Family Law Council

08/12163

21 October 2008

The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

Family Law Council advice on binding financial agreements under Part VIIIA of the Family Law Act 1975 and in particular, the operation of section 90G

The Family Law Council wrote to you on 28 May 2008 in relation to concerns about binding financial agreements under Part VIIIA of the *Family Law Act 1975* and in particular, the operation of section 90G in light of the Full Court of the Family Court's decision in *Black and Black*.[1]

You agreed that the matters raised in Council's letter required further consideration and provided Council with terms of reference. Given the concerns expressed by the Family Law Council and the Family Law Section of the Law Council of Australia, advice from Council is to be provided by the end of August. The advice is to include whether or not amendments to the Family Law Act are necessary and if they are, what those amendments should be in accordance with the terms of reference. Council will also consider the urgency of the matter in the context of the current law reform program.

[1] (2008) FLC 93-357

Terms of Reference

The terms of reference are that Council:

(a) consider the possible consequences of the Full Court's decision in *Black and Black* on the validity of existing binding financial agreements

(b) consider possible amendments to section 90G to ensure that existing binding financial agreements retain legal validity without recourse to the courts

(c) consider possible amendments to section 90G to ensure that the intention of the legislature regarding binding financial agreements is fulfilled

(d) comment on and respond to the proposed amendments to section 90G put forward by the Family Law Section of the Law Council of Australia in its submission .

Background

Approximately 50,000 heterosexual couples go through the divorce process each year in Australia.[2] As a guess, a further 10,000 of de facto married couples separate. The once-divorced or separated population of Australia increases every ten years by over one million people.

An unknown percentage of these separating or divorcing couples have no property or each take certain items of property and walk away. They may make this choice with or without the benefit of legal advice. They are statistically invisible.

Of the remaining divorcing couples, over 90% reach some written agreement about property division. They may do this either:

- By way of an application for consent orders filed in a court after agreement has been reached. This can be done with or without legal representation.

- By the filing of terms of settlement or consent orders when agreement is reached after the commencement of defended proceedings. This may occur at any stage of the proceedings from the very early stages during which the court tries to assist the parties to resolve their dispute, right

[2] Australian Bureau of Statistics 2008, Divorces, Australia, Cat. No. 3307.0.55.001, ABS Canberra

up until during the course of the trial. Again, parties may or may not be legally represented but legal representation is more common.

- By entering into a binding financial agreement under Part VIIIA of the Family Law Act. This may be done following negotiations outside the Court process, or less commonly, during the course of contested proceedings. Binding financial agreements are often used to reduce the potential for spouse maintenance claims after parties have entered into consent orders in relation to property settlement. Parties must have independent legal advice when entering into a binding financial agreement.

The word "binding" as it occurs in all countries begs the question of how "binding"?

Finality

Society and separating couples *normally* have a strong interest in property agreements being legally "final". A substantial degree of finality:

- enables each party to confidently buy and sell property in the future
- reduces the chance that inevitable regrets about a property settlement will trigger renewed property negotiations or threats of litigation
- reduces the stress of uncertainty
- reduces uncertainty and conflict for any children of the relationship
- reduces expenditure on lawyers, courts, and mediators if the property dispute has formally "ended".

However, predictably, finality is not an absolute value. Accordingly, there is a fluctuating number of *pre-requisites* before an agreement will be given the label or badge of "binding" or "final". Additionally, there is a fluctuating number of *post-agreement events* which will remove the "binding" or "final" label.

There is an ongoing and legitimate debate about what should or should not be in the list of

- pre-requisites; and
- post-agreement events

which will either stabilise or destabilise the finality of financial agreements.

However, it is submitted that whatever the lists of exceptions to finality at any stage of Australian legal history, these exceptions should be as *clear* as

possible. Citizens, lawyers, mediators, courts, banks, child support officers, and social welfare agencies should have as much *clarity* about the meaning of each exception as is possible. And arguably, the list of exceptions should be *shorter,* rather than longer.

Informed Consent

One of the common pre-requisites to the "finality" or "binding" nature of financial agreements is that each party has a substantial degree of "informed consent". This is a slippery concept in all areas of law, medicine and real estate purchase.

Both "full" information and "full" consent are *always* missing in property settlements as:

- all past facts are not known, or are reconstructed differently;
- future facts are just guesses;
- there is never sufficient time or money to collect all the versions of the past or guesses about the future;
- even if there was time to collect more relevant information, human beings do not have the skills to process such complexity with accuracy;
- the separation process is often accompanied by a roller-coaster of emotion, numbing grief and confusion, which make balanced decision-making impossible, or very difficult.
- Discussions to settle (or not) are made under varying degrees of pressure from time, money, exhaustion, threats of violence, relatives, uncertain court outcomes, and new life goals about business, health or children.

Luckily, perfectly informed consent can never be the legal goal. Rather, some degree of the objective appearance of "informed consent" is all that a system can manage.
For example:

- "It was a terrible deal, but I had to get on with my life". "I was under so much pressure at that time, but had to stop spending money on the wreckage".
- "I wanted more, but was forced by circumstances to accept less".
- "My relatives persuaded me that I was crazy to chase my beliefs in justice".

