Talk

The Ever Changing Landscape of Financial Agreements

LPLC Risk Conference, 2013
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Following on from Bronwyn you will notice that I don't use the term "binding". I have never used it. I take the view that a Court can declare the financial agreement to be binding. Mere legal practitioners cannot. It is interesting to hear Bronwyn suggest that the word "binding" gives clients a false impression. I agree. It is much easier to say "BFAs" and it sounds better than any short version but I use the term financial agreements.

We are in another downturn for the popularity of financial agreements. We know more about the technical difficulties of meeting the requirements of the *Family Law Act*, we know more about the broad grounds upon which they can be set aside, and we know that agreements may be found not to be binding for issues outside of our control. It may be the fault of the other legal practitioner.

Since *Parker & Parker* (2012) FLC 93-499 and *Hoult & Hoult* (2011) FLC 93-489 the popularity of financial agreements amongst legal practitioners has hit a new low. An agreement may not be binding if a party was not properly advised. An extra layer of uncertainty was added by the High Court in *Stanford v Stanford* (2012) FLC 93-495. The High Court appeared to reject the "four step process" for applications under s 79 and s 90SM. We do not know what process has taken its place. So what advice do you give as to the likely property entitlements of your client if it was not for the agreement?

I won't ask how many of you have advised your clients entering into financial agreements before or during a marriage about the possibility of a property and maintenance claim even though the parties are not separated. 12 months ago we advised clients about their entitlements in terms of *Hickey* not *Stanford*. We gave incorrect advice.

Requirements of s 90G(1)/s 90UJ(1)

A financial agreement must meet the requirements of Pt VIIIA (or similar provisions in Pt VIIIAB) with respect to de factos. It is important to refer to the precise wording of the Act as it existed (or it was deemed to have existed) when the agreement was entered into by the parties. I won't go through them except to refer to (b) and (c). Advice and the Statement of Independent Legal Advice are two separate requirements. They are set out in the paper. I

will say that the most important thing is not to rely on this paper but to check the Act.

The *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* commenced on 4 January 2010. I will refer to this as the 2010 Amendments.

An important change was that failure to comply with the advice and statement of legal advice requirements may not be fatal to the binding nature of the agreement. The court can declare that the agreement is binding on the parties if it is satisfied that it would be unjust and inequitable if the agreement were not binding on the parties to the agreement.

Section 90G currently reads as follows:

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

(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.

Definition of “legal practitioner”

The legal advice must be provided by a legal practitioner. The term "legal practitioner" is not defined. Federal Magistrates Coates in *Murphy & Murphy* (2009) FMCAfam 270 said that the legal practitioner must be able to practice in the Australian federal jurisdiction. The agreement in *Murphy* didn't comply as the wife’s certificate was

signed by a lawyer with the right to practice in the Philippines. Federal Magistrates Coates said that it was also a factor:

> "the fact that legal advice is advice about the law and that must be with regard to the law of a particular jurisdiction..."

In *Ruane & Bachmann-Ruane* [2009] FamCA 1101 Justice Cronin agreed with this.

Black & Black: strict interpretation approach

The Full Court in *Black & Black* (2008) FLC 93-357 adopted a very strict interpretation of the version of s 90G(1) which applied prior to 14 January 2004. This approach appears to have survived the 2010 Amendments, subject to the ability of a Court to save an agreement under s 90G(1A).

The Full Court said that strict compliance with the statutory requirements was necessary to oust the court's jurisdiction to make s 79 orders.

Incorrect references to sections

One of the most common errors in reported cases is that the agreement and/or the statements of independent legal advice refer to the incorrect section of the *Family Law Act*.

These errors appear to be made for one of two reasons. Either:

- The agreement was drafted based on a precedent and the references to the sections were not changed or were not consistently changed; or
- The agreement was drafted over a period of time and not updated for changed circumstances. Commonly, the agreement may have been intended to be entered into before the date of the marriage but the parties married before the agreement was executed by both of them.

Justice Collier held in *Balzia & Covich* [2009] FamCA 1357 (prior to the 2010 amendments) that he could rectify the financial agreement so that it referred to s 90C rather than s 90B, but he could not rectify the certificates signed by the legal practitioner which referred to advice having been given under s 90B. The parties married just prior to the agreement being executed by them both.

