**Family Court of Australia**

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| **WALLACE & STELZER and anor**  | **[2013] FamCAFC 199** |

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| FAMILY LAW – APPEAL – PROPERTY – BINDING FINANCIAL AGREEMENTS – The effect of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* (Cth) (“2009 amendments”) on financial agreements entered into between 14 January 2004 and 4 January 2010 – Whether the 2009 amendments operate retrospectively – Where it was submitted by the appellant that certain of the application and transitional provisions in Schedule 5 of the 2009 amendments (items 8 and 8A) were mutually inconsistent and so neither could apply, the effect being that the financial agreement in this case was not binding – Where the Full Court upheld the trial judge’s conclusion that items 8 and 8A could be construed in a manner which overcomes the inconsistency – Whether the trial judge erred in failing to find that the retrospective application of the 2009 amendments contravened Chapter III of the Constitution and the separation of powers doctrine as a direction by Parliament to apply the 2009 amendments retrospectively to pending proceedings – Where the Full Court held the retrospective application of the 2009 amendments did not direct the Court as to the manner and outcome of the exercise of its discretion in a particular case and thus were constitutionally valid – Whether the trial judge erred in relation to his findings as to the adequacy of the provision of legal advice to the parties – Where the Full Court found there was no proper basis to interfere with such findings by the trial judge – Whether the trial judge erred by rejecting the appellant’s claim of inducement to enter the financial agreement by fraud – Where the Full Court found the trial judge had not so erred – Whether the trial judge erred in relation to the period for which interest was payable – Where the Full Court found the trial judge had so erred – Appeal allowed in part in order to amend the period in which interest was payable – Appeal otherwise dismissed –Appellant to pay respondent’s costs of the appeal. |

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| Acts Interpretation Act 1901 (Cth)Family Law Amendment Act 2000 (Cth)Family Law Amendment Act 2003 (Cth)Family Law Act 1975 (Cth)Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009 (Cth)Matrimonial Causes Act 1959 (Cth)Family Law Rules 2004 (Cth)Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 (Cth) |

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| *Abebe v Commonwealth* (1999) 197 CLR 510*Australian Building Construction Employees & Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88*Black & Black* (2008) FLC 93-357*Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317*Felton v Mulligan* (1971) 124 CLR 367*Fender v St John-Mildmay* [1938] AC 1*Hoult & Hoult* (2013) FLC 93-546*Kostres & Kostres* (2009) FLC 93-420*Liyanage v The Queen* [1967] 1 AC 259*Logan & Logan* [2013]FamCAFC 151*Minister for Immigration and Citizenship v SZJGV and Another* (2009) 238 CLR 642*Polyukhovich v The Commonwealth of Australia and Anor* (1991) 172 CLR 501*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 104 CLR 355*R v Humby; ex parte Rooney* (1973) 129 CLR 231*Senior & Anderson* (2011) FLC 93-470*SS Hontestroom v SS Sagaporack* [1927] AC 37*Vernon & Vernon* [2010] FamCAFC 215 |

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| **Appellant:** | Mr Wallace |

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| **FIRST RESPONDENT:** | Ms Stelzer |

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| **SECOND RESPONDENT:** | Attorney-General of the Commonwealth  |

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| **File Number:** | SYC | 5433 |  | of | 2007 |

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| **Appeal Number:** | EA | 28 |  | of | 2011 |

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| **Date Delivered:** | 11 December 2013 |

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| **Place Delivered:** | Canberra |

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| **Place Heard:** | Sydney |

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| **Judgment of:** | Finn, Strickland & Ryan JJ |

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| **Hearing date:** | 4 & 5 February 2013 |

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| **Lower court jurisdiction:** | Family Court of Australia |

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| **lower court judgment date:** | 31 January 2011 |

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| **LOWER COURT MNC:** | [2011] FamCA 54 |

### REPRESENTATION

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| **COUNSEL FOR THE Appellant:** | Mr Rayment QC with Mr Washington |

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| **SOLICITOR FOR THE Appellant:** | Hall Partners |

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| **COUNSEL FOR THE FIRST RESPONDENT:** | Mr Lethbridge SC with Mr Gould |

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| **SOLICITOR FOR THE FIRST RESPONDENT:** | Searle & Associates |

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| **COUNSEL FOR THE SECOND RESPONDENT:** | Mr Orr QC |

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| **SOLICITOR FOR THE SECOND RESPONDENT:** | Australian Government Solicitor |

# Orders

1. The appeal is allowed in part.
2. Paragraph 2(i) of the orders made on 11 February 2011 be set aside.
3. In paragraph 2(ii) of the orders made on 11 February 2011 the date “4 January 2010” be substituted for the date “2 March 2010”.
4. The appeal be otherwise dismissed.
5. The husband pay the costs of the wife of and incidental to the appeal with such costs to be assessed in default of agreement.

