Binding Financial Agreements – Recent Changes

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I OVERVIEW

A. *Full Court Decision in **Black & Black***

On 24 January 2008 the Full Court delivered judgment in the matter of ***Black & Black***[1]. In this case, the Full Court adopted a strict approach to the need for parties to comply with technical formalities under section 90G of the Family Law Act 1975 (also referred to herein as "The Act") to ensure that a binding financial agreement ("BFA")[2] was in fact legally binding. The ***Black & Black*** decision was widely criticised because it meant that if there was the slightest non-compliance with technical requirements, a BFA could be struck down by the Court on an application for enforcement.

The effect of ***Black & Black*** was to invalidate, or at least open up to challenge, any previously executed BFA with technical deficiencies. This would be good news for a party who no longer wanted to be bound by such a BFA and bad news for the party to the BFA (not to mention their lawyer) who sought to rely upon it in good faith. The ***Black & Black*** decision was also perceived to put at risk the public's confidence in the whole concept of a BFA as a satisfactory and secure alternative to Court orders for resolving their financial affairs.

B. *The Government's Response to Black & Black - Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2009*

The government responded to the decision in ***Black & Black*** by passing "corrective" legislation to amend the Family Law Act 1975, as contained in the ***Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009*** [3] ("the Amending Act").

The amendments to the Act became law on 4 January 2010.

The amendments are an attempt by the legislature to relax the technical requirements for making a BFA valid and to restore public confidence in the binding nature of such agreements. Amendments have been introduced in the same terms across the board in relation to Matrimonial BFAs (s90G), De Facto BFAs (s90UJ) and Termination Agreements in respect of both kinds under s90J and s90UL. For convenience, this paper refers to 90G but the provisions all mirror each other.

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[1] Black & Black [2008] FamCAFC 7. The Full Court comprised Faulks DCJ, Kay and Penny JJ sitting in Hobart in June 2007. The judgment was delivered in Melbourne on 24 January 2008.

[2] Unless indicated otherwise, the acronym BFA in this paper is used as an umbrella term referring to a Binding Financial Agreement under ss.90B, 90C of 90C of the Act (before, during or after marriage) or ss.90UB, 90UC or 90UD of the Act (before, during or after a de facto relationship) OR Termination Agreements under either section 90J (matrimonial) or section 90UL (De Facto) of the Act.

[3] Legislative instrument No.122 of 2009. See www.comlaw.gov.au for a full copy of the amending Act incorporated into the Family Law Act 1975.

The amendments remove the requirement for a certificate of independent legal advice to be annexed to the agreement (a previous pre-condition to validity) and instead require legal practitioners to provide a signed statement about the giving of independent legal advice to both their client and the other party (or their lawyer). The statement can be provided to the client and the other party either *before or after* the BFA is made, so long as the advice itself was provided *prior* to the making of the BFA and the statement confirms this.

But by removing the requirement to annex a statement of independent legal advice to a BFA, the Amending Act removes the ability for parties to rely upon the matters set out in the annexure as proof of compliance with their obligations under the Act, namely that the legal advice was given about certain prescribed matters and that it was given prior to the BFA being made.

The Amending Act replaces the Annexure requirement with two separate requirements, namely (i) that independent legal advice *actually* be given prior to the BFA being made; and (ii) that statements of independent legal advice be given and exchanged between the parties at some point *thereafter* (regardless of when the BFA was made) confirming the prior advice. In other words, the Amending Act has the effect (if there is a dispute in subsequent enforcement proceedings) of:

- potentially requiring each party to actually *prove* that they received independent legal advice *prior* to signing a BFA (because the requirement to so advise is now separate and distinct from the requirement to give a statement about the advice); and
- potentially requiring that each party prove that the advice was in accordance with the criteria set out in section 90G, and not deficient in some way.

The government was also worried about the effect of the ***Black & Black*** decision on the validity of BFAs which pre-dated their corrective legislation. ***Black & Black*** might have triggered a fresh wave of litigation by parties seeking to challenge the validity of any BFA with potential technical errors (the very thing a BFA was intended to prevent) and so the government took the further step of making the corrective legislation retrospective.

The amendments therefore apply to all BFAs made under the Family Law Act 1975 since the original BFA legislation was introduced by the new Part VIIIA on 27 December 2000, save and except in cases where:

- a BFA had already been set aside by Court Order prior to the introduction of the new legislation on 4 January 2010; or
- in cases where an order of the Court had been made on the basis that a BFA was not binding (in which case the BFA would be taken not to be binding for the purposes of the Amending Act).

The intention of making the legislation retrospective was to ensure that parties would not seek to rely upon ***Black & Black*** to "re-open" the question of the validity of a BFA executed prior to the date of the legislation. Needless to say, the notion of retrospective legislation is of itself controversial.

Despite good intentions, there is real concern that in drafting the Amending Act the way it did, the Legislature has opened the door to a new range of unforeseen and/or unintended avenues for dispute.

II SECTION 90G – WHEN IS A FINANCIAL AGREEMENT BINDING?

For the purposes of comparison, the previous and new versions of section 90G are set out below:

1 *Section 90G pre- 4 January 2010 (previous version)*

(1) 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

(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.

(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.

2 *Section 90G post 4 January 2010 (current version)*

(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 of 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.

(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.

III KEY FEATURES OF SECTION 90G(1) – OLD VERSUS NEW

Key features of the OLD section 90G(1)	*Key features of the NEW section 90G(1)*
Both old and new versions of section 90G are mirrored by the old and new versions of section 90UJ in Part VIIIAB (in relation to De Facto financial agreements) - with two minor exceptions set out below: • there is one additional clause in the de facto provisions providing that certain agreements made under state law in non-referring States can, in certain circumstances be later deemed to be a BFA for the purposes of the Act and; • there is one further additional clause providing that a de facto BFA ceases to be binding if the parties marry each other.	
The agreement must be **signed** by all parties	Same as before
The **agreement** must contain a statement to the effect that **independent legal advice has been given** to each spouse party to the agreement the matters set out in 90G (1)(b)	No longer required [4]
A signed certificate of **independent legal advice** about the matters set out in 90G (1)(b) **must be given** by a legal practitioner	Same as before (save it is called a 'statement' not a 'certificate')
The **certain matters** about which the **independent legal advice** must be given as set out in 90G (1)(b) are: • "the effect of the agreement on the rights of that party" • "the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement"	Same as before[5]
The signed certificate of independent legal advice must state that the **ADVICE was provided BEFORE the agreement was signed**	Same as before
The signed statement of independent legal advice must be **annexed** to the agreement. This implies that the independent advice must be **provided** to the party **BEFORE** they sign the BFA as it could not be annexed	A signed **statement** of independent legal advice **still needs to be provided** to the party: • BUT it does NOT have to be **annexed** to the agreement (now **optional**)[6]; and

[4] This cures the problem arising from the technical defect found by the Full Court in ***Black & Black*** whereby the certificates annexed to the BFA set out the elements of section 90G as it then was but the body of the agreement did not set them out as was required.