If decided now, the court could find that the agreement was binding if the court was satisfied that it was unjust and inequitable if the agreement were not binding on the parties under s 90G(1A)(c). However Justice Collier considered that, as a distinction was drawn in the Act between agreements under each section, it was important for the advice to be specific to the

section under which the agreement was made.

The distinction between the rights of de facto couples and married couples is less important since 1 March 2009 when the Act was amended to cover de facto couples separating after that date. However, the rights of de facto and married couples are not precisely the same. For example, there is no jurisdiction for property orders to be made if de facto couples have not separated whereas there is jurisdiction in relation to married couples. Another important distinction is the complex jurisdictional hurdles which must be overcome before a s 90SM order can be made, such as geographic (s 90SK) and whether the de facto relationship lasted for a period of a total of two years, there was a child, the relationship is or was registered under a prescribed law or the relationship meets the serious injustice test (s 90SB). These are relevant to advice on Pt VIIIAB financial agreements as they may arise if the agreement is set aside.

The Full Court in *Senior & Anderson* (2011) FLC 93-470 was unanimous that references to incorrect sections and incorrect names were errors capable of rectification. There were errors in the agreement and the certificates. These were:

1. On both the coversheet to the agreement and the heading of the first page of the agreement, but not in the recitals, it was expressed to be a financial agreement pursuant to s 90C. The parties had divorced before the execution of the agreement but the error was repeated in the first substantive clause. The agreement should have been entered into under s 90D.

2. The wife's legal practitioner's certificate was dated 20 July 2009 and the wife's receipt and acknowledgement of her understanding was dated 22 July 2009. This discrepancy was largely explained in the affidavit of the wife's legal practitioner.

3. The wife's certificate was inaccurate in that, having correctly identified her as the client to whom the advice was given she was subsequently identified, not by her correct name but by the name "*Patricia*" in clauses 2 and 3 of that certificate.

4. The certificate from the husband's legal practitioner correctly identified the husband but there were errors in clauses 2 and 3 of the certificate where the husband was wrongly identified by the name "*Chris*".

The trial Judge Justice Young found that the agreement was binding on the parties despite the errors because (at para 94):

> "On the facts of this case the parties negotiated and concluded an agreed contract for a division of their property. They were in complete agreement at the time of execution of that contract as to its terms...The subjective and common intention of the parties was properly expressed within the agreement, but save for the technical errors."

In the light of later cases such as *Parker & Parker* (2012) FLC 93-499 and *Hoult & Hoult* (2011) FLC 93-489*,* the result in *Senior & Anderson* may have been different if the agreement was challenged on the basis that the advice given to the parties was incorrect.

So does the advice need to be given and must it be correct?

The advice required is more than an explanation of the meaning of the agreement. It includes, for example:

1. Assess your client's entitlements under the Act. This is particularly difficult as there is uncertainty following the High Court's decision in *Stanford v Stanford* (2012) FLC 93-495 as to whether the "four step" approach used in cases such as *Hickey & Hickey and Attorney-General for the Commonwealth* (2003) FLC 93-143 still applies and the approach to s 79 generally. A court must determine that it is just and equitable to make an order before embarking on the rest of the s 79 process. It is no longer the fourth step, but a threshold or preliminary issue. The extent to which it is relevant to the rest of the s 79 process is unclear. For example, following *Stanford* what advice do you give to your client as to their likely entitlements or the likelihood of an order being made if:
    - the parties have overseas assets?
    - the parties keep significant assets in their personal names?
    - there are inheritances or are likely to be inheritances?
    - one of the parties applies for a property settlement in circumstances where the parties are legally married but separate voluntarily rather than by intention?
    - one party has significant superannuation?

There are conflicting decisions as to the effect of inadequate or incomplete advice. In *Senior & Anderson* (2011) FLC 93-470 Strickland J, in dicta, said the advice did not need to be correct for the agreement to be binding. In *Ruane & Bachmann-Ruane* [2009] FamCA 1101 Justice Cronin found that the requirement was simply for the parties to obtain legal advice. This did not mean that the advice had to be accepted and followed, or even that it had to be correct.

