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## Financial agreements - is this the end?

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**By Jacqueline Campbell***

The *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009 (the amending Act)* passed through the Senate on 26 October 2009. It received Royal Assent on 7 December 2009 and became operative on 4 January 2010.

The original purpose of the amending Act was to address the issues raised by the Full Court of the Family Court's decision in *Black & Black (2008)* FLC 93-357 which held that a financial agreement entered into under Pt VIIIA of the Family Law Act 1975 (Cth) did not bind the parties to the agreement because it did not strictly comply with all of the requirements in s 90G(1) of the Act. In addressing these issues, the amending Act has, arguably, gone too far. Financial agreements will be less stable, less attractive and less predictable as to their binding nature and enforceability.

Although the requirements of s 90G(1) (and s 90J(1), s 90UJ(1) and s 90UL(1)) were strict, parties and their lawyers knew that if the legislative requirements were met, they could only be set aside on the limited grounds in s 90K(1) and s 90UM(1).

Before the amendments, s 90G(1) stated:
*A financial agreement is binding on the parties to the agreement if, and only if:*

> *(a) the agreement is signed by all parties; and*
>
> *(b) the agreement contains, in relation to each spouse 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 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 *(iii) (repealed)*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 *(iv) (repealed)*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 that the advice was provided; and*
>
> *(d) the agreement has not been terminated and has not been set aside by a court; and*
>
> *(e) after the agreement is signed, the original agreement is given to one of the*

*spouse parties and a copy is given to each of the other parties.*

After the amendments, the new s 90G(1) to (1C) state:

*90G(1) Subject to subsection (1A) a financial agreement is binding on the parties to the agreement if, and only if:*

*(a) the agreement is signed by all parties; and*

*(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and*

*(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and*

*(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and*

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

*(1A) A financial agreement is binding on the parties to the agreement if:*

*(a) the agreement is signed by all parties; and*

*(b) one or more paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and*

*(c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and*

*(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and*

*(e) the agreement has not been terminated and has not been set aside by a court.*

*(1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the enforcement application) by a spouse party seeking to enforce the agreement.*

*(1C) To avoid doubt, section 90KA applies in relation to the enforcement application.*

**Main effects of the changes**

1. Although a statement of legal advice must be given to each party, it is no longer mandatory for a financial agreement to include the statements.

2. It is mandatory that each party receives independent legal advice, not simply that statements of legal advice be signed by each of their lawyers to the effect that a party has been provided with

independent legal advice about the matters specified, being

(a) the rights of that party; and

(b) the advantages and disadvantages at the time the advice was provided to the party of making the agreement.

Therefore, if the advice does not include all the specified matters or, arguably, is not absolutely accurate, the mandatory requirement may not have been met. It may not be possible for a court to accept that despite a signed statement of legal advice, that the required advice has been given.

3. A statement of legal advice must be signed by each legal practitioner but the agreement is valid whether or not the statements are annexed to the agreement, provided they are given to the other party or to the other party's legal practitioner. This means that in the absence of statements as part of or annexed to the agreement, it will be more difficult to ensure the validity of the agreement. The agreement is not self contained and enquiries may need to be made of former legal practitioners as to whether statements were provided and exchanged. After a period of years this may be difficult to prove.

4. Legal practitioners can provide signed statements about the giving of prior independent legal advice to parties to financial and termination agreements either before or after the parties sign the agreement. Prior to the amendments, the timing of signing the certificate or statement was not set out in the Act.

5. If the requirements of s 90G(1)(b),(c) and (ca) are not met, (in relation to agreements made before 4 January 2010, compliance with s 90G(1)(c) and (ca) is not required), a financial agreement can still be binding if:

(a) a court is satisfied that it would be unjust and equitable if the agreement was not binding on the parties (taking into account their circumstances at the time the agreement was made) (s 90G(1A)(c)); and

(b) the court declares that the agreement is binding.

6. There is no longer a requirement for the original and copies of the agreement to be given to the spouse parties after it is executed. It is still good practice, however, for legal practitioners to provide their client with a copy of the agreement. The practice of many legal practitioners has been to also retain the original or the copy given to their client in their firm's deed safe. There is no process for court registration and the parties may lose their original or copy agreements. This practice ensures that the parties can go back to their lawyers to obtain copies if needed.

Under the amendments, the statements of legal advice must be given to either the other party or the other party's legal practitioner.

7. Failure to comply with the requirements for legal advice and the provision of statements of legal advice may not be fatal to the binding nature of the agreement. The court can declare that the agreement is binding on the parties if satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made). For the purpose of determining whether or not to enforce an agreement, all the equitable remedies of s 90KA apply.

**Transitional provisions**

The transitional provisions set out which of the amendments apply to financial agreements entered into at various times since Part VIIIA of the Act commenced on 22 December 2000.

Importantly, s 90G(1)(c) and (ca) which require the provision and exchange of statements of legal advice, only apply to agreements made on or after 4 January 2010. The retrospective operation of the new s 90G(1) but with the exclusion of the new s 90G(1)(c) and (ca) means that agreements made before 4 January 2010 are binding without either a certificate of legal advice (as required before the amendments) or a statement of legal advice (as required after the amendments). The alternative s 90G(1A)(b) of the Act, which applies to agreements made between 27 December 2000 to 3 January 2010, does not refer to s 90G(1)(c) or (ca) of the Act.

The amendments do not apply to:

- financial agreements and termination agreements which have been set aside by court order before the amendments commenced (Sch 5, item 8(2), item 8A(7) and item 18(3) of the amending Act).
- financial agreements if a court has made an order under s 79 or s 83 on the basis that the agreement did not bind the spouses (Sch 5, item 8(3)).

The transitional provisions also validate financial and termination agreements signed on or after 14 January 2004 and before the commencement of the amendments in which the certificate of legal advice uses the pre 14 January 2004 wording which required advice about:

> (a) the effect of the agreement on the rights of that party; and
>
> (b) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and
>
> (c) whether or not, at that time, it was prudent for that party to make the agreement; and
>
> (d) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable (Sch 5, items 8A(2) and (5)).

**Conclusion**

Under the former provisions, parties did not need to look beyond the statements of legal advice. Under the new provision, parties and their legal practitioners will need to be satisfied that the other party received independent legal advice on the specified matters and that the advice was complete and accurate. It is sufficient if the statements are not annexed but were exchanged, but it may be difficult to verify this later. If the advice was not given or not properly given, the court may find the agreement is nevertheless binding.

Financial agreements were intended to provide spouses with certainty when sorting out their property and spousal maintenance disputes after separation or to cover the possibility of a separation. It appears that the amendments will bring a new era of uncertainty and confusion. Consent orders, at least for spouses at the end of their relationship, look to be a much more secure option.

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