

THE RISKY BUSINESS OF ADVISING ON PRE-NUPTIAL AGREEMENTS

By Simone Herbert-Lowe



Simone Herbert-Lowe is a senior claims solicitor at Lawcover.



According to the *Family Law Act 1975* (Cth) (the Act), the parties to a marriage may enter into financial agreements in contemplation of their marriage (s 90B) during the course of the marriage (s 90C) or after divorce (s 90D). The purpose of such agreements is to oust the court's jurisdiction under s 79 to alter the property interests of the parties. Equivalent provisions for de facto relationships are set out in sections 90UB-90UD of the Act. Section 90G of the Act provides that financial agreements are binding if – and only if – they are signed by both parties, and where independent legal advice is provided 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, of making the agreement.

The exposure for lawyers in this area can arise through drafting the agreement or in providing the independent advice for either party. The agreement will not be binding where it is proven that a client was not aware of the advantages and disadvantages of entering into the agreement at that time.

An unusual feature of professional negligence claims in this area is that a lawyer who provides advice could face a claim from either his/her client or the other party, because where a document is set aside, the party who would have been better off under the agreement could argue that their loss was caused by the solicitor's failure to provide proper advice.

Some family law specialists decline to provide advice in relation to agreements under s 90B. In Lawcover's claims experience, about 70 per cent of claims against solicitors in this area are made against those in general practice rather than those who practise mostly in family law.

There is a wide range of individuals who may wish to prepare a financial agreement in contemplation of a marriage. Some couples may be marrying later in life and their future financial circumstances appear more certain. The situation is very

Snapshot

- Most claims involving financial agreements are made against solicitors in general practice.
- Prenuptial agreements are a high risk area for lawyers if detailed advice is not provided.
- Keep a record of the advice given and the basis upon which it was provided.
- If you are drafting the financial agreement document, always confirm in writing that each of the parties will need to obtain a statement of independent legal advice.

different, however, where the parties are young and intend to have children at some stage. Unless the agreement comprehensively provides for all the circumstances that could affect a court's assessment under s 79, the agreement could be set aside. The validity of an agreement is governed by the general law and equity meaning that agreements can also be set aside on many other grounds, such as where duress and undue influence were present; in the case of misrepresentation or fraud; or where the terms of the agreement are uncertain.

Factors to consider when weighing up risk

Wealthy clients sometimes engage senior counsel to draft their financial agreements and to advise. In these cases, the agreements can be very comprehensive and counsel may charge fees in the tens of thousands of dollars, reflecting both the professional time spent and counsel's assessment of the risk attached to advising on these documents.

On the other hand, lawyers in general practice can sometimes charge several hundred dollars only, perhaps because of a concern the client will be unwilling to pay more, particularly if competitors

charge low fees. But is this a sound business decision?

A financial agreement that is designed to oust the jurisdiction of the Family Court is not a document that should be quickly explained to a client. A significant amount of time will need to be spent with the client discussing the current assets of the parties, the future expectations of the parties (including plans for children), and what will occur if one of the parties becomes seriously ill etc. Regardless of whether the solicitor's role is to draft the agreement or to provide an independent certificate of advice, time will need to be taken with the client in obtaining information and explaining the advantages and disadvantages of entering into the agreement.

Lawcover has dealt with a number of claims where the parties have jointly instructed a solicitor to prepare an agreement which was then not taken to an independent solicitor for advice, and where one of the parties later made a claim against the solicitor who drafted the document for allegedly failing to explain the importance of obtaining independent legal advice. It is important for solicitors in these situations to be able to prove they advised the parties of the importance of obtaining independent advice and that they explained the consequences of not doing so.

Risk management

For solicitors who provide advice in this area, it is important to be aware of the risk that a claim may be made many years later, after the couple's relationship has broken down. The solicitor will need to demonstrate the advice that was given and the basis upon which it was provided. For this reason it is important to always:

- Make a record of the advice provided (ideally in a detailed letter), including the information and instructions provided by the client; and
- Ensure the documents are kept indefinitely. **LSJ**