**IT IS NOTED** that publication of this judgment by this Court under the pseudonym *Wallace & Stelzer* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

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| THE FULL COURT OF THE Family Court of Australia at Sydney |

Appeal Number: EA 28 of 2011

File Number: SYC 5433 of 2007

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| Mr Wallace  |

Appellant

And

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| **Ms Stelzer**  |

First Respondent

And

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| **Attorney-General of the Commonwealth**  |

Second Respondent

REASONS FOR JUDGMENT

# Introduction

1. This is an appeal by Mr Wallace (“the husband”) against orders made by Benjamin J on 11 February 2011 (following the delivery of reasons for judgment on 31 January 2011) which contained a declaration that a financial agreement dated 29 September 2005 between the husband and Ms Stelzer (“the wife”) was “an enforceable financial agreement” under the provisions of the *Family Law Act 1975* (Cth) (“the Act”), together with orders consequential on that declaration.
2. The proceedings before Benjamin J and before this court raised important issues relating to the operation of various amendments to s 90G of the Act. That section contains the requirements for a financial agreement to be binding, and thus oust the jurisdiction of a court to make orders in relation to the matters which are the subject of the agreement (save in the situation where a party to the agreement had become bankrupt) (s 71A of the Act).
3. Since its commencement in 2000, s 90G has been amended. The amendments enacted in 2003 and 2009 affect this case. Relevant to this appeal, these amendments changed the requirements that govern whether or not a financial agreement will be binding. It is sufficient to observe at this point that both amendments altered the terms of the independent legal advice which had to be provided to each party to the agreement and the need for a certificate or statement from the legal adviser.
4. The essential questions in this case are what were the provisions of
s 90G(1) which applied to determine whether or not the financial agreement in this case was binding, and were those provisions complied with?

# Background

1. The husband and wife met in May 1998 and began living together in about May or June that year. The husbandwas 51 years old and recently separated from his first wife. According to the trial judge, he“came into the relationship with an overwhelming pool of assets” ([310]), the precise value of which was not in evidence. The wife was divorced and had no assets of value.
2. Prior to the parties’ marriage in early October 2005, they executed a financial agreement, each in the presence of their own solicitor, respectively on 28 and 29 September 2005.
3. Recital W in the agreement provides:

W. Each party has sought, obtained and given due consideration to individual and independent advice from a separate qualified legal practitioner and prior to executing this Agreement as to matters including but not limited to:

i. The effect of this Agreement on the rights of each party to apply for property and maintenance orders under the provisions of the Act and as amended and otherwise to seek relief at law and in equity.

ii. The advantages and disadvantages at the time the advice was provided, for each party to enter into this Agreement.

As will later be seen, the matters on which legal advice had been obtained, as recorded in this statement, were the matters on which legal advice was required to be provided under s 90G(1)(b) as it stood when the agreement was executed (September, 2005).

1. Annexed to the agreement were the legal advisers’ certificates described as being for the purposes of s 90G of the Act and in which each solicitor certified:

… that, in relation to an agreement in writing proposed to be entered into between [the husband] and [the wife] (“the parties”), [each solicitor] advised [husband or wife] (“my client”)independently of the other party and before [he or she] signed the agreement as to the following matters:

1. The effect of the agreement on the rights of my client;

2. Whether or not at that time it was to the advantage, financially or otherwise, of my client to make this Agreement;

3. Whether or not, at that time, it was prudent for my client to make this Agreement; and

4. Whether or not at that time in the light of such circumstances as were at that time reasonably foreseeable, the provisions of the Agreement were fair and reasonable.

As will also later be seen, the content of these certificates did not reflect the requirements of s 90G as it stood in September, 2005, but rather the requirements of that section as it stood prior to the 2003 amendments.