[5] The Family Law Section of the Law Council of Australia, in its submission to the Senate Committee prior to passage of the new legislation, recommended the removal of the words "and about the advantages and disadvantages" from the new legislation because "they serve no useful purpose, but if left in may provide potential for disputes of a technical nature". This recommendation was NOT adopted by the legislature.

otherwise	• As well as giving a **copy** of the statement to the party, a copy must also be given to **the other spouse party**[7] (or their lawyer); • BUT the signed statement does **NOT** need to be given to the party or the other spouse/lawyer **PRIOR** to the agreement being signed (it can be before OR after)
The statement **of independent legal advice must include a certificate** by the person providing the independent legal advice, stating that the advice was provided	The statement of independent legal advice is **no longer required** to be **certified /** take the form of a **certificate**
The agreement has n**ot been terminated or set aside** by a Court	Same as before
The **original signed BFA** must be given to one party and a copy to the other party: • The practical effect of this is that each party has an original (or duplicate) of the signed agreement and moreover, each party has a copy of the signed certified statement of independent legal advice from the their own lawyer and the other party's lawyer (because these certificates must be annexed to the agreement)	The new section 90G is silent on this issue: • The practical effect of this is that there is no obligation on the second party who signs to provide the first party with a copy of the actual agreement[8] • So long as each party provides the other with a copy of their own lawyers' signed certificate of independent legal advice (at some stage, before or after signing the agreement) then they have met their obligations under section 90G (1)(ca).
Old section 90G (2)	*New section 90G(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".	Same as before – the court retains the power to make such orders for enforcement as are necessary <u>if the agreement is found to be binding on the parties</u>.

[6] It is strongly recommended from a practical and evidentiary point of view that signed statements of independent legal advice are still annexed to the BFA at the time of signing, despite the fact that this is now optional

[7] Presumably if signed statements of independent legal advice are annexed to the BFA at the time of signing and the executed BFA is later exchanged, this obligation has been satisfied.

[8] As a matter of common sense, the second party to sign the BFA should forward a fully signed copy of the BFA to the other party.

IV KEY FEATURES OF NEW SUBSECTIONS 90G(1A) TO (1C)

New sections		*Key Features of new subsections 90G(1A),(1B)&(1C)*
(1A)	A financial agreement is binding on the parties to the agreement if:	*In other words:* notwithstanding the requirements of s90G(1), a BFA can also be binding in the following circumstances:
(a)	the agreement is signed by all parties; and	Signing the BFA is the minimum criteria for it to be binding
(b)	one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and	This subsection enables court to declare a BFA binding notwithstanding that some or all of the three technical criteria under 90G(1) may not have been satisfied.
(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	In order to make such a declaration, the Court must be satisfied that it would be unjust and inequitable not to do so. The court must <u>not</u> take into account any change of circumstances since the BFA was made. The amendments to the Act are not intended open the floodgates to people who have changed their situation since a BFA was made and now want to revisit the BFA for other reasons. The purpose of the Amending Act is to enable the Court to resist applications to reopen BFA's on purely technical grounds where it would be unjust and inequitable to the party relying upon the BFA not to do so.
(d)	the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and	The Court now has the power to make a declaration that a BFA is binding. This is in addition to the general powers which previously existed under s90G(2) enabling the Court to make such orders in relation to enforcement of a BFA as it thinks necessary.
(e)	the agreement has not been terminated and has not been set aside by a court.	This provision mirrors s90G(1) (e) and is a pre-requisite to a BFA being binding.

(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.	The Court now has the power to make a declaration that a BFA is binding.
(1C)	To avoid doubt, section 90KA applies in relation to the enforcement application.	Section 90KA provides that the question of whether a BFA is valid, enforceable or effective is to be determined by the Court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts. It then goes on to set out the powers that the Court has in relation to such proceedings.

V THE FULL COURT'S DECISION IN **BLACK & BLACK**

A. *Background*

The case was an appeal by the Husband against an order of Benjamin J made on 15 September 2006, dismissing an application to set aside a BFA signed during the course of their short (18 month) marriage. The Husband challenged the agreement on the basis of technical defects under section 90G (as it then was). He wanted the financial agreement to be set aside, as he thought the 50/50 split provided for was unfair based on subsequent events. The trial judge took a purpose based approach to interpreting the legislation and found the BFA to be binding despite technical errors. The Husband however succeeded in having the decision overturned on appeal to the Full Court. The Full Court held that the BFA between the parties ought to be set aside by reason of technical non-compliance and the matter remitted for re-trial under section 79 of the Act.

B. *The Facts of the Case*

The Husband was 43 years of age at the time of the trial and the wife was 42 years of age. The parties met in August 2001, cohabited from November 2001, got married in April 2002 and separated in May 2003. There were no children of the marriage but each party had children from previous relationships. Both parties had suffered injuries affecting their working capacity and neither was working full time. The trial judge accepted that these injuries affected their respective capacities for work approximately equally.

The parties wanted to buy a house together but decided first to enter into a BFA to provide for the manner in which they would contribute to the purchase and what would happen if they separated. The parties signed an agreement during their 18 month marriage that envisaged that:

- the husband would sell his house;
- the sale proceeds of the house would go into a deposit account;
- the wife would put into the deposit account some monies she was about to receive from a personal injuries claim;

- the parties would acquire another house;
- in the event their marriage broke down the new house would be deemed to be joint property; and
- the new house would be sold and divided equally between them.

The Husband had received a compensation payout of $103,000 some 3 years prior to meeting the wife and owned a house in South Australia prior to the relationship. The Husband sold his house in December 2002 and cleared $180,000 or thereabouts. In the same month, the parties signed a contract to purchase a home for $220,000 in joint names. The purchase was completed in March 2003.

The wife was injured early in the relationship and instituted proceedings for damages during the relationship, but the claim was not finalised prior to the time the parties purchased their new house during the relationship, save for a small sum of $13,000 which she applied for the joint benefit of the parties during the relationship. In fact the wife did not actually receive her final payout until after separation and when she eventually did receive it, it was much smaller than anticipated. After payment of medical and legal costs, she only received $41,000 net. This money was placed into a separate account pending the outcome of the proceedings.

