Law Council
OF AUSTRALIA

19 January 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

1. The Law Council of Australia welcomes the opportunity to provide comments on the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*.

2. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at **Attachment A**.

3. This submission has been prepared by the Law Council's Family Law Section (FLS). The Family Law Section is the largest professional association for family law practitioners, with a membership of almost 2,500 from all Australian States and Territories together with a number of international members. It exists to positively influence the development and practice of family law for the benefit of its members and the general community, and to promote professional excellence and influence decision making, so that the family law system in Australia is fair, respected, functional and responsive to community needs.

4. The FLS has, for over a decade, made submissions to Government and called for amendments to address inadequacies in the legislative provisions in dealing with financial agreements.

5. Many of the concerns initially raised by the FLS, came to a head in the decision of the Full Court of the Family Court of Australia in ***Black v Black*** which is referred to below.

6. The FLS notes that the post *Black* amendments to the legislation, that came into operation in January 2010, did not address many of the concerns raised by the FLS regarding the financial agreement provisions in the *Family Law Act 1975* (**the Act**).

7. Many of the issues identified by the FLS both prior to and subsequent to the *Federal Justice Amendment (Efficiency Measures) Act 2008*, were unfortunately, not dealt with and are now the subject of the amendments to be made by the terms of the amending Bill now before the House.

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8. We have set out the following for the assistance of the Committee:

- Some comments on the legislative policy behind financial agreements;
- Highlighted problems that emerged under the original legislation and the amending legislation;
- Noted some aspects of interpretation of the legislation by the courts;
- Highlighted additional areas where the FLS has proposed some amendments, but which are not captured by the Bill currently before the House.

9. It is important to note that a number of the proposed amendments are to have retrospective effect. The FLS supports the provisions of the Bill as drafted, insofar as it seeks to give certain sections retrospective operation. There are literally thousands (if not tens of thousands) of financial agreements now in existence. Retrospective operation of the relevant parts of the Bill as drafted, will help cure the problem for the public, the legal profession and the courts, of many of those agreements otherwise being declared non-binding due to relatively minor technical deficiencies. The FLS does not seek any further change to the other provisions of the Bill as drafted that do not have retrospective effect, and FLS recognises that some of the amendments can and should only apply to agreements entered into after that legislation is enacted.

10. There has been significant publicity in recent months highlighting the massive problems facing the Family Court and Federal Circuit Court due to lack of resources and under funding. It is imperative that legislative steps are taken to ensure that the workload of the courts is reduced. Giving retrospective operation to curative legislative provisions, may assist, at least in part, in keeping many parties out of the courts by giving full force and effect to the financial agreements they previously made together.

THE LEGAL FORMALITIES

11. For a financial agreement to be binding it must comply with certain formalities set out in the Act (s90G for married couples; s90UJ for de facto couples); and in particular:

- The agreement must be specified to be made under the appropriate section of the Act and be signed by both parties: s90B, C and D; s90UB, UC and UD.
- Before the agreement is signed, each party must be provided with independent legal advice.
- Signed statements of independent advice must be provided to each of the parties and exchanged.

12. These formalities have varied over time[1] and the history and impact of those changes and their effect has recently been considered and explained by the Full Court of the Family Court in ***Wallace & Stelzer*** [2013] FamCAFC 199.

13. An agreement may only be terminated by another agreement complying with all of the same formalities as apply to the initial entry into the agreement, or by a court setting it aside.

14. However financial agreements between de facto couples also terminate automatically if the parties subsequently marry: s90UJ(3).

[1] *Family Law Amendment Act 2003; Federal Justice System Amendment (Efficiency Measures Act) (No1) 2009*

LEGISLATIVE POLICY

15. The policy underlying the legislation is clear.

16. In his Second Reading speech introducing the Part VIIIA amendments in 1999, the then Attorney-General, the Hon Daryl Williams AM QC, identified the aim of such agreements as being to encourage couples to agree about how property should be distributed and spouse maintenance dealt with, in the event of, or following, separation:

> "*Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown. Financial agreements will be able to deal with all or any of the parties' property and financial resources and also maintenance. An agreement may cover how property would be divided, or how maintenance would be paid. Particular assets, such as rural properties, would be able to be preserved.*"

17. He also noted that agreements "*will be of particular benefit to people who are entering into subsequent marriages as well as to people on the land and those who own family businesses*".

18. This reflected the policy outlined in an earlier media release by the Attorney-General and Minister for Justice on 15 October 1996 that:

> *"Importantly, financial agreements can encourage people to take responsibility for their own financial affairs, rather than relying on outside intervention to resolve their affairs when the relationship breaks down"*

THE DECISION IN *BLACK* BY THE FULL COURT OF THE FAMILY COURT

19. Some of the issues around financial agreements came to a head in ***Black and Black***[2] where the husband sought to have an agreement set aside on the 'technical' ground that although a certificate of independent legal advice was attached to the agreement and the provision of advice was referred to in the preamble, the statutory requirement that "*the agreement contains ... a statement ...that the party ...has been provided ...with independent legal advice*" was not met as this was not found within the body of the agreement (just in the attached certificate) .