1. The trial judge found the parties separated on or about 22 May 2007.
2. In August 2007 the husband commenced proceedings in this court for a declaration that the agreement is not binding and, in the alternative, an order pursuant to s 90K of the Act setting the agreement aside. Relying upon what she said was a binding financial agreement, the wife sought that the husband’s application be dismissed.
3. While those proceedings were pending, the Full Court of this court delivered its decision in *Black & Black* (2008) FLC 93-357 which held that in order for a financial agreement to be binding, strict compliance with the requirements of s 90G is necessary.
4. Because the solicitors’ certificates referred to the provision of advice in accordance with the requirements of s 90G as it existed prior to January 2004, the wife initially conceded that the agreement did not strictly comply with the requirements of the then operative s 90G. She conceded that the effect of
*Black & Black* was that the agreement was not binding and that property adjustment issues would be determined in accordance with Part VIII of the Act. In late 2008 she withdrew this concession.
5. Before the proceedings were determined, the *Federal Justice System Amendment (Efficiency Measures) Act* *(No. 1) 2009* (Cth) (“the 2009 amendments”) commenced operation on 4 January 2010. By that amending legislation Parliament responded to *Black & Black* and both prospectively and retrospectively changed the requirements to make a financial agreement binding. This was achieved through changes to s 90G and the introduction of s 90G(1A). It is how the changes to s 90G operate on financial agreements entered into before 4 January 2010 which is a focus of this appeal.
6. Becausethe issues of theconstruction and constitutional validity of these amendments were raised in the proceedings, the Attorney-General for the Commonwealth intervened in the proceedings before Benjamin J.
7. Having heard the proceedings over seven days in August and October 2010,
his Honourpublished his reasons for judgment on 31 January 2011. The orders and declaration which gave effect tothose reasons were entered on 11 February 2011 as set out below.

1. A DECLARATION that the financial agreement dated 29 September 2005 between [the husband] and [the wife] is an enforceable financial agreement under the provisions of the *Family Law Act 1975* (Cth).

2. A CONSEQUENTIAL ORDER that within twenty eight (28) days from the date of this order, the husband pay to the wife the amount of $3,150,000 plus interest calculated as follows:-

(i) From 13 July 2007 to 1 March 2010 at a rate of 6.5 per cent per annum.

(ii) From 2 March 2010 to the date of payment interest in accordance with the rate determined pursuant to the *Family Law Rules* 2004 (*Cth*).

(iii) Interest is to be calculated on $3,250,000 until the date the husband paid $100,000 to the wife (in two sums each of $50,000), including part paid pursuant to orders made by this Court in about 23 August 2010 and thereafter interest on the sum of $3,150,000 until paid.

3. Leave is given for the parties or either of them to apply in respect of order 2 in terms of the date of payment of the two amounts of $50,000. Such leave to apply for twenty (28) days from the date of this order.

4. Upon the husband complying with orders 1 and 2 above, the wife shall forthwith resign from her position as trustee and in respect of any office she holds in [S Pty Ltd], in regard to the property [at W] and the wife shall, as soon as is practicable after that time, sign all documents and do all things to assign any interest she has in that property to the husband or his nominee. The husband to be liable for and shall indemnify the wife against any taxes and/or duties arising from this order.

…

1. In his orders as entered Benjamin J also noted as follows:

…

9. Having regard to the findings set out in the reasons; the Court did not need to make an order for rectification of the agreement in accordance with the *Family Law Act* 1975 (Cth), however, had that have been necessary such an order would have been made.

10. As an alternate Order, the wife sought a declaration pursuant to s 90G of the *Family Law Act* 1975 *(Cth)* and Item 8A in Schedule 5 of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1)* 2009 in relation to the financial agreement. Had that been necessary, such an order would have been made.

1. In summary, his Honour concluded in his reasonsthat the 2009 amendments were constitutionally valid and operated to cure the defects in the agreement, and that there were no circumstances which would warrant the agreement being set aside under ss 90K and 90KA of the Act on account of fraud or unconscionable conduct on the part of the wife. His Honour also made the findings (as he was requested to do) as to how, hypothetically, he would have applied s 90G(1A)(c) of the Act and how, in the event that the agreement was held to be not binding or was set aside, he would have applied s 79 of the Act. He further determined that the husband should pay interest to the wife on the amount due to her under the agreement as from 13 July 2007.
2. The husband filed a Notice of Appeal on 7 March 2011, which has been amended twice. Before us, leave was given to the husband to rely on a Further Amended Notice of Appeal in the form attached to the affidavit of his solicitor filed 22 January 2013.
3. On condition that the husband paid the wife an amount of money, Benjamin J stayed Order 2 of his orders made 11 February 2011. In the context of an expedited hearing of the husband’s appeal against Benjamin J’s stay orders, consent orders in that application were entered on 19 May 2011. In the event, the hearing of the substantive appeal was delayed because the husband and wife variously sought extensions of time within which to comply with directions and, once the appeal was prepared, it took some time to achieve hearing dates convenient to all parties.