The result was that the wife ultimately contributed significantly less than the husband did toward the jointly owned house, yet the BFA gave her equal entitlement to the sale proceeds of the house in the event of separation. The Husband asserted that the wife had told him she was hoping to receive $200,000 by way of her claim, but the wife denied this (saying she was unaware of the amount she would receive) and the trial judge preferred the Wife's version on this point.

The fact remained however that financially, the Husband contributed a lot more to the joint house than the wife did. The Husband thought this was unfair and he sought to have the BFA declared void, or set aside. He wanted an 80/20 split in his favour. Not surprisingly, the wife sought to enforce the BFA and claim her 50% share.

C. *Trial Judge's decision*

Justice Benjamin concluded that there had been substantive compliance with section 90G(1) and that strict compliance was not necessary. His Honour reviewed the authorities on interpretation of s90G and notwithstanding that those cases tended toward strict compliance, he formed the view that so long as the requirements of s 90G were substantively met, that was satisfactory compliance and that (at paragraph 101):

> The strict interpretation approach takes away from the legislative meaning and the better approach is the objective approach, which has been the subject of consideration by the High court in a number of decisions.

His Honour concluded that the BFA was binding and that the Court therefore had no jurisdiction to adjust the property pursuant to Part VIII (i.e. section 79) of the Act as sought in the Husband's application. His Honour adopted an objective approach when interpreting the legislation and finding that the agreement was binding and ought not be set aside. In making such a finding, his Honour took into account the intention of Part VIIIA (to enable ordinary people to enter into a BFA without the necessity of court proceeding) and noted that the explanatory memorandum indicated that it was the legislature's intent to encourage the use of BFA's. His Honour went on to state[9]:

> If courts require strict interpretation of the legislation then this would have the effect of making such agreements less available to the broader community. It would positively discourage the use of financial agreements and it would limit the pool of legal practitioners who are equipped and willing to draft and/or advise

[9] [2006] FamCA 972 at paragraph 110.

> in relation to such agreements. Such a strict and inevitably narrow construction would add to the cost of such agreements and may put the costs to prepare and advise on them outside the financial means of the general community. That is not the legislative intent….courts should not make the legal practitioners and the parties cross all of the "t's" and dot all of the "i's" to enter into and give effect to financial agreements. The form should not defeat the substance.

As far as the trial judge was concerned, none of the matters raised by the Husband in support of his application to set aside had been found proven. It is interesting to note that in dismissing the Husband's application to set aside, the trial judge made adverse findings of fact against the Husband to the effect that he was violent and domineering toward the wife and that his evidence was self serving and fashioned to suit his case. His Honour was not impressed by the Husband as a witness and preferred the evidence of the wife wherever the parties' evidence conflicted.

Whilst his Honour formed the view that the BFA between the parties ought to treated as binding and Husband's application ought to be dismissed for lack of jurisdiction under s79, his Honour also said in passing that if he was wrong about that, then a 2/1 division in favour of the Husband would have been a fairer result than 50/50 on the facts. His Honour favoured the "purposive approach" to interpreting legislation, such that the Court seeks to "give effect to the intent of Parliament in drafting the instrument, rather than the objective, natural meaning of the text alone"[10]

D. *The Husband's Grounds of Appeal*

The Husband had many grounds of appeal, but the main two grounds are set out below.

1. *First ground of appeal*

The BFA had lawyer's certificates annexed to it stating that each party had received independent legal advice prior to signing the BFA. The wording of the certificates was in compliance with section 90G(1)(b) (as it then was). However the body of the BFA did not mirror the wording as set out in the annexed certificates.

As his first ground of appeal, the Husband sought to rely upon the fact that the exact wording as set out in section 90G(1)(b) did not appear in the body of the BFA, only in the Annexure. Although there was a reference to independent legal advice in the Recitals and the operative clauses of the BFA, the wording did not mirror the wording of section 90G(1) and he argued that this was not enough to comply with the legislation as the required wording must appear in <u>both</u> the body of the agreement <u>and</u> the annexure. In other words, in order for the BFA to be binding under section 90G, strict compliance was necessary.

The relevant parts of section 90G(1)(b) as then written provided that (<u>emphasis added</u>):

> 90G (1) A financial agreement is binding on the parties to the agreement, if and only if:
>
> ……
>
> (b) the <u>agreement contains</u>, in relation to 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:
>
> …….
>
> (c) the <u>annexure to the agreement contains</u> a certificate signed by the person providing the independent legal advice stating that the advice was provided;….

His Honour stated in response to this submission that:[11]

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[10] at paragraph 104.

[11] [2006] FamCA 972.

> Adopting a purposive construction…the certificate is annexed to the agreement and forms part of it and in my view it is thus "contained within the agreement", within the meaning of s90G(1)(b)….the legislative intent is that each of the parties has the benefit of independent legal advice and the structure of the subsection ensures that that requirement is met. It is not designed to set up word traps for the unwary, it is designed to ensure that each party has independent advice, and that such advice addresses the matters set out in the subsection.

His Honour went on to say at paragraph 115 that in the event his analysis was incorrect, then the statement required under s 90G(1) was imported into the main body of the agreement by virtue of recital R of the agreement. Although the Full Court disagreed with His Honour on appeal, ultimately the Legislature supported the trial judge's more relaxed "substantive compliance" approach when it subsequently passed the current amendments to the Act.

2. *Second Ground of Appeal*

The BFA was signed by the Husband and dated 3 September 2002. After the Husband signed the BFA, the wife took it to her solicitors and an alteration was made to one of the clauses. She told him he needed to take it back to his solicitor to initial every page and the alteration, which he did on or around 6 September 2002. Significantly, the certificate of independent legal advice executed by his solicitor prior to the Husband signing the BFA on 3 September 2002 was not refreshed or re-issued after he signed the amended version of the BFA on 6 September 2002.

The Husband's second ground of appeal was that prior to re-signing the amended BFA, his solicitor should have re-advised him and re-certified the certificate to be annexed to the BFA in order for the requirements under the legislation to be met.

The trial judge found that the Husband's solicitor advised him as to the effect of the BFA on his rights as required by s90G and that since the advice covered the amended clause 17, which was subsequently amended (seven words of the clause were deleted by consent and initialled), his Honour found that:[12]

> …the amendment was within the scope of that advice and the certificate was correct in that the effect of the agreement on the rights of the husband was explained… [and] I am satisfied that the Husband knew what this meant when it was included in the agreement and knew what it meant when it was not. There was no need to provide a new certificate as the existing document was adequate…

E. *The Full Court Judgment*

The Full Court held that if a BFA is validly entered into under part VIIIA, it has the effect of ousting the Court's jurisdiction in relation to matters covered by the agreement.

