



Representing Family Lawyers Throughout Australia

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The Hon Phillip Ruddock MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

### **Financial Agreements and Third Parties**

The recent implementation by the Government of Part VIII A of the *Family Law Act 1975* permits third parties to be effectively bound by orders of the family courts. While legislation of this type is often discussed in the context of contested matters, in reality the majority of cases settle and it is now both possible and desirable to join third parties to proceedings in order to make consent orders.

It is unfortunate that the same approach cannot be adopted in respect of matters resolved outside the court system. Before Part VIII A was inserted into the Act, maintenance agreements approved under section 87 of the Act permitted the inclusion of other parties (see definition of “maintenance agreement” in Section 4 of the Act).

Financial agreements, as presently defined, do not seem to allow for third parties to become parties to the agreement. It is the view of FLS that this situation should be remedied by legislative amendment to remove an obvious inconsistency in the approach to property proceedings.

### **The Legislative Framework**

Section 90C is analysed for the purpose of this submission, but the amendments should extend to sections 90B, 90C and 90D.

Section 90C (1) provides (emphasis added):

90C (1) If:

- (a) **the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and**
  - (aa) *at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90D) is in force between the parties with respect to any of those matters; and*
  - (b) *the agreement is expressed to be made under this section;*
- the agreement is a financial agreement.*

It is clear from the words emphasised in bold in subsection (1)(a) above that only the parties to a marriage can make a written agreement which has the qualities of a financial agreement. The only possible subsection which may be relied upon in aid of third party joinder is subsection 90C(3) which provides:

90C(3) *A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).*

There is an extensive body of authority on what the words “incidental or ancillary” mean. It is the view of the FLS that these words do not extend the operation of the section to unambiguously permit the participation of third parties in financial agreements. In the light of a recent decision by Collier J in **Ju and Ju** (No. PAF464 of 2005 delivered on 29 March 2006), where his Honour found that failure to strictly comply with the formalities prescribed by the legislation rendered an agreement invalid, the need for clarity in the legislation is imperative.

### **Circumstances Where Third Parties Need to be Joined**

Without wishing to provide an exhaustive list of circumstances, the following examples stand out to illustrate the necessity for legislative certainty:

- (a) Where assets are held in the name of a company or trust and it is sought to make the obligations to pay or transfer assets enforceable against the legal owner, it is desirable to bind that third party to an agreement. For problems associated with enforcement against trusts that are not parties to an approved Section 87 agreement, see the decision of Warnick J in **BP and KS** (2003) FLC ¶93-157.
- (b) Where a parent or other relative of one of the parties wants to lend money or make a gift to the married couple on condition that in the event of marriage breakdown the money is repaid, used in a specified way or put beyond the reach of a property settlement order.
- (c) Where spousal maintenance is to be paid from a source other than the income of the liable spouse – eg a parent’s trust.

## The Proposed Legislative Framework

FLS believes that the current legislative framework, which requires the breakdown of the marriage to trigger the operation of the property aspects of the agreement, is appropriate. It would be unfortunate if a third party could trigger the operation of a financial agreement by seeking enforcement or some other remedy before the agreement is activated. That having been said, the same principle should not apply where the third party's obligations under the agreement have been invoked (such as the above example of a parent's trust paying maintenance).

It is suggested that the appropriate outcome can be achieved by redrafting section 90C(3) and its counterparts in the other sections in the following manner (new text underlined):

- 90C(3) *A financial agreement made as mentioned in subsection (1) ~~may contain matters incidental or ancillary to those mentioned in subsection (2)~~*
- (a) *contain any other matters whether they are matters incidental, ancillary to those mentioned in subsection (2) or not; and*
- (b) *include third parties as parties to the agreement with all of the rights and responsibilities of a party to the agreement;*
- Provided that nothing in this sub-section is taken to invoke the provisions of a financial agreement before the occurrence events specified in subsection (2).*
- In this Part the expressions "third parties" or "third party" shall have the same meaning as in Part VIII AA.*

The provisions of section 90G would also need to be amended. While there are good reasons for the parties to the marriage to obtain legal advice and for an appropriate certificate to be annexed as presently prescribed, the requirement ought not to apply to the third parties, who should be assumed to be either an alter ego of one or both of the parties to the marriage, or to be competent to form the intention to create legal relations and to do so upon legal advice if they choose to seek it. It is suggested that the section be amended as follows (new text underlined):

- 90G(1) *Requirements for binding agreement*
- A financial agreement is binding on the parties to the agreement if, and only if:*
- (a) *the agreement is signed or lawfully executed by both all parties; and*
- (b) *the agreement contains, in relation to each party to the agreement marriage, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to*

*the agreement, with independent legal advice from a legal practitioner as to the following matters:*

- (i) the effect of the agreement on the rights of that party;*
- (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and*
- (iii) (Repealed)*
- (iv) (Repealed)*
- (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and*
- (d) the agreement has not been terminated and has not been set aside by a court; and*
- (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the others.*

There will also be necessary changes to other sections in Part VIIIA. The separation declaration section will need to be amended to make it clear that only a party to a marriage can sign such a declaration. Subsections which now refer to “both” parties will need to be amended to “all parties” or, where appropriate, to “both parties to the marriage”.

In the event that the Government adopts this submission, the FLS is happy to consult further on the detailed legislative changes.

### **Recommendation**

Like any contract, a financial agreement is made between consenting parties. Given the Government’s initiatives in the recent past to try and keep parties out of the court system, FLS recommends this proposal as another worthwhile tool to achieve that end.

Yours sincerely



Ian Kennedy AM  
Chair