Protecting the Public Purse

Apart from an interest in "informed consent", society has an interest in reducing social welfare payments to separated families. That is, the community normally does not want "final" financial agreements which increase the likelihood that one of the partners will need a supporting welfare payment. For example:

- "I will not ask for the children 50/50, if you agree to take only 30% of the property."
- "Unless you agree to 50/50 on the property, I will act for myself and wear you out with the court system."
- "If you take only 40% of the assets, you will be able to claim the highest federal welfare payments."
- "I will keep all the assets if you take all the super, and then you can claim top welfare" etc.

Accordingly, society has an interest in each person agreeing to a property division which is in the broad market range of property divisions available under the *Family Law Act* - no more, no less than that broad range.

After receiving "market appropriate" capital, then arguably each party has a reduced chance of increasing his/her dependency on state welfare payments.

This policy of attempting to protect the public purse is also clearly reflected in s 90F(1) and 90F(1A) of the *Family Law Act* which state:

> "90F(1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection 1A applies.
>
> 90F(1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit."

Formal Prerequisites

There is an array of formal pre-requisites which could be imposed by a legal system *before* a financial agreement receives the legal reward of a substantial degree of "finality". These formal pre-requisites are aimed inter alia at informed consent and protection of the public purse. These include:

- writing and signing
- cooling off period
- short or lengthy judicial approval
- approval by a state official
- registration at a court or state department
- representation by *one* lawyer, accountant or other skilled helper
- representation by *two* lawyers, accountants or other skilled helpers
- written certification of "advice" or "fairness" by one or two lawyers, accountants or other skilled helpers
- short or lengthy sworn written statements of "*disclosure*" by each party about assets, health, employment etc.

Obviously, each formal pre-requisite comes at a price:

- extra delays
- delay during which post-settlement regrets (reneging) will occur
- money paid to skilled helpers (This is a minor problem for wealthy families; but substantially "eats up" diminishing assets for the poor and middle class)
- time and money educating skilled helpers about the life goals of each party; educating each party about how the legal system works and about their rights, ranges, and risks.
- conflicting interests of skilled helpers who need to protect their own professional reputations and licenses ("I must be certain that you understand this agreement"; "I do not want you to blame me later for this agreement"; "I must record everything in writing in case one of you say later, 'but you did not tell me'…" etc)
- suspicion of one or both parties that skilled helpers are not "adding value" to the settlement; rather they are collecting unnecessary fees; and asking unnecessarily provocative questions ("they are destroying our agreement, rather than stabilising it" etc)

The above indicates the inevitable and complex cost-benefit balance which must be struck between a list of formal pre-requisites and degrees of finality.

Formal Requirements in s 90G of the *Family Law Act*

Section 90G states:

> **"[Requirements for binding agreement]** A financial agreement is binding on the parties to the agreement if, and only if:
>
> (a) the agreement is signed by both parties; and
>
> (b) the agreement contains, in relation to each party to the agreement, a statement to each effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified as an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
>
> (i) the effect of the agreement on the rights of that party;
>
> (ii) The advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
>
> (iii) (Repealed)
>
> (iv) (Repealed)
>
> (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating the advice was provided; and
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> (d) the agreement has not been terminated and has not been set aside by the court; and
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> (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.
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> Note: For the manner in which the contents of a financial agreement may be provide. See section 48 of the *Evidence Act 1995*."

Three Types of "Financial Agreements" in Australia

Section 4 of the *Family Law Act* states that:

> "financial agreement means an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies."

In Part VIIIA of the *Family Law Act* entitled "Financial Agreements" sections 90B, 90C and 90D then describes a "financial agreement" as:

- a written agreement
- between two people
- who are contemplating marriage, are married, estranged, separated or divorced
- with respect to property and financial resources of either or both of them;
- and/or in respect of spousal maintenance
- and any other "matters incidental or ancillary" (s 90B(3); 90C(3); 90D(3)).

As mentioned, financial agreements have three statutory "types" based on time namely:

- pre-marriage (s90B(1))
- during a marriage either "before or after the marriage has been broken down" (s90C(2A))
- post divorce (s90D(1))

In Australia at present, anecdotal evidence would suggest that use of the first type is infrequent and the second rare before the marriage has broken down. However, the second type (s90C) are frequently used after separation but before divorce. The third type (s90D post divorce) are also relatively common.

Choice of Settlement "Products"

Predictably, some legal systems offer clients a choice of products – those with less formality get less finality; with more formality get more finality. Between 1975 and 2000, Australians had that choice of products. What was known as "maintenance agreements" under s 86 (registered at court) or under s 87 (approved by a judge or State magistrate) of the *Family Law Act* were available. Since 2000, there is still a choice of less to more formal-final products, namely:

- written agreements (which are probably also "ante-nuptial" or "post-nuptial settlements" under s 85A of *Family Law Act)*.
- written agreements under Part VIIIA of the *Family Law Act*
- consent orders under s 79 and s 74 of *Family Law Act*.

In most countries, there continues to be healthy debates on:

- the *range* of financial settlement products available (in theory and in practice)
- the number and expense of formal pre-requisites to each product
- the degree of finality attached to each product (or the post settlement list of exceptions to finality).
- The cost-benefit analysis of each current or proposed system.

General Advantages of Financial Agreements
(compared to alternative forms of financial settlement)

As mentioned, there is a variety of methods available by which to record agreements about property and spousal maintenance.