There have been relatively few decisions relating to the interpretation of s90G however one such decision was J and J [2006] FamCA 442. The Full Court quoted Collier J with approval when his Honour commented to the effect that, because it was the intention of the legislature that a BFA be a method of resolving differences between parties "without any supervisory power of a Court" in a situation where parties rights are to be affected, then this had to be done "fully in compliance" with the requirements of the statute.

The question for the appeal was whether the provisions of the BFA between the parties met the requirements of s90G so as to preclude Court's power to make adjustive property orders.

In relation to the Husband's first ground of appeal, the Full Court stated (at paragraphs 44 – 45 of the judgment) as follows:

> The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did.

[12] At paragraphs 129 – 130.

> Recital R and clause 29 of the agreement…dealt predominantly with advice in relation to the legal implications of the agreement and each party's rights and obligations. These statements did not meet all the requirements set out in sub-section 90G(1)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties. It follows that we prefer the approach taken by Collier J in *J and J* (above) to that taken by the trial judge in this case. We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders under s 79.

In relation to the Husband's second ground of appeal, the Full Court stated (at paragraph 46) as follows:

> The husband raised the issue that the certificate provided by the husband's solicitor predated the amendments made to the agreement and therefore the agreement should be set aside. It is not necessary to determine this issue, as regardless of the failure to re-certify the agreement after the amendment, the agreement itself was flawed as it did not meet the statutory requirements.

In conclusion, the Full Court simply stated:

> The agreement between the husband and the wife did not contain a statement directly acknowledging that the husband, or for that matter the wife, received legal advice in relation to all the matters set out in s 90G(1)(b). The husband's appeal is therefore allowed. The agreement should be set aside and there should be a retrial in relation to the parties' competing applications for property settlement.

VI TRANSITIONAL PROVISIONS OF THE AMENDING ACT

There was an obvious further complicating factor in making the legislation retrospective however. Since the original legislation was introduced in December 2000, there have been two previous versions of section 90G, as to the criteria for making a valid and binding BFA, namely:

- the version of section 90G which was in force during the period 27 December 2000 to 13 January 2004 (which I will refer to as "phase 1");
- the version of section 90G which was in force during the period 14 January 2004 to 3 January 2010 (which I will refer to as "phase 2"); and
- the new version of section 90G which came into force on 4 January 2010 (which I will refer to as "the current version").

Practitioners might recall that when Part VIIIA was originally introduced in December 2000, s90G required them to advise a party, inter alia, as to whether it was to the party's advantage "financially or otherwise" and "prudent" to make the agreement and whether in the circumstances that were "reasonably foreseeable" the provisions of the BFA were "fair and reasonable". There was outcry about this wording because, among other things, it was considered inappropriate for the legislature to expect lawyers to give *financial advice*. That outcry was the reason for the changes to the legislation in 2004.

A. *Retrospective Legislation*

BFAs entered into during phase 1 or 2 would be incapable of complying with the current criteria set out in s90G, as the criteria have changed.

To ensure that the Amending Act did not render these historical BFAs automatically invalid due to failure to meet the new s90G criteria, the Amending Act "re-inserted" both the phase 1 and phase 2 criteria in the "Notes" to the legislation for the Court to refer to in the event of dealing with a BFA made pursuant to s90G made either prior to 4 January 2010, or prior 14 January 2004.

In other words, when the Court is assessing validity of a BFA made during phase 1 or phase 2, a modified version of the current section 90G applies to reflect the criteria which were in force at the relevant time.

The modified versions of section 90G are to be "read in" to the current version of s90G whenever the Court is assessing the validity of a BFA made at a previous point in time. Bear in mind however, that the modified versions of s90G *do not appear on the face of the amended legislation*, but rather are reproduced in the Notes to the Act, as Transitional Provisions.[13]

The Court's new power under the Amending Act to declare the BFA binding *despite technical defects* therefore applies across the whole range of BFAs and termination agreements, and across the whole period of time that Part VIIIA has been in operation (27 December 2000 to date).

The purpose of the Amending Act was to provide additional comfort and protection for parties who entered into a BFA that the court could declare the BFA binding in spite of a failure to meet the technical requirements for validity. The purpose of making the legislation retrospective was to avoid a wave of ***Black & Black*** type litigation by parties hoping to challenge their historical BFAs by reason of technical deficiency. Had the legislature not taken this step, parties and practitioners would have been forever left wondering if that BFA lurking in the filing cabinet was going to be struck down when the time came to rely upon it.

The positive thing about the new legislation being retrospective is that, so long as the Court is satisfied that it would <u>not</u> be unjust and inequitable (disregarding any change of circumstances from the time the agreement was made) to do so, it has the power to declare that the agreement binds the parties even if it is technically deficient, *no matter when it was entered into*.

VII THE BACKGROUND TO AMENDMENTS TO SECTION 90G

A How did the Amending Act come to be in this form?

The law is an evolving creature. The current legislative amendments had their beginnings way back in 2008 and only came to fruition on 4 January 2010. Practitioners working in this area may benefit from an insight into the process by which the Amending Act came to be in its current form and to perhaps understand why the amendments have been drafted in the way they have.

1. Impetus for the Amending Act

On 7 May 2008, the Family Law Section of the Law Council of Australia wrote a letter to the Attorney-General drawing attention to the decision of the Full Court in ***Black & Black*** which the FLS stated "had the effect of invalidating" any BFA where the technical requirements of Part VIIIA and in particular s90G were not strictly met[14]. FLS made recommendations, *inter alia,* that to reduce the scope for disputes about formal validity, Parliament amend subsection 90G(1) in relation to:

- Evidence of independent legal advice; and
- Provision of copies of the agreement

The Attorney-General then referred the matter to the Family Law Council[15], which supported the FLS's assertion that amendments to s90G were indeed required to restore confidence in the binding nature of financial agreements.

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[13] The purpose of the Notes section of the Act is to record any transitional or application provisions which may affect the practical operation of amendments that have been incorporated into the Act. The Notes section of the Family Law Act 1975 appears at the very end of the Act (after the Schedules). It can be accessed in the Austlii version of the Family Law Act 1975 by clicking on the tab at the top entitled "[Notes]".

[14] Letter from Law Council of Australia to Senate Standing Committee on Legal & Constitutional Affairs dated 22 January 2009, paragraph 7.

