

# BLACK WOUND BACK

Strict reading of the formal requirements of s90G of the *Family Law Act* invalidated some financial agreements. New provisions relax those rules.

The effect of *Black v Black* has been ameliorated. While many practitioners were still on the beach in early January, legislative change crept in, affecting the formal requirement for signing financial agreements under the *Family Law Act*.

The good news is that the draconian effects of *Black v Black* [2008] FamFC 7 have been relaxed; technical non-compliance with the formal certification requirements of s90G will no longer be immediately fatal to an agreement.

## Black v Black

In 2008 the Family Court Full Court decision in *Black v Black* adopted a very strict approach to the formal requirements of s90G. This opened the possibility of agreements being invalid due to minor housekeeping errors by practitioners. The effect of this decision has been dealt with legislatively. The reforms are achieved by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth), which commenced on 4 January 2010. They include the following changes:

- the formal certification procedures are adjusted and relaxed under s90G.
- the Court is given a specific discretion to uphold an agreement despite a breach of the formal requirements in s90G.

## What has changed?

Section 90G(1)(e) used to require that after the agreement was signed, the original was to be given to one party and a copy to the other. This has been repealed. This means that firms can now arrange for two original agreements to be signed and exchanged.

Section 90G(1)(c) used to require the certificates of independent legal advice to be annexed to the signed agreement. The new provisions allow the statement to be annexed, but this is not mandatory. Section 90G (1)(c) now reads:

*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).*

Although the advice itself must still be provided before your client signs the agreement, the amendments allow the solicitor's statement to be provided before or after the parties sign. This new flexibility means that procedural untidiness about the sequence of signing and exchanging statements will not automatically invalidate the agreement.

Section 90G(1)(c) does not specify whether an "original" or "copy" of the legal practitioner's statement be given to the client. It could be interpreted either way.

A further new s90(1)(ca) provides that a copy of each legal practitioner's statement be given to the other party or to their legal practitioner.

In practice, family law practitioners are already in the habit of annexing the statement to the agreement. We recommend that practitioners continue this practice because having all the relevant information together in one deed is a good way of minimising the risk associated with lost or missing deeds further down the track.

Attaching a copy of the legal practitioner's statement to the agreement and giving

the agreement to the other party will comply with s90G(1)(ca). The question is open whether s90G(1)(c) requires an original legal practitioner's statement to be given to the client. To err on the side of caution, we recommend that you give the client the original.

## The discretion

The Court now has a discretion to uphold an agreement despite a breach of the formal requirements in s90G if it is satisfied that it would be unjust and inequitable if the agreement were not binding. It does not apply to agreements that have already been terminated or set aside by a court.

## Old agreements

The reforms have retrospective effect. The new provisions apply to financial agreements made on or after 27 December 2000. This means that agreements signed since that time will receive the benefit of these relaxed requirements.

## Risk management

As outlined above, it is prudent practice to annex each solicitor's statement to the signed financial agreement certifying that independent advice has been given. This is a simple way of ensuring that all necessary documents are signed and remain together for safekeeping. Ensure that when the other party returns the executed agreement that their legal practitioner's statement has also been completed. ●

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