In *Parker & Parker* [2010] FamCA 664, Justice Strickland, dealt with an agreement with handwritten amendments. The wife was advised by her legal practitioner not to sign the agreement. She decided to sign it and met with her legal practitioner about three weeks later to do so. At that meeting, handwritten changes were made to the agreement by her legal practitioner. The agreement was executed and sent to the husband's legal practitioner. A further handwritten amendment was made. The agreement was executed by the husband and sent back to the wife's legal practitioner. The wife and her legal practitioner initialled the change but the certificate was not amended.

The wife's application to set aside the agreement was opposed by the husband. Justice Strickland found:

- When the wife initially signed the agreement, she received advice on it. The legal practitioner's file note recorded that the wife's legal practitioner went through the agreement with the wife and discussed the implications with her;
- No advice was given to the wife on the husband's amendment. The wife said she initialled the amendment in a short meeting at which no advice was given. The wife's legal practitioner said she gave the advice she was required to give. However, her file note was less detailed than the file note of the previous meeting, stating only that the amendments were discussed, agreed to by the wife and initialled;
- No further certificate of advice was given nor was the previous one amended;
- Neither the relevant terms of the agreement nor the certificate of the husband's legal practitioner positively indicated that he received the necessary legal advice *before* signing the agreement.

The husband submitted that the wife should not be able to avoid the terms of the agreement being binding on the basis of a technicality and should not be able to rely on her own legal practitioner's omission. Justice Strickland said:

> "the receipt of independent legal advice by all parties to a financial agreement is an essential requirement. Indeed, it could well be unjust and inequitable to the wife if she was bound by the financial agreement in circumstances where I have found she was not fully advised of the implications of the amendment."

He declared that the agreement was not binding on the parties. The husband appealed. Justices Coleman and May in *Parker & Parker* (2012) FLC 93-499 allowed the appeal and remitted the matter for rehearing. In three separate judgments the Full Court judges gave very different reasons, which makes it difficult to predict the future of the interpretation of s 90G(1) and s 90G(1A). In summary:

- Coleman J seemed to accept that the agreement did not comply with s 90G(1) but found that Strickland J took an overly narrow interpretation of s 90G(1A);
- May J said that Strickland J was entitled to find that the wife had not been properly advised and therefore the agreement was not binding under s 90G(1). Strickland J should have considered s 90G(1A), but he was hindered in doing so by the manner in which the case was presented;
- Murphy J dissenting found that it was not possible to find that an agreement ever existed at all. He also found (at para 215) that:

  > "the issue joined before the trial judge was not whether advice was given or whether advice was given that fits a particular description; in issue was whether the advice *actually given* was compliant with s 90G. The trial Judge found, in my respectful view correctly, that there as *an insufficiency* of evidence about the

very matter that His Honour was required to determine on this issue".

He said that the trial Judge correctly concluded that s 90G(1A) could not be used to find the agreement was binding. Relying on *Senior & Anderson* (at paras 121-2 per Strickland J with whom Murphy and May JJ agreed on this point) he rejected the argument (at para 230) that s 90G(1A) only applied to "technical" non-compliance. He dismissed the appeal.

In *Sullivan & Sullivan* [2011] FamCA 752 Justice Young was faced with a financial agreement signed by the wife prior to the marriage and by the husband subsequent to the marriage. The agreement referred to it being entered into under s 90B. The husband sought to rectify the agreement and the wife sought to set it aside.

Justice Young found that the husband did not receive the requisite advice. The agreement was not a "financial agreement", it was not enforceable, it was not binding and it was unable to be rectified. He seemed to have changed his view since *Senior & Anderson*.

In *Omar & Bilal* [2011] FMCAfam 1430 the Federal Magistrate was not satisfied that the wife had been properly advised. She had left school at age seven and was illiterate in her native language, Arabic, which she spoke with a Lebanese accent. Her legal practitioner spoke Arabic with an Egyptian accent. The wife said she had difficulty understanding her legal practitioner. Her Honour said this was unsurprising given the wife's limited education. Her legal practitioner referred her to an interpreter to translate and explain the agreement without the legal practitioner being present. Her Honour was very critical of this process. She said (at paras 65, 68–71):

- It was his duty to ensure that the wife understood his explanation of the effect of the Deed as he is the solicitor. This duty could not be abrogated to an interpreter.
- It was improper for a lawyer to certify '*I informed and gave legal advice to this person*' if that person did not understand due to a language difficulty or some other impairment what was being said to them.