[15] The Family Law Council is a statutory authority established under section 115 of the Family Law Act 1975. It commenced operation in November 1976. The functions of the Council (pursuant to s 115(3) of the Act) are to

2. Draft bill passed by the House of Representatives on 3 December 2008

The proposed Bill was passed by the House of Representatives on 3 December 2008. It was proposed that subparagraphs 90G(1)(b) and (c) both be repealed and new subparagraphs substituted.

It was further proposed that subparagraph (1)(e) regarding the provision of a copy or original of the executed BFA to each party was to be entirely repealed. The proposed changes were NOT ultimately passed as legislation.

However the original wording which formed a platform for the current Amendments does provide insight into how the amendments ultimately came to be more complex than perhaps they needed to be.

The House of Representatives' version of the amendments to s90G are set out below (with old text of s90G proposed to be repealed 'struck through' and proposed changes underlined):

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

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

Pre 4/1/10 (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~~

Proposed 3/12/08

(b) before signing the agreement, each spouse party was provided with:

(i) 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

(ii) a signed statement by the legal practitioner stating that this advice was given to that party; and

(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.~~

advise and make recommendations to the Attorney-General concerning: (a) the workings of the Family Law Act and other legislation relating to family law, (b) the working of legal aid in relation to family law, and (c) any other matters relating to family law. The Council may provide advice and recommendations either of its own motion or at the request of the Attorney-General. For further information, refer to the website http://www.ag.gov.au/flc .

3. Explanatory Memorandum – House of Representatives 2008

The Explanatory Memorandum to the Bill states that the intention of the amendments was to "relax the requirements in relation to evidence …of independent legal advice when entering into a binding financial agreement". It further goes onto state[16] that:

> Section 90G of the Family Law Act currently provides that a financial agreement is binding on the parties to the agreement if, and only if:
>
> - it is signed by all parties
> - certain technical requirements are complied with, to ensure that the spouse parties entered into the agreement with independent legal advice, and that evidence of that advice was contained in a certificate annexed to the agreement
> - the agreement has not been terminated and has not been set aside by a court, and
> - after it is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties
>
> [The Bill] …substitutes paragraphs 90G(1)(b) and 90G(1)(c) with a new paragraph 90G(1)(b) to relax the requirements in relation to evidence that the spouse parties to the agreement must provide in relation to the obtaining of independent legal advice when entering into a financial agreement. Spouse parties to a financial agreement will be required to obtain independent legal advice from a legal practitioner about the effect of the agreement on their rights, and the advantages and disadvantages, at the time that the advice was provided, of making the agreement. Spouse parties will also be required to obtain a signed statement from the legal practitioner giving the advice stating that the advice was given.
>
> [The Bill] repeals paragraph 90G(1)(e) to remove the requirement that the original agreement be given to one of the spouse parties and a copy be given to each of the other parties…

(i) Removal of Requirement for One Party to Keep Original BFA and Other(s) a Copy

In its submission to the Senate Committee in January 2009, the FLS supported the deletion of subparagraph (e) of the pre-amendment legislation regarding 'one party keeping the original BFA' and the 'other party keeping a copy'. Presumably this was because it was seen as desirable to avoid problems of the kind which arose in the case of Fevia & Carmel-Fevia[17] a decision of Murphy J which post-dated the Full Court's decision in ***Black & Black***.

The following is a summary of the facts giving rise to the said problems in the case of ***Fevia & Carmel-Fevia***:

- The parties entered into a BFA prior to marriage under s90B of the Act signed in or about September 2001;
- The Husband was very wealthy (twice before married) and the wife was of modest means (and once before married);
- The parties subsequently married and had two children;
- The parties separated in February 2008;
- When the Husband and his solicitor signed their version of the BFA in September 2001, added to it was a number of pages to Schedule 1 (his schedule of assets) setting out additional entities. This was added after the wife and her solicitor had signed and was added without their knowledge;

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[16] At paragraphs 67 – 69.

[17] [2009] FamCA 816. For an analysis of that case, I commend to you the paper by Minahl Vohra Barrister at the Victorian Bar (who in fact appeared in the case) which paper was delivered at the LIV annual family law conference in Melbourne on 16 October 2009 entitled "Latest and Greatest Property Cases – A Selection".

- Neither of the wife or her solicitor were given a copy of the BFA signed by the Husband at or around that time;
- The version the wife had kept in her filing cabinet throughout the marriage only contained her signature and that of her solicitor;
- The first the wife knew that the Husband had signed an agreement with extra pages in the Schedule 1 was when she was served with his Response to her Application to have the BFA set aside, which had a copy of the different version signed by him attached;
- The Court held that by inserting new pages into the Schedule 1 he signed, the Husband unilaterally changed the agreement in a material way and had no authority to do so, thus there was no contract or agreement at all.
- As there was no contract, there was no access to the remedy of rectification;
- Since there was no agreement, neither party had retained an ORIGINAL copy;
- That even if there had been an agreement (which there was not) the "giving" by the Husband of a "copy" of the BFA to the wife 7 years after he signed it (by way of service in court proceedings about the BFA) did NOT satisfy the criteria under s90G(1)(e) providing that *"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"*
- The Court relied upon and upheld the Full Court's decision in ***Black & Black*** that strict technical compliance was necessary for a BFA to be binding; and that was not the case here.

The FLS recommendation to remove of subsection (e) was in fact adopted and passed by both houses of Parliament and came into law on 4 January 2010.

This has the consequence of leaving the statute silent on how or when the exchange copies of a BFA after it is signed. The only explicit provision regarding provision of copies of documents relates to Statements of Independent Legal Advice.

(ii) Removal of Requirement to Annex a Certificate of Independent Legal Advice to BFA OR ("relaxation of the requirements in relation to evidence of independent legal advice")

In its submissions to the Senate Committee, the FLS criticised the proposed wording of the draft amendments to subsections 90G(1)(b) and (c). The FLS stated at paragraph 12 of the submission:[18]

> FLS has a number of concerns with the proposed redrafting of paragraph 90G(1)(b) and the omission of the existing paragraph 90G(1)(c).

Section 90G(1)(c) provides that a BFA is only binding (inter alia) if:

> "*the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided"*

4. Submission by Law Council of Australia to Senate Committee on 22 January 2009

The FLS stated at paragraph 20 of its submissions to the Senate Committee:[19]

> While the analysis of the Full Court may reflect the law as it is currently written, it does not accurately reflect the legislative intent of Part VIIIA articulated by the Parliament.