# The grounds of appeal

1. Counsel addressed the grounds of appeal by reference to the following common provisions and topics:
* Ground 18 contends that properly construed, the 2009 amendments could not operate retrospectively.
* Ground 1 asserts the trial judge erred in failing to find the retrospective application of the 2009 amendments offended the constitutional separation of powers.
* Grounds 2, 3, 11, 12 and 15 challenge the trial judge’s findings as to the provision of legal advice to the parties.
* Ground 4 asserts that the trial judge erred in failing to find that the financial agreement was void and unenforceable. To a considerable degree this ground overlaps with Ground 19. No oral or written submissions were directed to either ground by the husband, and therefore these grounds will not be discussed further.
* Ground 5, which challenges the trial judge’s findings about how, had the agreement not been binding, he would have applied s 79, was not pursued given that those findings became hypothetical once the trial judge declared that the agreement was binding.
* Ground 6 challenges the trial judge’s imposition of interest earlier than the commencement of the 2009 amendments.
* Grounds 7 – 10, 13 and 14 relate to ss 90K and 90KA and the trial judge’s rejection of the husband’s claim the wife induced him to enter into the financial agreement by fraud or unconscionable conduct.
* Grounds 16 and 17 concern rectification of the financial agreement and the legal advisers’ certificates. These grounds were not pursued.

# Legislative history of s 90G

1. In order to understand the 2009 amendments and the issues which arise in this appeal, it is necessary to consider the legislative history of s 90G.
2. Although at common law, intending spouses could enter into contracts with each other, contracts that provided for the possibility of future separation were void (*Fender v St John-Mildmay* [1938] AC 1 per Lord Wright at 44). Similarly, an agreement to oust the jurisdiction of the court to order the payment of spousal maintenance was regarded as contrary to public policy and void (*Felton v Mulligan* (1971) 124 CLR 367). Although the common law position was altered by the *Matrimonial Causes Act* *1959* (Cth) which, pursuant to s 87(1)(k) allowed the court to sanction an agreement between spouses which included a benefit in substitution for rights to maintenance or property under that Act, these provisions did not change the common law in relation to intending spouses.
3. Following the enactment of the *Family Law Act*, and until the introduction of Part VIIIA of that Act, s 86 enabled spouses and former spouses to make agreements which were not binding, thus preserving the court’s jurisdiction and not offending the common law rule against ouster. Section 87(1)(k) of the *Matrimonial Causes Act* was continued in s 87 of the *Family Law Act*.
4. Part VIIIA (and thus s 90G) was introduced into the Act by the *Family Law Amendment Act 2000* (Cth) (“the 2000 amendments”) which commenced operation on 27 December 2000. Part VIIIA provided for binding financial agreements between spouses as well as intending and former spouses (ss 90B, 90C, and 90D).

## The 2000 amendments – the original provisions

1. As originally enacted in 2000, s 90G(1) provided:

(1)  A financial agreement is binding on the parties to the agreement if, and only if:

(a)  the agreement is signed by both parties; and

(b)  the agreement contains, in relation to each party to the agreement, 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)  whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement;

(iii)  whether or not, at that time, it was prudent for that party to make the agreement;

(iv)  whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; and

(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 other.

1. As with all iterations of s 90G(1), the section commenced with the provision that a financial agreement is binding “if, and only if” the requirements contained in the section are fulfilled.

## The 2003 amendments

1. The *Family Law Amendment Act 2003* (Cth) amended s 90G with effect from 14 January 2004 (“the 2003 amendments”). The 2003 amendments repealed ss 90G(1)(b)(ii) – (iv) and inserted a new s 90G(1)(b)(ii). The effect of these amendments was to reduce the number of matters on which advice was to be provided to the parties from four to two, and altered the nature of one of the remaining two matters. The requirements that a financial agreement contain a statement about the independent legal advice provided to the parties and that a certificate be attached, were retained.
2. Section 90G(1), as affected by the 2003 amendments, is set out below:

(1)  A financial agreement is binding on the parties to the agreement if, and only if:

(a)  the agreement is signed by both parties; and

(b)  the agreement contains, in relation to each party to the agreement, 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

(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 other.

1. These are the provisions that were in operation when these parties signed their agreement. It will be recalled that although the statement provided by the parties (in recital W)accorded with the law as it then stood following the 2003 amendments,the parties’ legal advisers provided certificates which said the advice provided was in accordance with s 90G(1)(b) as originally enacted, rather than as required by the 2003 amendments.

## The 2009 amendments

1. The2009 amendments commenced on 4 January 2010.
2. As amended by the2009 amendments, s 90G(1) provides:

(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.

1. Compared with the original 2000 and the2003 versions of s 90G(1), the requirements for a legal adviser’s statement in the agreement that the advice had been provided on “effect”, “advantage”, “prudent”, “fair and reasonable” (2000), or “effect”, “advantages and disadvantages” (2003) no longer applied under the 2009 amendments; similarly, the requirements for an annexed certificate concerning the advice and provision of a copy of the agreement to the other side, no longer applied.
2. Rather, what was required under the 2009 amendments was that legal advice had been provided as to “effect” and “advantages and disadvantages”; the provision of a legal adviser’s statement that the advice had been provided; and a copy of that statement provided to the other side.
3. The 2009 amendments alsointroduced ss 90G(1A), (1B) and (1C), which are as follows:

(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.

