuck with the debts of your partner.

Sexually transmitted debt (STD) is where one person in a relationship becomes responsible for their partner's financial debts.

This can occur in several ways:

- One party may be convinced or misled into giving a guarantee in relation to a debt of the other party. When the other party defaults on the loan, the creditor may then chase the person who has given the guarantee;
- There may be a redraw facility in joint names that one party then draws down on for their own benefit without telling the other person;
- One party may need money but the lender requires security for the debt. The other party may then be convinced to offer security over an asset in joint names even though the money is only being borrowed by one party. This commonly occurs where a person is borrowing money to set up a business and security is taken over the family home. If the business operator defaults on payment of the debt, the family home can be at risk.



Partners are often vulnerable because they feel morally obligated to support their partner. Often debts accumulate without their knowledge and by the time the other party becomes aware of the true state of affairs, huge amounts may be owed to the lender.

STDs can be avoided by:

- Ensuring that you don't give security over joint assets or personal guarantees for the other party;
- If you must do this, ensure you are well aware of when payments are due on the loan and ensure repayments are met. Preferably have conditions in place that you are kept fully informed of any difficulties as soon as they arise. Ensure that extra credit cannot be provided without your written consent and that there is no redraw facility allowing the loan amount to be increased without your permission.

If you are ending a relationship and you are concerned you may be at risk of STD, seek urgent legal advice. The sooner you act, the greater the chance the situation can be rectified.





9. WHAT IS TAKEN INTO ACCOUNT IN A PROPERTY SETTLEMENT?

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Will everything be split equally?

Many people mistakenly think that when they separate, property will be divided equally. This is not the case. The Family Law Act sets out what a court must take into account when considering whether to make an order for property settlement.

Family law courts follow a four step process. This involves:

1. Identifying the net assets and liabilities of the parties;
2. Determining the financial and non-financial contributions made by the parties to the net assets and liabilities;
3. Considering factors set out in the Act relating to the needs (current and future) of the parties. The Court then determines whether any adjustments need to be made as a result of these needs; and
4. Finally, the Court considers what orders would be just and equitable in all the circumstances of the case.



Strict time limits apply in relation to property settlements. A settlement can be done at any time after separation, but no later than:

- 12 months after a divorce order becomes final; or
- within 2 years of separation in the case of a de facto relationship.

After these time limits expire, a property settlement order can only be made with leave (permission) of the Court, which may be very difficult to obtain.





What if we agree about how our property is split?

It's great if you and your partner can agree on how to divide your assets. It is important however, that the agreement is properly drawn up and filed with the Court. "Handshake agreements" are not enforceable and one party may decide to change their mind later causing all sorts of problems.

If you and your former partner agree how you want to divide your property, you can file an *Application for Consent Orders* with the Court. This doesn't mean you have to go to court. Rather, your agreement is filed with the Court and provided the Court is satisfied it is just and equitable, the Court will approve it. Your agreement is then binding and has the same force as any order made by the Court after a contested hearing.

It is not necessary for both parties to have Independent legal advice from a family law solicitor, but it is advisable that they do so.

Alternatively, agreements about property settlement can be included in a Binding Financial Agreement. Both parties must have independent legal advice and very strict requirements apply. If these are not followed, there is a risk the agreement will be set aside if later challenged in Court.

Generally, Binding Financial Agreements are more expensive than an Application for Consent Orders due to these technical requirements. We generally recommend that a property settlement be finalised by way of consent orders rather than a binding financial agreement.

If a property settlement involves a superannuation split, any proposed order or agreement must be served on the Trustee of the Superannuation Fund. This is to ensure the Trustee has no objection to the proposed superannuation split. It is unusual for the trustee to have an objection, but there is technical wording that has to be used so it is best to get legal advice if you are thinking of splitting superannuation.

NEED MORE HELP?

All information in this booklet is of a general nature only and is not intended to be relied upon as, nor to be a substitute for, specific legal professional advice. It is important that you understand your specific rights and obligations so you can make the decisions that are best for your future.

After reading this booklet, we recommend you contact us for an **initial consultation** so we can discuss your personal situation. The appointment runs for up to an hour and during this time you will be able to ask as many questions as you like. During your appointment we will get a very good understanding of your situation and your desired result.

If you have difficulty getting to our office, we can conduct appointments over the phone or by Skype. If business hours are a problem, ask us about our out of hours appointments.

The initial consultation cost is \$330 and payments can be made pay by cash, credit card, EFTPOS or electronic transfer.

Spending time with experienced family lawyers will remove the confusion or conflicting stories you may be hearing from others. Now is the time to find out the truth about your situation, and consider a strategy that will allow you to move on with your life.

After your initial consultation there is absolutely no obligation for you to retain us as your solicitor or go ahead with a divorce or separation.

To make an initial consultation simply call us on **40311044**
or email us at info@rdlawcairns.com.au

We hope you do. We looking forward to assisting you and your family move forward with your life.



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