In support of its criticisms of the removal of subsection (c) which requires a Statement of Legal Advice to be annexed to a BFA, the FLS stated (at paragraphs 23-28) (<u>emphasis added</u>):

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18 A copy of the submissions made by the FLS to the Senate Committee can be obtained from <u>http://www.aph.gov.au/Senate/committee/index.htm</u> .

19 *id*

> The fundamental requirement is that both parties should have independent legal advice so that they understand the commitments they are making, the consequences of the agreement, and the effect of the agreement on their legal rights. The effect of a binding agreement is to extinguish the jurisdiction of the Court in relation to the subject matter of the agreement and, because of that, FLS **endorses** the policy considerations underlying the protective provisions of Part VIIIA.
>
> It follows that FLS endorses the requirement that before signing the agreement a spouse party be provided with independent legal advice from a legal practitioner about the effects of the agreement on the rights of that party. It also supports the requirement that the legal practitioner provide a signed statement (which FLS **strongly recommends** should continue to be by way of a certificate attached to the agreement) confirming that the advice was given to that party.
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> While reflecting the underlying intentions, the current drafting…gives rise to the potential for further disputes of a technical nature of the very type that the amendments are intended to overcome.
>
> By conflating existing sub-paragraphs (b) and (c), the amendment imposes a requirement that both the advice be given and the legal practitioner's statement be provided before the agreement is signed by the party. That gives rise to the potential for dispute about the order in which the various steps occur; and the possibility of the agreement being held not to be binding if the advice is given prior to signature but the legal practitioner's statement is not provided to the spouse party until after the agreement has been signed. The requirement for temporal juxtaposition of the statement and the execution of the agreement creates a potential mischief. If, as is clearly the case, the intention is to have written confirmation that the required advice has been provided before the agreement is signed, it should not matter whether the statement confirming this is signed before, after, or at the same time as the agreement.
>
> …The Bill seeks to respond to and ameliorate the strict technical compliance test imposed by the Full Court in *Black & Black*. The Explanatory Memorandum to the Bill identifies the intention as being to *"relax the requirements in relation to evidence… of independent legal advice when entering into a financial agreement"*. Rather than relaxing the requirements, Item 2 of Schedule 5 adds a new hurdle of the signed statement of advice having to be provided to the party before the agreement is signed by that party (whereas the clear intention is merely to have objective evidence of the advice having been given) - yet provides no obligation to make a copy of the statement of advice available to the other party by way of verification that the requirement has been met.
>
> FLS considers that the requirement for a statement (or preferably a certificate) of independent legal advice to be annexed to the agreement, as currently appears in Section 90G(1)(c), is advantageous as providing clear evidence that the advice was given prior to the agreement being signed, and should be retained.

The Senate picked up on some of the FLS's concerns but missed the point in relation to others. This has led to unnecessarily complicated and confusing amendments.

It is the writer's view that:

- the requirement to annex a statement of independent legal advice is still the most sensible way of confirming that independent legal advice was given prior to the BFA being made. Above all else, that requirement should have been retained but regrettably this recommendation by the FLS was ignored;
- by separating out the two requirements of firstly "giving advice" and secondly "giving a certificate" (in the absence of the certificate being annexed to the BFA) there is potential for dispute about timing of which order the two steps occurred as on the face of the BFA there is nothing to confirm either way.
- The "timing" problem could have been cured by reverting to the "annexure requirement" but instead, the legislature went ahead and diluted the technical requirements by:
    i. making the annexure optional; and
    ii. providing that it did not matter *when* the certificate was given, so long as the advice was given prior to signing the BFA

- These additional requirements not only failed to cure the problem, they added a further layer of complexity to the proposed amendments which makes the new laws less capable of being readily understood and complied with by lawyers and their clients.

5. Minister's Second Reading on 5 February 2009

Set out below are extracts from the Minister's Second Reading Speech (emphasis added):

> **Ley, Sussan, MP Farrer LP:** The amendment in respect of binding financial agreements is a necessary corrective to the decision in Black v Black, which held that strict compliance with all of the technical requirements in the Family Law Act was a precondition to enforceability of the agreement. That decision was widely criticised. The amendment will provide that, provided a party has entered an agreement on the basis of an informed decision, the agreement will not be voided by a mere technicality.
>
> **Neumann, Shayne, MP Blair ALP**: Schedule 5 deals with what I have described as the Black v Black amendments, which are to do with binding financial agreements. The decision of Black v Black caused a lot of media comment, a lot of comment by the Law Council of Australia and a lot of comment by family lawyers generally. It was an interesting decision and I will turn to it. This particular bill amends, in effect, the Black v Black decision. It deals with the validity of binding financial agreements made under part VIIIA of the Family Law Act. Those types of agreements have been in our legal system since December 2000. They are commonly known as prenuptial type agreements, but lawyers who practise in this jurisdiction call them BFAs—binding financial agreements.
>
> The average person who used to come into my law practice and ask about these sorts of things would ask me for a prenuptial agreement. But there is a problem caused by this decision, because it effectively makes the whole operation of binding financial agreements more murky and more difficult. It puts lawyers at risk in terms of law claims and it puts certainty of the resolution of property settlement and spousal maintenance matters at peril. So Black v Black is one of those decisions which the full court of the Family Court, in my view, got wrong. I think the judge in the first instance got it absolutely right. This legislation overcomes the Black v Black decision by allowing binding financial agreements to have a degree of flexibility to ensure there is confidence that if there is a technical problem in the agreement it can be overcome. The binding nature of those types of agreements is restored by this piece of amending legislation.
>
> The bill amends the Family Law Act to ensure people who have made informed decisions, got legal advice and come to an agreement before they cohabitated or before they married could then have certainty that if they separate there is a resolution as quickly and efficiently as possible. It takes out the rancour, the disputation and often a lot of the anger. So, for a lot of people, having a binding financial agreement is what they want. Having certainty is important in terms of the resolution of property settlements but also in terms of child support. People who dispute about property settlements often dispute about spousal maintenance, about where the children live, about who has contact with the children and about issues of child support. So taking the emotion out of these types of disputes as much as possible is a good thing and it is good for families who interact with the family law system in Australia and with the Child Support Agency. The family law section of the Law Council of Australia was consulted in the drafting of these amendments and they agree with what the Attorney-General is suggesting in the circumstances.
>
> ….binding financial agreements allow people to opt out of the family law system, but the provisions under section 79 of the Family Law Act, which talk about the contribution a person makes not just of a financial and nonfinancial nature to the acquisition, conservation and improvement of matrimonial assets but as a homemaker and a parent, are effectively ignored in the circumstances of binding financial agreements. The section 75(2) factors are also ignored—age, health, entitlement to a pension, superannuation, care of children. All that is ignored with binding financial agreements. But they are here to stay, and whilst they are here to stay we have to make sure that there is clarity and certainty and precision with binding financial agreements. Black v Black left the law murky. It was the wrong decision. It has created mayhem for 18 months or two years. We have seen a lot of problems as a result of that decision….
>
> …Significantly, under part VIIIA the court has no power to vary financial agreements, so there is no power of rectification. So an ineffective agreement must be set aside and the matter remitted under section 79 for consideration as a normal property settlement. So the stakes in these circumstances are as high as they come for people. When you consider the hundreds of thousands of people that interact with the family law system and the Child Support Agency in this country every year, and the billions of dollars that get paid in child support, you can see this is a very serious matter for the Australian population.