20. Justice Benjamin, at first instance, dismissed this, holding:

> "*The strict interpretation approach takes away from the legislative meaning and the better approach is the objective approach. The intention* [of the legislation] *is to enable ordinary people to enter into financial agreements which will deal with property and spousal maintenance and avoid the necessity of court proceedings ... Such a strict and inevitably narrow construction ... is not the legislative intent.*
>
> *The form should not defeat the substance ...* [the legislation] *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 sub-section".*

[2] [2008] FamCAFC 7; (2008) FLC 93-357

21. However the Full Court of the Family Court, on appeal, rejected the trial judge's reasoning, holding:

> "*The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy ... The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the rights of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met ... We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders."*

THE LEGISLATIVE RESPONSE TO *BLACK*

22. The Full Court decision in *Black* caused considerable consternation for the legal profession and the public. The following extracts from the Parliamentary debate reflected the degree of dissatisfaction:

> "*The decision in **Black v Black** was one which, without wanting to criticise the courts, is difficult to understand."*
>
> *"**Black v Black** … makes the whole operation of binding financial agreements more murky and more difficult."*
>
> *"**Black v Black** is one of those decisions which the Full Court of the Family Court … got wrong. I think the Judge at first instance got it absolutely right."*

23. The Government moved to attempt to rectify the situation and to restore the integrity of, and public confidence in, financial agreements. Amending provisions were included as a schedule to the *Federal Justice Amendment (Efficiency Measures) Bill 2008* which was going through Parliament at the time, and made a number of changes to the requirements for a financial agreement to be binding.

24. The amendments made in 2008 did not address all the concerns expressed by the profession, through the FLS, and endeavored to deal only with certain areas of the financial agreement legislation.

25. The then Attorney-General, the Hon Robert McClelland, when making the Second Reading Speech to the House of Representatives on 3 December 2008 said:

> *"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."*[3]

26. The amendments had bi-partisan support. They were passed into law on 7 December 2009 and commenced operation on 4 January 2010.

[3] Second Reading Speech, Wednesday 3 December 2008, House of Representatives, *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*, the Hon. Robert McClelland MP, Attorney-General of the Commonwealth

27. The amendments were introduced into the Act via Schedule 5 to the Amendment Act, and the net effect was to retrospectively validate existing agreements which might otherwise have been at risk of being set aside as a result of technical deficiencies (but not to resurrect agreements which had already been set aside by the court as technically defective).

28. The provisions of Schedule 5 of the Amending Act were, with due respect, confusingly drafted; however their meaning and effect (and the constitutionality of their retrospective impact on agreements which predate the commencement of the amendments) has now been considered and explained by the Full Court in ***Wallace & Stelzer*** [2013] FamCAFC 199.

29. The amendments also inserted new provisions [s90(G)(1A) and (1B); s90UJ(1A) and (1B)] – sometimes referred to as the "get out of jail" provisions – which empowered the court to make an order declaring an agreement binding on the parties notwithstanding that it did not comply with all of the technical requirements for a binding agreement if the 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)."*

30. The purpose of those aspects of the amendments was explained and confirmed by the Full Court in ***Kostres & Kostres*** (2009) FLC 93-420.

31. The Full Court in ***Parker & Parker***[4] has since made it clear that the provisions in sections 90G(1A), (1B) and (1C) – being "remedial" or "beneficial" – should be construed "generously"; ie, given a *'"fair, large and liberal' interpretation rather than one which is 'literal or technical'"*.[5] Their application has more recently been further considered by the Full Court in ***Hoult & Hoult***.[6]

32. These amendments – and the extension of the ability to enter into binding financial agreements to de facto and same sex partners – reflect a strong policy commitment to encouraging and enabling parties to regulate the financial aspects of their relationship outside the formal legal framework, and to free themselves from the jurisdiction of the courts by appropriately documenting their wishes and intentions subject to certain safeguards.

33. However, it must with respect be said, that inadequate drafting of legislative provisions (both originally and in the previous amending legislation) and an ongoing failure to address the underlying problems appropriately, gave rise to a further raft of problems and difficulties - in addition to the long standing issues with the legislation.

THE MATTERS REMAINING TO BE ADDRESSED

34. The FLS has welcomed the opportunity to consult and confer with the Attorney-General's Department over several years, to voice concerns in relation to the legislative provisions dealing with financial agreements. Many of these matters are now reflected in the Bill.

35. There are a number of matters where submissions made by the FLS have not been included in the Bill, and we highlight 3 in particular of them below:

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[4] [2012] FamCAFC 33)
[5] Coleman J citing *I W v The City of Perth and Others* [1997] 191 CLR 1
[6] [2013] FamCAFC 109 delivered on 26 July 2013

35.1 Whilst the provisions of s90GA and 90UJA go a long way to preventing agreements being the subject of attack in respect of the content of the legal advice provided, FLS had submitted that matters would be made clearer, by the legislation containing a **deeming provision** that once a signed statement of independent legal advice has been provided, the requirements are met and the legal advice cannot be further scrutinised as a basis for declaring an agreement non-binding.

35.2 Section 90K(1)(d) and the similar provision in the de facto sub-section of s90UM relates to circumstances where a court can set aside a financial agreement in circumstances relating to the care, welfare and development of a child. The FLS had submitted that the threshold should be uniformly lifted from the current "material change" of circumstances test, to an "exceptional circumstances" test. That would be consistent with s79A of the Family Law Act and s136(2)(d) of the *Child Support (Assessment) Act 1989*, and further lessen the likelihood of agreements being set aside by courts.

35.3 The FLS has submitted that the Outline and Object sections of the amending legislation, should recognise that financial agreements can deal with property acquired *after* relationship breakdown or divorce, and not just property and financial resources received or acquired *prior* to that time.

36. The FLS would be happy to provide further clarification if this would be of assistance to the Committee.

Yours sincerely,

S. Stuart Clark AM
President

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.