



Chairperson: Professor John Wade

Family Law Council

Members: Ms Nicky Davies
Mr Kym Duggan
Deputy Chief Justice John Faulks
Federal Magistrate Norah Hartnett
Mr Clive Price
Federal Magistrate Robyn Sexton
Justice Garry Watts

28 May, 2008

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

Dear Attorney-General,

BINDING FINANCIAL AGREEMENTS

The Family Law Council has considered the effect of the words in s 90G of the *Family Law Act 1975* as applied in the case of *Black & Black* at its Sydney meeting. In the Council's opinion, the wording of s90G needs to be amended to have both prospective and retrospective effect.

The current wording as a result of the Full Court's decision and interpretation of s90G means that:

1. It may well be that hundreds, even thousands of people who have existing "Binding" Financial Agreements may find their agreements are not binding. In some cases property has been sold and purchased presuming the validity of such agreements.
2. These non-binding agreements may only come to light in legal challenges between former spouses over the next fifty years.
3. These technical defects in agreements allow ex-spouses to recant on the substance of an agreement that everyone believed was "final."

4. This may mean thousands of potential professional negligence actions against the lawyers but more importantly perhaps, pain and expense to unsuspecting litigants.
5. The resolution of these disputes may involve complex legal concepts including estoppel, deemed knowledge and substantial reliance.
6. Non accredited family law specialists in city, country and suburban areas should be able to feel confident about drafting enforceable binding financial agreements.

In light of these perceived defects in the wording of s90G, Council recommends that:

The Attorney make a limited reference to Council about the possible consequences of *Black & Black* or a more general reference about Binding Financial Agreements.

The Council is willing to undertake that reference if so requested.

Council is conscious that any reference may itself cause some temporary anxiety and publicity about dormant and potentially defective "final" agreements.

Yours sincerely



Professor John Wade
Chairperson