So what happened in Black v Black? In 2006, Justice Benjamin, in the Family Court at Hobart, was asked to consider Mr Black's application to set aside a financial agreement executed by the parties in September 2002… He argued that the agreement was flawed in a number of respects. He said that his solicitor had not recertified the documents in light of the additional advice, the certificates were not annexed to the agreement and the agreement did not contain within its body a statement of independent legal advice. This was a very technical argument at law. Justice Benjamin, to his credit, dismissed the application. He considered the legislature had made it very clear that binding financial agreements were to be set aside in only limited circumstances or where the parties had not obtained legal advice. He declined to entertain the husband's application, and he told the husband to go away.

The husband appealed the decision and it then went to the full court of the Family Court, who overturned Justice Benjamin's decision, construing section 90G in the most strict legal sense. They made a number of comments about the stringent requirements under the legislation. The implications to practitioners in the area and to people who had signed binding financial agreements were really stark. If you neglected to include a statement of independent legal advice in the body of the agreement, the binding financial agreement had a fatal flaw in it and it could be overturned. You could get out of it that way. So all the tens of thousands of Australians that had signed binding financial agreements since 2000 were at risk if their lawyer had stuffed up or if they had just made a little technical error. It is very difficult to support the full court's decision, when you look at good policy, certainty and precision, in the area of family law. Because they cannot rectify it, what we are doing here is allowing flexibility and amendments….I commend the bill to the House.

McClelland, Robert, MP Barton ALP Attorney-General: The bill responds to the decision of the full court of the Family Court of Australia in Black v Black. The bill amends the Family Law Act in particular to limit the technical requirements that people need to meet to enter into prenuptial agreements, while still providing necessary protections to parties, such as the requirement to obtain legal advice. It will restore confidence in the binding nature and enforceability of financial and termination agreements under the Family Law Act.

(Senate) Wong, Sen Penny South Australia ALP Minister for Climate Change and Water: Importantly, the bill responds to the decision of the Full Court of the Family Court of Australia in Black v Black. In that case, the Court found that a binding financial agreement (commonly known as a pre-nuptial agreement) made under the Family Law Act 1975 was invalid because it did not strictly comply with certain technical requirements in the Family Law Act. The amendments are being made because the Government is concerned about the possible consequences of the decision on the validity of existing binding financial agreements which contain technical errors… The bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these agreements cannot later get out of it on a technicality, resulting in court battles that the agreement was designed to prevent. These amendments will restore confidence and certainty in the binding nature and enforceability of financial and termination agreements under the Family Law Act. I commend this bill.

6. Referral of Bill to the Senate Standing Committee on Legal and Constitutional Affairs ("Senate Committee") on 4 December 2008 and Report from Senate Committee on 23 February 2009

On 3 December 2008 when the Bill was introduced into the House of Representatives, the Attorney General stated:

> Importantly, the bill responds to the decision of the Full Court of the Family Court of Australia in the matter of Black and Black. In that case, the court found that a binding financial agreement (commonly known as a pre-nuptial agreement) made under the Family Law Act 1975 was invalid because it did not strictly comply with certain technical requirements set out in the Family Law Act. The amendments are being made because the government is concerned about the possible consequences of that decision on the validity of existing binding financial agreements which may contain technical errors. The bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these agreements cannot later avoid or get out of the agreement on a mere technicality, resulting in court battles that the agreement was designed to prevent. These amendments will restore confidence and certainty in the binding nature and enforceability of financial and termination agreements under the Family Law Act. I commend this bill.

The Bill was referred to the Senate Standing Committee the following day and the Committee delivered its report on 23 February 2009. The report considered the recommendations made by the FLS and sated (at paragraph 3.10) as follows (emphasis added):

> The Attorney-General has responded to the committee by stating that the requirement to obtain a statement evidencing receipt of independent legal advice prior to the signature of an agreement ensures that parties will not be left in an uncertain situation about the binding nature of the agreement which has the potential to occur if it were open to spouse parties to obtain such a statement before, during or at the same time as signing the agreement. It provides a clear direction to spouse parties to obtain legal advice *before* signing an agreement.

This statement does little to justify or explain why the Senate Committee went on to ignore the FLS's recommendation that the 'annexure' requirement be retained (in respect of statements of independent legal advice).

Further, these comments refer firstly to "statements of independent legal advice" and secondly to "independent legal advice" as though they are one and the same thing, or interchangeable concepts. That was more so the case under the pre-amendment legislation, because an annexure setting details of the first tended to be treated as proof or evidence of the second – mainly because they both necessarily had to occur prior to signing the BFA in order for the statement to be annexed to the BFA. But the new legislation actually separates out the two concepts as distinct obligations both legally and temporally. FLS had identified that as part of the problem with the new legislation and suggested that this problem would be cured by retaining the annexure requirement and deeming that same was to be taken as proof that the advice had been given on the date and in the manner set out therein. However the Senate Committee did not adopt this recommendation.

7. Amendments made by the Senate and Supplementary Explanatory Memorandum 26 October 2009 following Report of Senate Committee

The Senate Committee recommended that the Bill be passed in the form as amended by the Senate, inclusive of amendments by the Senate.