The requirements of s 90G(1) were not met.

The first of the really scary cases for me was *Hoult & Hoult* (2011) FLC 93-489. This was decided by Justice Murphy who was later the dissenting judge in the Full Court in *Parker & Parker*. Justice Murphy was critical of the wife's legal practitioner's evidence:

- Not least of the concerns about her evidence was her admission that her file contained no diary notes, statements, correspondence or anything else in writing to which reference could be made in respect of the advice given to the wife. This seems to me extraordinary.

- The solicitor said that she intended to write a letter of advice to the wife after the agreement had been signed and the agreement was returned to her. Why would a Solicitor do that? I would have thought there would be some anxiety to record the advice given as soon as possible and, preferably, before the client signed the agreement. The solicitor did not do so because "time just got away from her".
- Some years had elapsed since the consultation, lasting 50 minutes which was the only consultation between the solicitor and the wife. These factors dictate the prudence of comprehensive notes or a contemporaneous letter of advice. It might also be observed that not only might those documents have assisted recall but they might have been evidence.
- The absence of notes or other documents and the gaps in the solicitor's recollection caused the Judge to have significant concerns about the solicitor's evidence.

The wife did not recall having been given any explanation about the law relating to the agreement. She said that she did not receive advice about her rights under the agreement, nor the advantages or disadvantages arising from the agreement. The wife's lawyer was unable to dispute this.

Justice Murphy found the certificate was insufficient to satisfy the onus of establishing that the relevant s 90G requirements had been met, as it appeared that the wife had not been given the requisite advice. He adjourned the matter for submissions as to whether the agreement could be “saved” under s 90K(1)(a).

In a later case, Justice Murphy found that under s 90G(1A)(c) it was unjust and inequitable if the parties were not bound by the agreement.

Jacky refer to *Hoult* Full Court

The particular difficulties of giving advice about pre-nuptial agreements were discussed by Murphy J in *Hoult & Hoult* (2011) FLC 93-489 (at para 65):

> “How is the justice and equity (in s 79 terms) of the agreement to be determined at the time it is signed if it does not become operative until separation occurs? If advice as to ‘the advantages and disadvantages’ is not to be given by reference to prospective s 79 entitlements, what criteria or reference point or points are the measure of ‘advantage’ or ‘disadvantage’? The terms of an agreement might be seen to be wholly just (or ‘advantageous’) if separation was to occur a week later and wholly unjust (or disadvantageous) if separation was to occur 25 years later. The terms of an agreement may be seen to be wholly just (or advantageous) if the parties have modest assets at the time it is made but be seen to be wholly unjust (or disadvantageous) should, 20 years later, one of the parties acquire very significant wealth. Permutations are innumerable.”

Verbal vs written advice

Written advice is preferable to verbal advice, particularly if it confirms verbal advice given before the agreement was signed by the client. Important points to note are:

- Written file notes may be insufficient to show that the advice was fully explained;
- It can be difficult to accurately record the conversation in handwritten file notes;
- A party may forget or may not properly hear or understand the advice;

- Advice may be so general that it is misleading or it may be later alleged to be so;
- A party may enter into an agreement despite advice not to do so. There may be many reasons for this including depression or guilt about a marriage breakdown, or personal or family pressures to marry. Verbal advice may not be properly heard or recalled.

A legal practitioner giving a statement of independent legal advice is not required by the Act to give a letter of advice. It is, however, highly recommended that this occur to:

- Avoid any misunderstandings about the advice;
- Protect the legal practitioner if the client claims the legal practitioner was negligent;
- Ensure that there is evidence that the s 90G(1) advice requirement has been complied with (subject to any difficulties associated with waiving legal professional privilege).

It might be wise to only accept instructions on condition that the client pays for comprehensive written advice and acknowledges that advice.

Was the advice independent?

The circumstances in which the legal advice given by a legal practitioner lacks independence are unclear. Obviously, each party must each have their own legal practitioner and they cannot be from the same law firm.