Of these methods, "financial agreements" under Part VIIIA of the *Family Law Act* have the following alleged *advantages* over other forms of agreement:

1. They can be entered into at any time before, during or after marriage.
2. The prerequisite of writing ("written" in s 90B(1); 90C(1); 90P(1) encourages clarity.
3. They are *binding* and relatively "final" instantly upon being properly signed, (s 71A(1) of the *FLA)* with certain words and procedures being carefully observed (s 90G(1) of *FLA*). This has great attraction in drawn out and expensive family disputes, as:
    - it denies the opportunity to renege of any agreement on the day after when one party experiences common "post-settlement blues";
    - it excludes the expense, delay and uncertainty of having the conditional agreement approved by a court or state official.
4. There is no requirement for converting the agreement into a certain form and "registering" with a court or government agency. Thereby potential expense and delay are avoided.
5. Financial agreements give a greater degree of finality and certainty on the agreed amounts (if any) of spousal maintenance payable than any other form of settlement. (NB This is only a greater *degree* of finality – there is still a long list of exceptions to "finality" of spousal maintenance clauses in financial agreements – eg s 90E; 90F(1A); 90G(1); s 90K; 90KA)

   Thereby has emerged a common practice for lawyers who are acting for separating spouses to squeeze out the partial cups of finality for

property settlement by using consent orders under s 79; and for spousal maintenance by using a supplementary document, namely a financial agreement, under s 90C or s 90D.

6. Some couples do not want to risk any publicity by filing any documents in a Family Law Court with their names on those documents, even if the documents are only pre-requisites to consent orders.

7. Transfers of property pursuant to a financial agreement under the *Family Law Act* are usually not subject to state stamp duty (depending upon the legislation in each state and territory).

8. Since 2005, one important additional taxation benefit was added to financial agreements in Australia. Namely, transfers of property between (ex)-spouses pursuant to such an agreement defer (not cancel) the normal obligation to pay capital gains tax. Ie these transfers receive capital gains tax "rollover relief".

   Although there are no statistics to support the trend, this 2005 benefit probably increased the use of financial agreement in Australia.

9. Spousal maintenance obligations contained in financial agreements are binding after a payer's death, unless there is express provision to the contrary (*FLA*, s 90H Such obligations are not binding after a payee's death as deceased persons normally no longer need "maintenance"). Conversely, agreed spousal maintenance obligations embodied in consent orders automatically cease upon the death of the payer (*FLA* s 82(2); subject to 82(3)).

10. Between 1976 and 2003 in Australia, financial agreements (previously called "maintenance agreements") provided a useful mechanism for a married person to transfer assets to his/her spouse, thereby insulating them from claims of unsecured creditors. (*Bankruptcy Act* 1966 (Cth), s123(6); subject to s 121).

    This was a controversial device for clarifying financial priorities between families and unsecured creditors. In 2003, amendments were passed to the *Family Law Act* which substantially undermined the effectiveness of such a use of a financial agreement (*FLA*, s 90 K(1)(aa)). As a further nail the coffin, the *Bankruptcy Act* was amended in 2005 to provide that it is an act of bankruptcy if a debtor spouse becomes insolvent as a result of transfers of property pursuant to a financial agreement (*Bankruptcy Act* 1966 (Cth) s 40(1)(d)).

11. A financial agreement can include a preamble of history, or recitals of background as an agreed storyline. This may assist with interpretation,

or may make the monetary terms more palatable to tribal members, or the parties themselves.

12. A financial agreement may include other topics which are "incidental or ancillary to" property (s 90B(3); 90C(3); 90D(3)) and spousal maintenance. This includes for example, parties contracting to apply for a release, releases from post-death payments by agreeing to consent orders under the s 31(1) *Family Provision Act* 1982 (NSW).

13. A financial agreement can include provisions relating to superannuation (*FLA* s 90MH(1)).

General Disadvantages of Financial Agreements
(compared to alternative forms of financial settlement)

1. There is no official "register" of financial agreements. Parties (and their lawyers) should keep copies carefully in case of disputes years later. Sometimes these records disappear, or differ.

2. The necessary complexity of policies, precedents and legislation means that do-it-yourself drafting spouses or drafting friends will inevitably make mistakes. It is like do-it-yourself plumbing or surgery.

3. Due to the complexity of drafting financial agreements, separating spouses normally need to have at least one skilled and experienced person as initial drafter; and a second "skilled helper" to check or amend an initial drafting. This is expensive as the two drafters necessarily need to collect comprehensive information in order to cover as many loopholes as possible. Normally, lawyers have high skills and daily practice at drafting.

4. Moreover, expense escalates. Section 90G requires two (not one) lawyers to have a second role as advisers. Each lawyer is required to take a degree of responsibility to ensure that each party has given some degree of elusive "informed consent". Each lawyer must certify in writing that his/her client has been "provided" with "independent legal advice" (ie a message has been sent) on "effect" and "advantages and disadvantages" of making the agreement.

   For a conscientious or risk adverse lawyer, giving this "advice" is sometimes a monumental task of time, expense and communication skills. Predictably, the complex message sent is rarely heard. The lawyer's task becomes more expensive and time consuming if the client has a limited understanding of English.

   The shifting of "supervision" of financial settlement from the court to lawyers is always a cost and risk-shifting exercise.

5. There is often a difficult strategic question for a spouse who has sufficient finances to offer to pay for the legal adviser of his/her spouse. Should the payer specify a list of suitable lawyers? To be paid at what hourly rate? For how long? And with what cap for payment? Should the payer also insist that an interpreter is hired and present if his/her spouse does not speak English as a first language?