(original emphasis)

1. Section 90G(1A) thus conferred a new power on the court to declare that a non-compliant agreement may nonetheless bind the parties.
2. The purpose of the 2009 amendments was explained in *Kostres & Kostres* (2009) FLC 93-420 at [165] as follows:

… The amendments were designed to overcome the effect of the Full Court’s decision in *Black & Black* (2008) FLC 93-357 where the Court applied a strict compliance test with relation to certain technical requirements for binding financial agreements made under the Act. One of effects of the amending Act is to provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding despite a failure to meet the procedural requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made) …

## Application provisions – item 8 of Schedule 5 of the 2009 amending Act

1. For the purposes of the introduction of the 2009 amendments, item 8 of Schedule 5 to the amending Actcontains “Application” provisions. Some of those provisions have no present relevance, but those that do have relevance are as follows:

(1)     The amendments made by items 1A to 7A apply in relation to financial agreements, and termination agreements, made on or after 27 December 2000.

...

(4)    For a financial agreement made before 14 January 2004, paragraph 90G(1)(b) of the *Family Law Act 1975*, as inserted by item 2 of this Schedule, does not apply and the following paragraph 90G(1)(b) of that Act is taken to have been inserted by that item and to apply instead:

(b)  before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about:

(i)  the effect of the agreement on the rights of that party; and

(ii)  whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and

(iii)  whether or not, at that time, it was prudent for that party to make the agreement; and

(iv)  whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; and

…

(6)    For a financial agreement made before the commencement of this item, paragraphs 90G(1)(c) and (ca) of the *Family Law Act 1975*, as inserted by item 2 of this Schedule, do not apply.

(7)   For a financial agreement made before the commencement of this item, paragraph 90G(1A)(b) of the *Family Law Act 1975*, as inserted by item 4A of this Schedule, does not apply and the following paragraph 90G(1A)(b) of that Act is taken to have been inserted by that item and to apply instead:

(b)  paragraph (1)(b) is not satisfied in relation to the agreement; …

## Transitional provisions – item 8A of Schedule 5 of the 2009 amending Act

1. Item8A then contains “Transitional” provisions in relationspecifically to financial agreements made on or after 14 January 2004 (the commencement of the 2003 amendments) and before commencement of the 2009 amendments
(4 January 2010).
2. The presently relevant provisions ofitem 8A are as follows:

**8A  Transitional—agreements made on or after 14 January 2004 and before commencement**

(1)      Subitems (2) and (3) apply in relation to a financial agreement made on or after 14 January 2004 and before the commencement of this item.

(2)   Paragraph 90G(1)(b) of the *Family Law Act 1975*, as in force during that period, is also taken to be satisfied in relation to a spouse in relation to the agreement if, before signing the agreement, the spouse party was provided with independent legal advice from a legal practitioner about:

(a) the effect of the agreement on the rights of that party; and

(b) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and

(c) whether or not, at that time, it was prudent for that party to make the agreement; and

(d) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.

(3)      Paragraph 90G(1)(c) of the *Family Law Act 1975*, as inserted by this Act, applies in relation to the agreement as if the reference in that paragraph to the advice referred to in paragraph (b) included a reference to the advice referred to in subitem (2) of this item.

## The interaction between items 8 and 8A

1. It will be seen that, as drafted, item 8 and item 8A have apparently inconsistent operations in relation to ss 90G(1)(b), (c) and (ca) for agreements entered into in the period after the commencement of the 2003 amendments and before the commencement of the 2009 amendments (which is the period in which the agreement in the present case was entered into) in that:
* the effect of item 8(1) is that s 90G(1)(b) as inserted by the 2009 amendments applies, so that legal advice about the effect on rights and the advantages and disadvantages must be provided; but
* the effect of item 8A(2) is that s 90G(1)(b) as in force in the period apparently from 14 January 2004 to 4 January 2010 “is also taken to be satisfied” if legal advice has been provided as to the effect on rights, advantages, whether or not the agreement is prudent, and fair and reasonable (which were the matters which were to be the subject of legal advice in the statement to be contained in the agreement under the original 2000 version of s 90G(1)(b));
* the effect of item 8(6) is that s 90G(1)(c), as inserted by the 2009 amendments (which requires a signed statement that the legal advice in relation to the effect on rights and the advantages and disadvantages has been provided) and s 90G(1)(ca) (which requires a copy of the statement to be provided to the other side) do not apply; but
* the effect of item 8A(3) is that s 90G(1)(c) (but not (ca)), as inserted by the 2009 amendments (which requires a signed statement that legal advice has been provided) applies.
1. As we said at the outset of these reasons, the questions in this case therefore are: what were the provisions of s 90G(1) which applied to determine whether or not the financial agreement in this case was binding, and were those provisions complied with?