In *Logan & Logan* [2012] FMCAfam 12, Federal Magistrate Terry found that the wife had independent legal advice although there were indications that it was not. Arguably, another court might decide this case differently. Arguments against the advice being independent despite the Federal Magistrate's finding that it was, were:

- The parties jointly attended three of the wife's four meetings with the wife's legal practitioner without the husband's legal practitioner being present;
- The wife's legal practitioner had prepared wills for both parties;
- The wife's legal practitioner effected the transfer of the home to the husband at the husband's request;
- The only conference the wife had with the legal practitioner without the husband being present was the last of the four conferences, when she executed the agreement;
- The wife's legal practitioner's file note did not contain any reference to advice being given to her at the last conference and the husband did not contend that it was given at any of the previous three meetings;
- The husband ultimately paid the wife's legal practitioner's account;
- The wife's legal practitioner told her when she sought parenting advice after the agreement was signed, that he could not assist her because he had acted for both parties in the property matter.

After 23 years of marriage the wife received 15% of the pool, but in upholding the agreement, the court seemed to be swayed by a finding that the wife was not under any special disability, felt guilt about ending the marriage and that the initial approach to the legal practitioner was made by the wife.

In *Moreno & Moreno* [2009] FMCAfam 1109, the issue of the limitations placed on the wife's legal advice by the husband was not considered. Federal Magistrate Demack noted that the husband told the wife he would only pay for one hour's advice. The wife was advised that it was not to her financial advantage to sign the agreement. The legal practitioner recognised the reasons she might do so anyway. In the face of sensible advice (which the wife did not follow) and the fact that the agreement was set aside on other grounds, the limitation placed by the husband on legal advice was not important. However, in other circumstances it might arguably have assumed greater importance.

Questions to ask yourself before advising on an agreement

Matters to consider before giving legal advice include:

- Do you have sufficient experience to give the advice? If not, the client (and your professional indemnity insurers) may be better protected by a referral to a more experienced legal practitioner;
- How do you ensure that the other party, if without the resources to pay, is provided with "independent legal advice"?
- How do you ensure that the other party receives legal advice compliant with s 90G(1)?
- Can your client understand your advice? Does your client speak a different language? Is your client sufficiently literate to read the agreement and your letter of advice?
- Can the paying party put a maximum "cap" on costs to be incurred by the other party's legal practitioner? Does this amount to, or can it be a factor in, establishing duress or unconscionable conduct?

The drafting of pre-nuptial agreements is risky work for a legal practitioner. As with wills, negligence claims may still be made years later. Also like wills, there are pressures from clients to do them quickly, cheaply and without comprehensive instructions. Clients request "a simple will" or "a simple agreement" when in reality these do not, or only rarely exist.

Duty to third parties

It is possible that a legal practitioner acting for one party may have a duty of care to the other party to the agreement. The situation may be analogous to the preparation of a will and a duty of care may be found to exist.

This question arose in *Noll & Noll* [2011] FamCA 872. The wife applied to set aside a s 90C agreement on the basis that she did not receive independent legal advice. The husband applied to the Court to join the wife's legal practitioners to the proceedings. If the financial agreement was declared not to be binding or set aside, the husband wanted the wife's former law firm to be liable for any loss suffered by him. The trial judge refused the husband's application as the case did not fit the Full Court's guidelines in *Warby & Warby*

[2002] FLC 93-091 in relation to accrued jurisdiction. The husband's appeal was reported as *Noll & Noll* (2013) FLC 93-529. The Full Court did not decide whether the husband's claim against the wife's legal practitioners had merit but found that accrued jurisdiction was not attached. Apparently, the husband sought leave to appeal to the High Court but the parties resolved the dispute on a final basis by consent.

The contrary position regarding accrued jurisdiction was taken in *Ruane & Bachmann-Ruane* [2012] FamCA 369. The Full Court in *Noll* distinguished *Ruane* (at para 55):

> "The factual difference between that case and the present is that in that case a financial agreement between the parties had already been declared to be non-binding. We make no comment as to the correctness or otherwise of his Honour's decision, other than to observe that whether or not accrued jurisdiction is attracted in a particular case, will very much depend on the facts of that case."