   If a second suitable lawyer cannot be agreed upon due to expense or preference, the spouses cannot use a financial agreement.

6. As there is no judicial supervision, neither party has the extra negotiation lever to say "Make sure that our numbers are within the normal ranges, because a judge will be checking."

7. Predictably in any profession, where there is a legal obligation to explain "effect" and "risks" to a client (as under s 90G), the profession also usually engages in efficiency and self-protection strategies. The adviser usually develops long computer-stored precedents which set out the fifteen or twenty standard risks (of surgery) or exceptions to finality or financial agreements. These are either not read or understood by clients; nor by many of the professionals printing out the form letters. Nor can the risks and exceptions to finality be understood or be effectively communicated, even by experts, as policy balances and the language reflecting these balances are so complex and shifting (eg see current necessarily mysterious wording of s 90K; 90F(1A); 90(KA)).

   Predictably some professionals revert to oral advice about risks so that there is no written record of the necessarily incomprehensible and incomplete list of risks for each client. Others will only draft financial agreements on the condition that the client pays in advance for an expensive asset investigation and then comprehensive letter(s) of advice.

   This standard pattern of risk shifting in all professions leads some experienced family lawyers to:

   - Refuse to ever draft pre-nuptial agreements, especially for wealthy people;

   - Shift the "supervision" task back to judges by embodying property settlements in consent orders under s 79 and s 74 of the *Family Law Act* (again, especially for angry or wealthy clients).

   - Employ a second or third family law specialist in order to give extra written advice, and to thereby spread the risk of professional liability to an angry or wealthy client.

- Double or triple their fees (all paid in advance) when drafting financial agreements and letters of advice for the wealthy or angry.

8. Strangely, financial agreements *cannot* currently include as contractual parties some of the other third parties standardly involved in family financial affairs – eg adult children; banks; relatives; creditors or debtors, though this is about to change. (*FLA*, s 4(1))

9. Financial agreements in many countries have an added disadvantage because one of the exceptions to finality is non-compliance with "formalities". In Australia, s 90G states that a financial agreement is "binding…if, and only if" certain detailed formalities are complied with.

   Historically, many wills were signed with formal defects. These documents lay undetected in drawers and safes for years before the formal defects were discovered and disputes erupted over "what happened" decades before on the day of signing.

   A similar problem of dormant defective formalities exists with financial agreements in Australia. A few, some or many such agreements are not "binding" under s 90G. They await discovery by a former spouse who is looking for a convenient excuse to breach the remaining obligations under his/her financial agreement, and re-open negotiated or litigated claims for more finance. (*Black and Black*)[3]

This last particular disadvantage strict compliance with formalities of financial agreements is the topic to be addressed in this reference.

Strict Compliance and Black's case

The recent decision of the Full Court of the Family Court in *Black and Black* [4] (which reflected an earlier single instance decision in *J v J*[5]) set aside a financial agreement on the basis that although certificates by both legal practitioners stating that each of the parties had been provided with independent legal advice in relation to the matters contained in S90G(1)(b) were annexed to the agreement, the agreement itself did not "*contain, in relation to each party…a statement to the effect that*" each had been provided with such advice.

The trial judge had taken a purposive approach to the legislative requirements and had found the agreement to be valid. The Full Court

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[4] [2008] Fam CAFC 7
[5] (2006) [Fam CA 442]

however held that strict compliance with the legislative provisions *should be required* given that the effect of Part VIIIA is that a valid agreement ousts the jurisdiction of the Court to make orders in relation to the subject matter of the agreement.

Urgency of reform?

Arguably, the strict compliance test as confirmed by *Black and Black* needs to be reformed quickly, rather than slowly, because:

1. Other legislation[6] is being drafted on the assumption that the words of s90G of the *Family Law Act* are appropriate. It may be politically difficult to amend such legislation quickly once it is in place.

2. Some lawyers (particularly non-specialist family law practitioners) may choose to avoid financial agreements until the strict compliance test is relaxed. Thereby the list of advantages of financial agreements is lost to clients, and courts will have more work making consent orders.

3. As financial agreements are being drafted and signed on a daily basis around Australia, an increased stream of formal defects are also presumably being created. Accordingly, the avenues for re-opening claims and litigation are multiplying.

The requirement of strict performance of formalities under s 90G leads to a number of "problems" for firstly, financial agreements already entered into, and secondly, for the future use of such financial agreements.

Financial Agreements Already in Existence

There are no statistics on how many financial agreements have been signed in Australia under the *Family Law Act* since 2000. Approximately 400,000 couples divorced in Australia between 2000 and 2008[7]. Arguably, the low rate of use of financial agreements after separation increased after 2006 when transfers of property pursuant to such agreements were given capital gains tax rollover relief.

If say, 5% of the 400,000 couples divorced in Australia between 2000 and 2008 have used financial agreements, there would be approximately 8000 of these in existence. Whatever the number, it is almost certainly in the thousands.

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[6] *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 , Child Support (Assessment) Act* 1989 (Cth)

[7] Australian Bureau of Statistics (various years) *Marriages and divorces* (Catalogue No. 3310.0); ABS (2006), *Divorces Australia 2008* (Catalogue No. 3307.0.55.001).