# The trial judge’s approach to the 2009 amendments

1. In his reasons for judgment Benjamin J outlined the history of the amendments to s 90G and then, apparently relying on the submissions of the Attorney-General, stated that there were “three potential ways in which an agreement can have effect under Part VIIIA of the Act and consequently exclude the provisions of Part VIII of the Act” ([218]). His Honour can be read as finding the agreement in this case would be binding on the basis of each of the three ways which he thenoutlined ([219] to [229]).
2. The first way in which his Honour found the agreement binding (at [219] to [220]) was that, by an application of items 8(1) and (6), it was found to comply with ss 90G(1)(a), (b) and (d) as inserted by the 2009 amendments, in that:

219. …

1. It was signed by all parties.

2. 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

3. The agreement has not been terminated and has not been set aside by a court.

1. His Honour was satisfied that there was evidence of the above three matters.
2. It can be assumed that his Honour considered that item 8(6) made it unnecessary for the requirements in ss 90G(1)(c) and (ca) concerning legal advisers’ certificates to be met.
3. The second of the three ways referred to by his Honour relied on s 90G(1A) and need not be considered by us for the reason that, as earlier explained,
his Honour’s findings regarding this section became hypothetical, and no ground of appeal was directed to them.
4. The third way in which his Honour found the agreement binding (at [225] to [229]) was by an application of item 8A, in particular sub-item (2), and he expressed himself as satisfied that each of the parties was provided with advice in terms of the matters contained in sub-item (2); those matters being:

(a)  the effect of the agreement on the rights of that party; and

(b)  whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and

(c)  whether or not, at that time, it was prudent for that party to make the agreement; and

(d)  whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.

1. Although he did not say so expressly, it can perhaps be assumed that
his Honour was able to satisfy himself regarding these matters in sub-item (2) on the evidence overall.
2. In his discussion of his application of item 8A, his Honour referred to the submissions made to him about that item on behalf of the Attorney-General. We will shortly refer to those submissions.

# Ground 18: the challenge to the retrospectivity of the 2009 amendments

1. It is Ground 18 which can be seen to be the principal ground of appeal directed to his Honour’s conclusion that the agreement was binding, at least on the basis of the first and third methods relied upon by him, in that this ground asserts that his Honour erred in failing to hold that on a proper construction of Schedule 5 of the 2009 amending Act, retrospective effect was not given to the amendments made to s 90G by that Act.
2. The essential submission put in support of this ground by senior counsel for the husband was that as certain sub-items in items 8 and 8A were mutually inconsistent, neither could have any application or effect in relation to an agreement such as the present which was entered into between 14 January 2004 and 4 January 2010. There was no basis, it was submitted, for preferring one of the sub-items over the other, and therefore the inconsistent sub-items should be rejected (although no authority could be provided for theproposition that where two statutory provisions are inconsistent, both must be rejected). Thus, the agreement in this case was submitted to remain subject to the 2003 amendments, with which it did not comply, and so it should have been found to be “void” (i.e. not binding), and aswas asserted by Ground 19, his Honour erred in failing to find it was “void” (i.e. not binding).
3. In relation to the issues pertaining to Ground 18, senior counsel for the wife adopted the submissions of the Attorney-General (appeal hearing transcript,
5 February 2013, p. 99, lines 35-36).
4. The Attorney-General made no submission in relation to the merits of the case, with the submissions beinglimited to the construction, and so far as necessary, the constitutional validity of the 2009 amendments. The Attorney-General acknowledged that there were inconsistencies between items 8 and 8A, but submitted that according to the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, apparently inconsistent statutory provisions must be construed so that they are consistent with the language and purpose of the statute as a whole. The passage from the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky* which was relied on by the Attorney-General was as follows:

69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalianos* , Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

(footnotes omitted)

1. Senior counsel for the Attorney-General also referred us to *Minister for Immigration and Citizenship v SZJGV and Another* (2009) 238 CLR 642,where in considering the approach which could be adopted where the literal meaning of the statute produced an irrational result, French CJ and Bell J said (at [9]):

… If the language be so intractable that it requires a word or words to be given a meaning necessary to serve the evident purpose of the provision, then such a course may be permissible as a “realistic solution” to the difficulty. In the 12th edition of Maxwell's On the Interpretation of Statutes the approaches which can be taken in dealing with statutory language whose ordinary meaning is plainly at odds with the statutory purpose were explained:

“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning.”