How to avoid a claim

1. Simple! Do not act for clients entering financial agreements.

2. At the end of a relationship, use consent orders in preference to financial agreements.

3. Refer to the Act assiduously.

4. If the agreement is altered after the advice is given, updated written advice should be given. Avoid handwritten amendments. The whole agreement should be amended and reprinted. Fresh advice should be given and documented, preferably by letter.

5. Although there is no current requirement that each party be given a copy of the agreement (only copies of the two Statements), each party should promptly receive one to reduce the risk of allegations of duress and unconscionable conduct.

6. Signing the Statements of Independent Legal Advice and exchanging copies of the Statements before the Agreement is executed, may assist in proving later that the advice was provided to each party before they signed the agreement rather than after. This procedure should be documented in a file note.

7. As there may be an application to set aside the agreement and a legal practitioner may be a witness, it is important to:

   - Keep accurate, detailed contemporaneous file notes of instructions and advice;
   - Ask standard questions of the client (in addition to questions which are particularly relevant to an individual client);
   - Write a letter of advice which meets the requirements of s 90G(1) or 90UJ(1).

8. Advise the client that the terms of the agreement must be followed. If the parties do not abide by the agreement, the court may refuse to enforce it. If it becomes difficult or

impracticable to follow the agreement or the parties change their minds, the agreement should be reviewed.

9. Precedents should not be followed blindly. They are only a guide.

10. Advice must be both comprehensive and comprehensible. It must meet the requirements of the Act. At the same time, it must not be so complex that it is difficult for a client to understand or so simple as to be misleading.

11. Keep a copy of the agreement to ensure that a copy is available if the client cannot find a copy when it is needed. It may be prudent to keep a certified copy of the original agreement. The agreement, letters of advice and file notes of instructions should not be destroyed even if the file is destroyed. They may need to be referred to many years later. It may also be important to have evidence of efforts to obtain full disclosure of the other party's financial position, and the details of disclosure which was provided.

12. The letter of advice and final draft of the agreement should be sent to the client at least several days before the client executes the agreement. There is very little case law in Australia about signing an agreement close to the date of the marriage but, it is best to avoid the "ink on the wedding dress" or "ink on the tuxedo" situation.

13. The estimate of costs for the work done should take into account the complexity of the task and the risk of a later professional negligence claim. Don't under-estimate the work involved. If the client doesn't want to pay for the work to be done properly, you are better off not doing the work.

14. In acting for a female of child-bearing age you should seriously consider advising the client (and negotiating accordingly) to insert in the agreement that either the agreement terminates on the birth of a child or that different provisions in the agreement apply.

15. If the parties do not marry, the status of the agreement should be clear in the agreement. The agreement may not be able to act as both a pre-nuptial agreement and a de facto cohabitation agreement although Cronin J in *Cording & Oster* [2010] FamCA 511 found that it could. The intentions of the parties should be clear in the agreement so that the parties are not misled.

Don't forget the drafting

It is easy to be distracted by the plethora of cases dealing with the technicalities of whether a financial agreement complies with s 90G(1) and s 90UJ(1) and forget the importance of drafting the agreement properly. Common mistakes include:

- Relying excessively on precedents;
- Not giving sufficient background in the recitals;

- Drafting clauses as if they were orders;
- Omitting assets;
- Not providing for reasonably likely contingencies;
- Other gaps which could lead to an agreement being found to be uncertain.

As the Full Court said in *Kostres & Kostres* (2009) FLC 93-420 (at para 165):

> "As this case unfortunately demonstrates agreements designed to avoid costly litigation can have expensive consequences if the intention of the parties is not readily discernable from the drafting of the agreement...This makes it even more essential that the substantive clauses of such agreements are drafted with precision to ensure effectiveness, especially as they may be dealing with future acquired property or other interests in property."

Conclusion

Financial agreements were intended to provide spouses with certainty when sorting out their property and spousal maintenance disputes after separation or to cover the possibility of a separation. This has not been the case. Consent orders, at least for spouses at the end of their relationship, look to be a much more secure option.

The interpretation of s 90G and 90UJ remains unclear, the wording is complex and although the 2010 Amendments tried to move the courts away from the strict compliance interpretation of *Black & Black* (2008) FLC 93-357, that approach was not expressly rejected.

If in doubt about whether an agreement is advantageous to your client or you consider the agreement too advantageous to the other party, let another legal practitioner bear the risk.