The disadvantages of the current requirement for strict performance of formalities (as compared to some lesser test of "substantial" performance) for *past* agreements are as follows:

1. A larger percentage of the thousands of past agreements are potentially defective, and therefore not "binding".

2. A considerable number of spouses who settle their finances, would like to re-open their agreement, and have a "second bite" for a larger share (See J H Wade and C Honeyman, "A Lasting Agreement" Ch 56 in *The Negotiator's Fieldbook* (ABA: 2006)

   Even though an agreement was substantively "in the range" at the time, one party may want to have a second bite of his/her circumstances have nosedived with job loss; illness, addiction, share market or business collapse. Or conversely, his/her former partner's financial circumstances have changed for the better due to inheritance, business success, "profitable" re-marriage, lottery win or health recovery. [8]

   Although substantively "fair" at the time, any alleged technical defect in a past agreement opens at least a chance at a second bite.

3. The allegations of technical defects in past procedure are usually:

   - subject to different reconstructed memories of "what happened on the day".
   - subject to strong defences from lawyers who gave the past advice and certificate under s 90G. Naturally lawyers do not want to be labelled as "incompetent" or "negligent".
   - subject to well-funded defence support by legal insurers.
   - expensive for the parties to assemble credible evidence of the reconstructed historic events.
   - time consuming for courts if called upon to decide which version of history to accept.

4. The provisions of s 90G do not make formally defective financial agreements "void" or "voidable" or "invalid". That is, the parties to a formally defective agreement do not have to give back assets transferred; or restore each person to their original position of wealth. Rather the formally defective agreement is not "binding". That is, on one interpretation, everyone keeps what has been paid

[8] ; J Wade, "Deals which Came Unstuck: Reasons for the Breakdown of Family Settlements" (1993) 9 *Aust Fam Lawyer* 14-23

or transferred up to the date of agreement or court conclusion that there is a formal defect under s 90G. Only those still unperformed *future* obligations (eg transfer of a business; or a house; or weekly cash; or of waiving future claims under the *Family Law Act*) are no longer "binding". The not binding agreement of course no longer ousts the ability of a court exercising jurisdiction under the *Family Law Act* to alter the property of the parties and either of the parties is then free to make such an application. What happens in the interim, while there is uncertainty about the allegations of non-compliance with the strict formal requirements? It may be a number of months or years until there is settlement or a court decision on whether the allegations are "proven". What can happen legally or strategically in those intervening years of dispute is unclear. There would sometimes be some difficult interim, negotiated or judicial decisions on how to distribute finances while waiting for the "final" decision on alleged formal defects under s 90G.

5. If a financial agreement is found not "binding" under s 90G, then normally any clauses in the agreement purporting to be in full satisfaction of all claims under s 79 and s 74 of the *Family Law Act* will themselves be not "binding".

   Thereafter, either party could elect to start again and claim a "second bite" of property and/or spousal maintenance. This predictable second bite claim will involve expensive argument over uncertain precedents. For example:

   - Should a court grant leave under s 44(3) of the *Family Law Act* to commence a property of spousal maintenance claim out of time? Arguably not where the agreement reflected at the time substantively "fair" or "in the range" figures.

   - Should a claimant former spouse receive a share of property or wealth which came into existence years after marital separation? Or a variation to agreed spousal maintenance due to post-separation change of circumstances?

   Although normally such litigation would not be "successful" in legal principle or net dollars, occasionally such second bite litigation would be successful.

Disadvantages of Particular Words and Strict Interpretation of s 90G for Future Financial Agreements

The current words of s 90G, when given strict interpretation, lead to following predictable errors in the formal procedures or drafting incidental to financial agreements:

1. In times of computer print-outs, there is confusion over which agreement is the "original" (s 90G(1)(e)) and which is "a copy" (s 90G(1)(e)). When each party signs say four copies of the agreement, there is confusion over which one is the "original" of the four, and which is "a copy". (In practice, experienced family lawyers just write the words "original" on one agreement, and "copy" on any other copy).

2. When agreements are drafted at the end of long negotiations, it is normal for several rounds of amendments, as lawyers or parties notice typing errors, lack of clarity in phrasing, or missing details. If a lawyer gives advice under s 90G or any draft version of the final agreement, that advice technically becomes obsolete, even if a minor spelling error is subsequently corrected. Thus is because the advice must be "before" "the" [final] agreement. This is of course clumsy as each lawyer would strictly need to withhold his/her possibly lengthy speech of final advice to the moment before each pen hit the paper. Or alternatively, the lawyer can reserve a confirmatory short repeated advice such as "I confirm all the advice I gave you half an hour ago; and none of that advice has been altered by the three minor amendments we have made in the last half an hour. Now quickly, please sign."

   Of course, it is not possible for a group of people to remember what was said and in what order, days, months or years after a stressful event.

3. It is also common at the end of a long negotiation or mediation for parties to sign agreements. However, before going home, someone notices a typing error, or some minor amendment. Everyone gratefully handwrites the corrections and initials them immediately. Such a common practice strictly breaches s 90G(1) because no fresh "independent legal advice" was given to each party "*before the secondary* "signing".

4. Scenario 3 above of course also applies where a few days later one of the parties or lawyers notices a typing or minor error, then corrects it, and sends the document around for everyone to inexpensively initial the change.

   This polite amendment exercise is at least entirely ineffective (not "binding") to correct the errors spotted in the agreement; or worse, may lead to the argument that the whole "corrected" agreement is not "binding" as the second "signing" was the dominant or overriding "signing" under s 90G.