The Senate released an explanatory memorandum (dated 2008-2009) which stated as follows:

> The Government amendments proposed to the Bill will address issues that have arisen in submissions to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the provisions of the Bill and following consultation with key stakeholders. The proposed Government amendments will:
>
> - amend the *Family Law Act 1975* to enable legal practitioners to provide signed statements about the giving of prior independent legal advice to spouse parties to financial and termination agreements either before or after the spouse party signs the agreement
> - amend the *Family Law Act 1975* to provide that copies of those statement must also be provided either to the other spouse party or to a legal practitioner of the other spouse party
> - amend the *Family Law Act 1975* to provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding in spite of a failure to meet the procedural requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made)
> - provide that the amendments to the *Family Law Act 1975* in Schedule 5 to the Bill will not affect any court orders that have been made on matters covered by a financial agreement or a termination agreement
> - ensure that the amendments to the *Family Law Act 1975* in Part 1 of Schedule 5 to the Bill will not inadvertently render invalid financial and termination agreements made between 27 December 2000 and 14 January 2004
> - provide that a financial agreement or a termination agreement made before the amendments to Schedule 5 to the Bill commence will bind the parties who have signed the agreement if the spouse parties obtained independent legal advice prior to signing the agreement

The Senate goes onto explain in its Memorandum that concerns raised about deletion of the old subsections of 90G relating to the compulsory annexing of a certificate of advice (which the House of Representatives recommended to be replaced with a new subsection (b) making no reference to annexures) would be addressed by way of the **new subparagraphs (b) (c) and (ca)**

which make it no longer compulsory to provide the certificate of advice *prior* to signing of the BFA. In order to accommodate that extra level of flexibility, it also introduced the concept of an 'optional annexure'.

The Senate asserts at paragraph 7 of the Supplementary Explanatory Memorandum that the new subparagraph 90G(1)(ca), requiring a copy of the signed statement of legal advice to be given to the other party, will (presumably in lieu of an annexed statement of prior legal advice):

> Ensure that there is objective evidence readily available to each spouse party that legal advice was provided to the other spouse party if they later seek to enforce the terms of the agreement, without overly complicating the requirements for such an agreement to be binding.

It is further stated that amendments which insert the new subparagraph 90G(1A) will:

> …enable a court to declare, in enforcement proceedings, that a financial or termination agreement is binding in spite of a failure to meet some of the technical requirements if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made).

VIII SUMMARY OF ISSUES ARISING FROM THE NEW LEGISLATION

By separating out the two requirements of "advice" and "certificate of advice", the new law opens the door to possible disputes about whether the contents of the certificate can be relied upon as evidence of the facts therein, namely the fact that advice was not only provided, but that the advice complied with the requirement to cover the specific matters set out in section 90G and the requirement that the advice be provided *prior* to the signing of the BFA.

In the writer's assessment, the key issues and concerns can be summarised as follows:

1. The main purpose of the Amending Act was to make provision for the court to have discretion to enforce a BFA notwithstanding technical non-compliance with subsection 90G(1). This discretion is built into the new s90G(1A).

2. The writer asserts that s90G(1A) discretion is sufficient to allow the court to overcome technical compliance issues of the kind arising in previous cases before the Court (such as problems associated with differing annexures on each copy of the BFA, incomplete exchange of agreements, failure to recite the exact wording of the legislation in the body of the agreement as well as the annexure). This built in discretion cured the problem created by ***Black & Black*****.** There was no need dilute the technical requirements in subsection 90G(1) as well.

3. There were two possible ways of the Legislature tackling the problem:
   (a) Either there ought to have been be strict and clear criteria for making a binding BFA, overlayed by some judicial discretion to assist parties to overcome minor technical problems (in cases where the substance of the BFA ought not be defeated by the form); OR
   (b) There ought to have been a relaxation of the technical requirements for making a binding BFA so that 'near enough is good enough' and any BFA coming close to mark on compliance will automatically be binding (without the need for the court to exercise its judicial discretion).

4. Clearly it is easier for lawyers and clients if the legislative criteria are strict and clear and capable of readily being satisfied, with the additional comfort of knowing that the court retains discretion in case of an honest mistake or technical error, such that it would be unjust to set the BFA aside because of the error.

5. Scenario (a) above was therefore the preferred way of tackling the problem created by ***Black & Black.***

6. Regrettably, the Legislature has had a "bet each way" and adopted a combination of approach (a) and approach (b) which makes the new legislation unnecessarily complicated and less capable of being readily complied with.

7. There was no need to abandon the concept of compulsory annexures in an attempt to relax technical requirements; or at least no need to do this in *addition* to building in a new layer of judicial discretion to declare a BFA binding despite technical deficiencies. Common sense dictates that if a signed statement of independent legal advice is annexed to a BFA, the advice *must* have been given before the BFA was made. The legislature missed the mark completely on this one in the writer's view, and did so contrary to clear recommendations from the FLS.

8. There was no pressing need to delete subsection (e) which provided for one party to keep the original BFA and the other to keep a copy. Although the FLS actually recommended this (presumably to avoid a recurrence of the problem which arose in the case of ***Fevia & Carmel-Fevia)*** the result is that the legislation is now silent on that issue completely. The manner in which parties exchange a BFA or signed copies thereof is now left to chance. One presumes that common sense will prevail in the absence of any legislative direction on this issue and that parties will exchange signed BFAs as a matter of course.

9. Although the Legislature has seen fit to require the parties to exchange their statements of independent legal advice, it does not say <u>when</u> the statements need to be exchanged. Presumably this is "within a reasonable time" but this is a matter yet to be tested in the Courts.

10. There is nothing in the amending legislation which explicitly states that the parties are able to rely upon their signed statement of independent legal advice as proof of compliance with the requirement in subsection 90G(1)(b) that the advice was actually given.

11. To minimise evidentiary or other problems down the track however, it makes sense to exercise the option to annex the signed Statement of prior Independent Legal Advice to the signed BFA and exchange the whole document (comprising BFA and annexure/s) with the other party immediately after signing, making sure that each party has a fully signed copy with fully signed annexures.

IX CONCLUSION

The Legislature passed the new BFA provisions to cure the problem in ***Black & Black***. The writer is not convinced that the desired outcome has been achieved in the most effective manner, (on the contrary, the new provisions are somewhat of an overkill) however the legislation is now law and practitioners will need to grapple with the change in their obligations to the clients

brought about by the new provisions (whether they like it or not), unless and until the provisions are reviewed again.

In its submissions to the Senate Standing Committee, the FLS expressed concerns about the nature and effect of the proposed amendments, especially as not all of the FLS's proposals were adopted. The FLS stated[20] that:

> In some fundamental respects the amendments depart from the approached urged by the FLS, with the consequence that the FLS has significant concerns about the potential uncertainties the amendments will produce about financial agreements, whether entered into before 4 January 2010 or afterwards. FLS will liaise further with Government to address these concerns.

On the basis of these comments, one cannot rule out the possibility of further legislation to correct the Amending Act in future. Watch this space.

Michele J. Brooks, Barrister

25 March 2010

[20] FLS online newsletter Notice 2010 – 01 circulated 4 January 2010.