(footnote omitted)

1. In the discussion which follows we will explain more fully the construction of items 8 and 8A offered by the Attorney-General having regard to these principles; it is sufficient at this point to say that it was the construction adopted by the trial judge.

## Discussion of Ground 18:

1. As the provisions of certain sub-items of items 8 and 8A can be said, in the language of s 15AB of the *Acts Interpretation Act 1901* (Cth), to be “ambiguous” or “obscure”, the court is entitled under that section to have regard to the legislative history of those sub-items.
2. When the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 (Cth) was first introduced the proposed changes to
ss 90G(1)(b),(c) and (d) were to apply to all financial agreements made from the commencement of Part VIIIA, excluding agreements that had been set aside by a court.
3. However, upon reaching the Senate, the 2008 Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs. As the Senate Committee Report dated February 2009 reveals, in response to concern raised by the Family Law Section (“FLS”) of the Law Council of Australia about the effect of the retrospective amendments contained in the Bill, the Senate Committee requested the Attorney-General to reconsider the amendments. Relevantly, the Senate Committee Report referred to the FLS submission where the effect of the draft Bill on existing agreements was addressed:

…

1. In relation to validation of existing agreements [item 8 of Schedule 5 of the Bill] FLS is concerned to ensure that any agreement which is currently binding under the existing law (save for technical defects, for example, as identified in *Black and Black*) is not inadvertently rendered invalid as a consequence of the proposed amendments. As currently drafted, all agreements will be required to conform with the amending legislation.
2. FLS is also concerned to ensure that agreements made between 27 December 2000 and 13 January 2004 are not inadvertently rendered invalid by the proposed amendments. At the time that Part VIIIA was introduced into the FLA, section 90G provided, inter alia, that the independent legal advice addressed whether or not it was “..to the advantage, financially or otherwise, of that party to make the agreement.” Section 90G was amended in 2004 to the effect that the independent legal advice addressed, inter alia, “the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement”. In keeping with the policy intention of the amendments proposed to section 90G in the Bill to relax the requirements in relation to evidence (and to ensure that agreements prior to 14 January 2004 are not inadvertently rendered invalid), FLS **recommends** that the words “***and about the advantages and disadvantages***”, be removed from section 90G. These words serve no useful purpose, but if left in may provide potential for disputes of a technical nature. (original emphasis)

(footnote omitted)

1. When the Bill returned to the House of Representatives, item 8 had been changed to its current form. To the original item 8, which was identical to the current items 8(1) and (2), the current items 8(3)-(7) were added. As originally presented, the Bill did not contain item 8A, with that item also inserted following referral to the Senate Committee.
2. In the supplementary explanatory memorandum the Attorney-General explained:

20. Subitems 8(4) and 8(5) will ensure that the retrospective application of the amendments proposed by the Bill will not invalidate financial agreements and termination agreements which complied with the requirements for independent legal advice in the *Family Law Act 1975* prior to 14 January 2004 …

21. Subitems 8(6), 8(7), 8(8) and 8(9) will provide for the circumstances in which a financial agreement or a termination agreement made before the commencement of item 8 will bind the parties to the agreement ...

1. In relation to item 8A, the supplementary explanatory memorandum said:

22. This amendment inserts new item 8A into Part I of Schedule 5 to the Bill which will provide for **additional circumstances** in which a financial and termination agreement made on or after 14 January 2004 and before commencement of item 8A will bind the parties to the agreement. Amendments to the Family Law Act 1975 which commenced on that date changed the matters about which spouses had to obtain prior independent legal advice for the agreement to bind them. Some legal practitioners continued to rely on old precedents relating to the provisions of the Act as they stood before 14 January 2004 for agreements made for some time after that date. Subitems 8A(2), 8A(3), 8A(5) and 8A(6) will provide that the agreement binds the spouses if the prior independent legal advice obtained by one or both spouses was **about matters on which advice was required under the Act to be obtained before 14 January 2004** ...