5. Not only must each lawyer give fresh "advice" (short or long? – and or written?) after each amendment to the draft or signed agreement, each lawyer must also reprint and re-sign the "annexure" to the agreement. This is because the "annexure" must certify a historic event – namely that the (fresh) or ultimate legal advice was given before the ultimate draft was signed or re-signed!

   The cycle of renewed advice, renewed signed certificates and signing the agreement will verge on the comical in some extended negotiation sessions, if each of the lawyers use an abundance of caution.

6. If a certificate of legal advice adds any further comments than the formulaic statutory words of s 90G(1)(a), then on a strict interpretation, it is in breach of that section and the whole financial agreement is not "binding". This is arguable because the section states that each law lawyer must certify "as to the following matters" and by implication, nothing else. "[i]f and only if" the certificate addresses these topics, and nothing else, it is "binding".

   A lawyer may be tempted to add words of assurance to the annexure such as "the client has consulted his accountant", "this agreement has been reached after two years of expensive negotiation". However, on a strict interpretation these words have gone beyond the mystical boundaries of the permitted following matters:

   (i) the effect of the agreement on the rights of that party;

   (ii) the advantages and disadvantages, at the time the advice was provided to the party of making agreement;"

   Thus on a strict interpretation of s 90G a careful lawyer should scrupulously repeat in the agreement and the annexed certificate the precise sterile statutory words of s 90G(1)(b)(i) and (ii) – and nothing else.

7. Following the previous point, a strict interpretation of s90G(1) leads to the argument that a lawyer should never go beyond the sterile statutory words in the annexure, to give any written explanation of concepts like "effect", "rights", "advantages and disadvantages". (Of course, some lawyers attempt such detailed explanations in a separate, non-statutory letter or advice).

   This is because these concepts are so complex, that any accurate explanation must run for many pages and be subject to misunderstanding. This is especially so if the explanation attempts to use client language, and avoid the mindless recitation of further

legal jargon (eg such as repeating a list of exceptions to "right" under s 90E; 90F; 90J; 90K; and 90KA).

Additionally, all "legal" advice is given based on limited past facts known, future behaviour guessed at, and the limits of human capacity to manage the increasing complexity of facts and client life goals. Furthermore, "independent" legal advice also means advice given without direct access to the key values, perceptions and knowledge of the other party. Accordingly, most legal advice is wrong to a lesser or greater extent once it comments on "effect", "rights", "advantages and disadvantages".

Does mildly, moderately or grossly inaccurate "legal advice" satisfy the requirement in s 90G(1)? Arguably yes, as it would open a floodgate of uncertainty to measure retrospectively the degrees of accuracy of "legal advice".

Nevertheless, to avoid the argument even being made (eg that "grossly" inaccurate legal advice is not legal advice at all), it is again advisable for legal advice at least in the annexure, not to go beyond the sterile formulae words of s 90G(1)(b).

8. A possible strict interpretation of s90G requires that the legal advice must be given, and two signed annexure attached "before" the party to the agreement signs. Otherwise, how can a party state that there are two "annexure[s]" each signed by independent lawyers in existence unless those extra documents are already attached when (s)he signs.

This interpretation invalidates thousands of financial agreements as it is not common practice for both lawyers to sign and annex both certificates before either party puts ink on the paper. It is common practice after various email, typed or handwritten drafts, for:

- One lawyer and his/her client to sign the agreements and take it, or mail it, to the other party and his/her lawyer for signature

or

- Both parties to sign in succession, and then both lawyers to sign annexed certificates thereafter.

Both these common practices, on one strict interpretation of "before" in s90G, render the resulting document "not binding". That is, the order of signing becomes artificially critical.

9. Even if the correct order of signing, namely lawyer-lawyer-client-client is observed, was the "annexure" properly annexed? What if parties sign a pile of pages and only then is a staple or pin used? What if there is no stapler or pin available at the time of signing? Can the proposed annexed certificate be labelled "annexure" until a stapler is located?

   Can two existing and signed advice certificates which are proposed to be annexed at the time of each party signing, become effective annexures at some later date (how much later – years?) if cured by a belated staple?

   These technical arguments provide fertile grounds for the party looking for a loophole to an otherwise "fair" agreement.

10. Some financial agreements have two certificates as required annexed to (stapled to) the financial agreement. However, they omit a clause in the agreement which refers to such two annexures. (A similar "problem" arose in the facts of *Black and Black*). Section 90G(1)(b) requires this extra clause – namely "the agreement contains, in relation to each party to the agreement, a statement to the effect…"

    The phrase "to the effect" allows less than strict compliance when drafting the statement or clause. However abundance of caution suggests that the statutory words following that phrase should be repeated verbatim twice! – once in the agreement and once in the annexed certificate.

11. There are still some pre-2003 precedents of financial agreements and of annexed certificates in use, which now render the agreement not binding. These precedents include in both clauses and annexed certificates "statements" that the agreements are "financially" beneficial to each party.

    In 2003, the requirement for such extra statements about "finance" formerly contained in s.90 G (1) (iii) and (iv) was repealed.

