

Introduction to *Australian Family Law Act 1975* book 2010

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The year 2010 is the 35th anniversary of the commencement of the *Family Law Act 1975*. It is also 35 years since CCH commenced publishing *Australian Family Law and Practice*. Not far behind, this is the 29th edition of the CCH *Australian Family Law Act* (the Act). The complexity of family law has grown in the past 35 years and the need for a portable consolidation of the Act, *Family Law Rules* (the Rules) and the *Family Law Regulations* is greater than ever before.

The most significant change to the Act in the past 12 months involved when financial agreements are considered binding by the court. The merging of the Family Court and the family law jurisdiction of the Federal Magistrates Court did not occur, so the major revision of the Rules associated with this has been delayed. The changes to the Rules were relatively minor.

Federal Magistrates Rules extracts

In response to customer requests, extracts of the *Federal Magistrates Court Rules 2001* are again reproduced in this book. Chapters 1 and 2, Schedules 1 and 3 and the Dictionary of the *Federal Magistrates Court Rules* are back in. These are the most useful parts for family lawyers. Chapter 1 deals with the general conduct of matters, including the transfer of proceedings, the conduct of proceedings, disclosure, service, evidence and costs. Chapter 2 is specific to family law and child support matters. It includes the conduct of financial matters, divorce, child support matters and enforcement. Schedule 1 deals with costs and Schedule 3 sets out the application of the *Family Law Rules* and *Federal Court Rules* in the Federal Magistrates Court.

Financial Agreements

The *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* became operative on 4 January 2010. The original purpose of this Act was to address the issues raised by the Full Court in *Black and Black* (2008) FLC 93-357 where a financial agreement 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.

Although the requirements of s 90G(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).

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.*

Similar requirements to the above applied to termination agreements under Pt VIII A. The amendments apply to Pt VIII A termination agreements and Pt VII AB financial and termination agreements. 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.

The main effects of the changes are:

1. Although a statement of legal advice must be given to each party, it is no longer mandatory for certificates or statements to be annexed to the agreement. If they are not annexed it will be more difficult to ensure that the agreement is binding. The

agreement will not be self contained. 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.

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 specified matters. A court may find that despite a signed statement of legal advice, the required advice has not been given.
3. Legal practitioners can provide signed statements about the giving of prior independent legal advice to parties to the financial agreement 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.
4. 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 inequitable 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.
5. There is no longer a requirement for the original and copies of the agreement to be given to each of the spouse parties after the agreement is executed. It is still good practice, however, for legal practitioners to provide their clients with copies of the agreement. The practice of many legal practitioners has been to also retain the original or a copy in their firm's deed safe. There is no process for court registration and the parties may lose their original or copy agreements.
6. Under the amendments, the statements of legal advice must be given to either the other party or the other party's legal practitioner. Previously, the certificates were part of the agreement and each party therefore had a copy. Again, it is good practice to ensure that each party has copies of both statements.
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.

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 27 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, items 8(2), 8A(7) and 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)).

Prior to 4 January 2010, parties did not need to look beyond the statements of legal advice. Under the new provisions, parties and their legal practitioners need to be satisfied that the other party received independent legal advice on the specified matters and that the advice was complete and accurate. If the advice was not given or not properly given, the court may find the agreement is nevertheless binding.

Powers of Chief Justice

The *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* inserted a new s 21B(1) into the Act which applies to the Chief Justice (a similar provision in the *Federal Magistrates Act 1999* which applies to the Chief Federal Magistrate).

The Chief Justice has specific powers and responsibilities to ensure the effective, orderly and expeditious discharge of the business of the court including:

- (i) the power to make arrangements regarding the constitution of the court, in particular matters or classes of matters;
- (ii) the power to assign particular caseloads, classes of cases or functions to particular Judges;
- (iii) the power to temporarily restrict a Judge to non-sitting duties;
- (iv) the responsibility to ensure that judicial officers have appropriate access to annual health checks, short-term counselling and judicial education.

Proceeds of crime

The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* introduced freezing orders into the *Proceeds of Crime Act 2002* to limit the risk of criminal funds being dissipated. Similar provisions already exist in the South Australian and Victorian State legislation. The objective is to provide a simple and speedy process to ensure assets are frozen temporarily pending the making of a formal restraining order.

The definition of a "proceeds of crime order" in s 4(1) of the *Family Law Act* was expanded to cover freezing orders.

New Zealand

The *Trans-Tasman Proceedings (Transitional and Consequential) Provisions Act 2010* repealed the *Evidence and Procedural (New Zealand) Act 1994* and made consequential amendments to other legislation, including to the *Family Law Act*.

The *Family Law Rules* now deal with subpoenas to be served in New Zealand. A subpoena can only be served in New Zealand with the leave of a Judge of the Family Court. The subpoena must be served in accordance with s 10 *Evidence and Procedure Act (NZ)* (r 15.36H). The procedure for seeking leave to serve subpoenas in New Zealand is set out in r 15.36E and 15.36F. There are very specific and comprehensive requirements for matters to be included in the affidavit accompanying the application for leave. The affidavit must include such matters as:

- (a) A copy of each subpoena;
- (b) The nature and significance of the evidence to be given, or the document or thing to be produced, by each person named;
- (c) Details of the steps taken to ascertain whether the evidence, document or thing could be obtained by other means without significantly greater expense, and with less inconvenience to the person named.

Other Family Law Rules Amendments

On the death of a party, the court may order that the legal personal representative of the deceased person be substituted as a party (r 6.15(3)). Previously, this rule was broader and enabled a "person" to be substituted. That person may not have been the legal personal representative of the deceased. As the property of the deceased is otherwise dealt with by the legal personal representative it makes sense that the substitution be limited to the legal personal representative of the deceased.

When consent orders are submitted to the court it is now a requirement that the draft consent orders be accompanied by 2 copies of the order that are certified as true copies by either the applicant's lawyer or each party to the application (r 10.15(2)(d)).

The powers of the court in Table 11.1 were specifically expanded to enable the court to not only order a party to provide particulars or further particulars of the orders sought but also to provide particulars of the reasons why the orders are sought.

The date of filing of documents by electronic communication has been made more specific. Previously, r 24.05(4) provided that documents sent for filing by electronic communication after the filing registry was closed, were received by the filing registry on the next day when the filing registry was open. The change means that documents must be sent for filing by 4.30pm according to the time in the Australian Capital Territory or they will be taken to have been received by the filing registry on the next day when that registry is open. The potential for confusion due to the widely different time zone in Western Australia from other states and territories is avoided as filing time in Western Australia is covered by the *Family Court Act (WA) 1997*.

Transcripts are excluded from the definition of "court documents" in r 24.13(4). This means that if a party or lawyer wants to search a court file the parts of the file which can be searched without leave are the court documents only. Correspondence and transcripts are not within the definition of "court documents". The permission of the court is required to search other parts of the court records. The filing of a Notice of Address for Service is insufficient of itself.

In addition, the Rules were amended to correct some inconsistencies and errors.

Conclusion

Most of the changes to the Rules have been relatively minor. Simplifying the process for service of subpoenas in New Zealand was a welcome change for lawyers dealing with increasing numbers of clients moving overseas for employment opportunities.

The major changes to the Act were restricted to financial agreements. The complexity of the changes and the introduction of judicial discretion into a regime which required mandatory compliance to ensure agreements were binding has increased the uncertainty and utility of financial agreements. Most of the caselaw, which took about 9 years to develop, is now obsolete.

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