The Possible Advantages of ANY Strict Compliance Test for Formal Prerequisites

Of course there are arguably no inherent merits in "strict compliance" with a list of formalities. There could be statutory insistence on strict compliance with cooling off for 5 days (120hours); signing in black ink; all parties in the same room; use of plain English; reading the document out loud in each participant's first language; no signature after 5pm, or without medical certificate of "sound health" or without a standardised letter specifying exceptions to finality in layperson's language etc. The test should always be

whether "strict compliance with X, Y and Z" assists to improve more complete understanding and consent of the parties; and to reduce possible dependence on social welfare.

Nevertheless, some possible advantages of a "purpose driven" and strict list of formalities are:

1. It is easier to interpret than a "substantial compliance" test.

2. If known, it may "scare off" inexperienced lawyers from drafting financial agreements under the Family Law Act.

3. The symbolism of lawyers pedantically following strict procedures may add to an atmosphere of formality when the agreement is signed.

4. If known, lawyers may repeat advice and signing several times out of an abundance of caution, thereby increasing the chances that clients may hear the advice being repetitively given.

The foregoing list of common formal defects in financial agreements due to strict interpretation of s 90G(1) appears to be a pit of snakes. Presumably:

(a) the majority of non-specialist family lawyers are blissfully unaware of the minefields they tread whenever drafting financial agreements

(b) there are thousands of non-"binding" financial agreements since 2000 which lie sleeping in filing cabinets and drawers

(c) there are non-binding financial agreements being signed every day in Australia due to the strict compliance test

(d) some (unknown number) lawyers who hear of about "dangers" attached to use of financial agreements will, out of an abundance of caution, switch to consent orders[9]

(e) as the words of s 90G have recently been copied in Child Support legislation, (*Child Support (Assessment) Act 1989* s 80(1) in effect 1 July, 2008) and the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* the above four patterns will be replicated in those areas when settlements are being drafted.

(f) it is predictable that there will be a number of professional negligence claims brought against lawyers in the next few years for failing to follow the complex and "strict" procedures of s90G. Disillusioned clients will be hiring new law firms to check on

[9] J Dowd and A Harland, "Bound by Strict Compliance: An Examination of recent Family Court decisions on binding financial agreements" (2008) March *NSW Law Soc J* 60-63)

"how can I get out of my old financial agreement? I want more money now". Once these cases are sensationalised and publicised, this will lead to more attempts to "invalidate" agreements and more work for courts.

Options for Reform – Past Existing and Future Agreements

1. Do nothing – the Family Law Council does not recommend this option.

2. Amend s 90G and s 90K to reduce the number of formal prerequisites which would render the agreement not "binding"

3. Amend s 90G to simplify the procedure. For example, the Family Law Section of the Law Council of Australia suggested the following possibility for future agreements:

Proposed Amendments to the current Section 90G

Section 90G

When financial agreements are binding

1. A financial agreement is binding on the parties to the agreement if, and only if:

    a) the agreement is signed by ~~both parties~~ **each party**; and

    b) ~~the agreement contains, in relation to~~ **before signing the agreement** each party to the agreement, ~~a statement to the effect that the party to whom the statement relates~~ has been provided, ~~before the agreement was signed by him or her, as certified in an annexure to the agreement~~, with independent legal advice from a legal practitioner as to the following matters;

        i. the effect of the agreement on the rights of that party;

        ii. the advantages and disadvantages, at the time that the advice was provided, to the party making the agreement; and

    c) ~~the annexure to the agreement contains~~ a certificates signed by the persons providing the independent legal advice stating that the advice was provide **are**

annexed to the agreement (such certificates to be proof of the facts stated therein); and

d) the agreement has not been terminated and has not been set aside by a court.

~~e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.~~

Note: For the manner in which the contents of a financial agreement may be proved, see Section 48 of the *Evidence Act 1995.*

2. A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

The Council supports the proposed amendment in principle but does not support the proposal that the amendment would retain a strict compliance requirement. Council does not believe, for the reasons set out above, that there should be strict compliance required.

4. Amend the Act to add a new provision that would allow agreements to be set aside in limited circumstances. .

For example, proposed sections of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* contain wording which gives a double discretion to a court to "set aside" a financial agreement. That is, a financial agreement is not automatically not "binding"" for lack of formal prerequisites. Rather an agreement is prima facie valid, but a court "may" decide to set the agreement aside for lack of formal prerequisites, and if "it would be unjust and inequitable … not" [to do so].

The proposed sections are set out in Appendix A

These sections in the de facto property bill as a reform option for s90G of the Family Law Act has the disadvantage of dense language. However it has the advantages of:

- Consistency between Acts (the *Child Support Assessment Act 1989* should be amended to bring all family "agreement" procedures into uniformity).

- No automatic invalidity of agreements where there are formal defects. Rather, presumed validity unless and until a court has "set aside" the agreement.

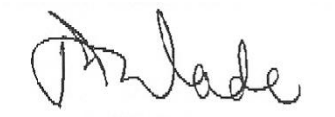
- A judicial discretion embodied in the word "may" which would enable a court to preserve an agreement with formal defects where there has been delay or reliance on the agreement, or where the formal defect is "minor".

- An additional judicial requirement to find that it would be "unjust and inequitable"… "if the court does not set the agreement aside". This particularly allows a court to leave a formally defective agreement intact where there has been delay, reliance, where the formal defect is minor; and particularly, where the applicant received under the agreement, a share of property which was, at that time, within the wide range of "appropriate", "just" and "equitable" orders under S79 of the Family Law Act. This form of drafting, provides a set of barriers to an applicant who tried to use a minor formal defect to re-open property negotiations, and perhaps property litigation.

- Importantly, such an amendment to s90G does not involve an awkward time lag while the legal profession is being re-educated about the meaning of an amended S90G. Lawyers who use the more detailed requirements of the existing S90G would still comply with the slightly more lenient words of the proposed reforms to S90G.

The Council recommends that this proposed amendment to S90G operates both prospectively and retrospectively.

Yours faithfully,



Chairman

Appendix A – Sections 90UE and 90UM *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*

90UE Agreements made in non-referring States that become Part VIIIAB financial agreements

How State agreements can become Part VIIIAB financial agreements

(1) This section applies if:

(a) 2 people (the ***couple***) have made a written agreement, signed by both of them, with respect to any of the matters (the ***eligible agreed matters***) mentioned in subsection (3); and

(b) the agreement was made under a non-referring State de facto financial law; and

(c) either:

(i) a court could not, because of that law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; or

(ii) a court could not, because of that law, make an order under that law that is with respect to any of the eligible agreed matters to which the agreement applies; and

(d) at the time the agreement was made, the members of the couple were not the spouse parties to any binding Part VIIIAB financial agreement with respect to any of the eligible agreed matters; and

(e) at a later time (the ***transition time***), the couple's circumstances change so that:

(i) if the de facto relationship has not broken down—sections 90SB, 90SD and 90SK would not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters if the de facto relationship were to break down; or

(ii) if the de facto relationship has broken down—sections 90SB, 90SD and 90SK do not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters; and

(f) immediately before the transition time:

(i) the agreement was in force under the non-referring State de facto financial law; and

(ii) the couple were not married to each other.

Paragraph (a) extends to agreements made before the commencement of this section, and to agreements made with one or more other people.

Note: This section extends to agreements made in contemplation of a de facto relationship, during a de facto relationship or after a de facto relationship has broken down.

(2) For the purposes of this Act, the agreement is taken, on and after the transition time, to be a ***Part VIIIAB financial agreement*** to the extent that the agreement deals with:

(a) the eligible agreed matters; and

(b) matters incidental or ancillary to the eligible agreed matters.

Note: This means that, after the transition time, the agreement can only be enforced, varied, terminated or otherwise set aside under this Act.

Eligible agreed matters

(3) The matters referred to in paragraph (1)(a) are the following:

(a) how all or any of the:

(i) property; or
(ii) financial resources;

of either member, or both members, of the couple at the time when the agreement is made, or at a later time and during a de facto relationship between them, is to be distributed;

(b) the maintenance of either member of the couple;

in the event of the breakdown of a de facto relationship between them, or in relation to a de facto relationship between them that has broken down, as the case requires.

(4) For the purposes of paragraph (1)(c), disregard whether the non-referring State de facto financial law permits the court to make such an order if the court varies or sets aside the agreement.

90UM Circumstances in which court may set aside a financial agreement or termination agreement

(1) A court may make an order setting aside, for the purposes of this Act, a Part VIIIAB financial agreement or a Part VIIIAB termination agreement if, and only if, the court is satisfied that:

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or

(b) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(c) a party (the ***agreement party***) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the ***other de facto relationship***) with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(d) a party (the ***agreement party***) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or

(iii) with reckless disregard of those interests of that other person; or

(e) the agreement is void, voidable or unenforceable; or

(f) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(g) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (4)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(h) in respect of the making of a Part VIIIAB financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(i) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(j) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB; or

(k) if the agreement is a Part VIIIAB financial agreement covered by section 90UE—subsection (5) applies.

Note: For ***child of a de facto relationship***, see section 90RB.

(2) For the purposes of paragraph (1)(b), ***creditor***, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

(3) For the purposes of the application of subparagraph (1)(c)(ii) to a Part VIIIAB financial agreement covered by section 90UE:

(a) the reference in that subparagraph to an order under section 90SM is taken to include a reference to an order (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned; and

(b) the reference in that subparagraph to a declaration under section 90SL is taken to include a reference to a declaration (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned.

(4) For the purposes of paragraph (1)(g), a person has ***caring responsibility*** for a child if:

(a) the person is a parent of the child with whom the child lives; or

(b) a parenting order provides that:

(i) the child is to live with the person; or
(ii) the person has parental responsibility for the child.

(5) This subsection applies if:

(a) at least one of the spouse parties to the agreement was not provided, before signing the agreement, with independent legal advice from a legal practitioner about the following:

(i) the effect of the agreement on the rights of that party;
(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; or

(b) if the advice was provided to one or both of the spouse parties—a signed statement by each legal practitioner stating that the advice was provided was neither:

(i) included in, or attached to, the agreement; or
(ii) given to the party;

and it would be unjust and inequitable, having regard to the eligible agreed matters (within the meaning of section 90UE) for the agreement, if the court does not set the agreement aside.

(6) A court may, on an application by a person who was a party to the Part VIIIAB financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

(7) An order under subsection (1) or (6) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(8) If a party to proceedings under this section dies before the proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and
(ii) that it is still appropriate to exercise those powers;

the court may make any order that it could have made under subsection (1) or (6); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(9) The court must not make an order under this section if the order would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, ***acquisition of property*** and ***just terms*** have the same meanings as in paragraph 51(xxxi) of the Constitution.