(our emphasis)

## The item 8(1)/item 8A(2) inconsistency: the matters to be the subject of advice

1. It is apparent that both items 8(1) and 8A(2) apply to financial agreements made on or after 14 January 2004 and before commencement of the 2009 amendments. In his challenge to the operation of the amendments as they relate to agreements entered into in that period, senior counsel for the husband first focused on the effect of the words “as in force during that period”in item 8A(2) on the operation of s 90G(1)(b).He submitted that the failure to use the same words used in items 8(6) and (7) and item 8A(3), namely, “as inserted by this Act”, evidenced a deliberate intention against application of the new
s 90G(1)(b) to such agreements. That is, the literal meaning of the words in item 8A(2) is that for such an agreement to be binding, s 90G(1)(b) as in force between 14 January 2004 and 3 January 2010 must be complied with. However, given that by item 2 of Schedule 5 that provision was repealed and by item 8(1) the new s 90G applies to all financial agreements the two outcomes are incompatible, and according to senior counsel for the husband both must be struck down as “invalid”.
2. The words “is also” in item 8A(2) (which were relied on by the Attorney-General) were said not to help either and do no more than apply s 90G(1)(b) as it operated before 14 January 2004 to agreements entered into between
14 January 2004 and 4 January 2010.
3. The Attorney-General submitted that there were two possible constructions of item 8A(2) against the background of item 8(1). The construction preferred by the Attorney-General springing from the legislative intention, is that the words “as in force during that period” is a drafting error which should be rectified by their replacement with “as inserted by item 2 of this Schedule”. Although we agree this would accord with the legislative intention, we are not satisfied that this construction is required to overcome the inconsistency between item 8(1) and item 8A(2).
4. The second construction offered by the Attorney-General to overcome this inconsistency is that the use of the words “is also taken to be satisfied” in item 8A(2) points to the relationship between item 8(1) and item 8A(2), being that item 8A(2) operates in addition to item 8. This is consistent with the explanation contained in the supplementary explanatory memorandum that the new item 8A “will provide for additional circumstances”. This is the construction which we prefer. Construed in this manner there is no inconsistency between items 8(1) and 8A(2). It can also be seen that the amendments build upon each other and operate harmoniously.

## The item 8(6)/item 8A(3) inconsistency: the need for certificates or statements

1. There is no doubt that a literal reading of item 8(6) and item 8A(3) results in legislative provisions which are ambiguous and mutually inconsistent, as was common ground. First, item 8A(3) provides that in relation to an agreement executed between 14 January 2004 and before 4 January 2010, the new
s 90G(1)(c), which requires signed statements from the legal advisers, will apply. Read in this manner, item 8A(3) is in conflict with item 8(6) which provides that the new s 90G(1)(c) does not apply to financial agreements made before the commencement of the 2009 amendments.
2. Secondly, the ordinary reading of item 8A(3) appears to retrospectively apply to s 90G(1)(c) (but not s 90G(1)(c) and (ca)) as amended by the 2009 amendments. This would result in the retrospective imposition of a requirement which did not apply at the time an agreement was entered into, i.e. the provision of a statement that the required legal advice had been provided to the parties to the agreement. Yet, it is clear that the purpose of item 8A is to offer a solution for parties who after the 2003 amendments commenced, used certificates which operated before the date, and the retrospective imposition of an additional requirement would be entirely at odds with this purpose.
3. It was argued by the Attorney-General that the provisions evidence a drafting error which could largely be resolved if they are construed in a manner consistent with the language and purpose of all the provisions of the statute (*Project Blue Sky Inc v Australian Broadcasting Authority; Minister for Immigration and Citizenship v SZJGV*). In support of this argument, senior counsel for the Attorney-General compared items 8(6) and 8(7). It will be recalled that item 8(6) excluded the new ss 90G(1)(c) and (ca) to agreements made before the commencement of the 2009 amendments. Item 8(7) also operates retrospectively so that the new s 90G(1A)(b) is the only provision to which reference is made. In other words, these items do precisely the same thing; item 8(6) says that the new ss 90G(1)(c) and (ca) do not apply and item 8(7) says that for the purpose of s 90G(1A) there is to be no reference to
ss 90G(1)(c) and (ca). We agree with the Attorney-General that this reinforces the view that item 8A(3) is a drafting error.
4. We agree with senior counsel for the Attorney-General that the proper construction of the provisions is that item 8A(3) has no effect and is to be read as being omitted.
5. Without expressly saying so, the trial judge agreed with the Attorney-General that item 8A(3) achieved an incongruous result and should be read as having no effect.
6. Before leaving this topic, we mention that in *Senior & Anderson* (2011) FLC 93-470, Murphy J offered a possible interpretation of the inconsistency between items 8(6) and 8A(3). Before us senior counsel for the Attorney-General (with whom counsel for the other parties agreed) submitted that
his Honour’s interpretation could not be accepted in that the effect of item 8(6) was ignored and effect given to item 8A(3) only. As senior counsel for the Attorney-General demonstrated, it is item 8(6) rather than item 8A(3) to which effect should be given.

## Conclusion in relation to Ground 18

1. The trial judge was correct in holding that (subject to the required evidence being available) the agreement in this case would be a binding financial agreement on the basis of either of the following two approaches:
2. By the application of item 8, in that pursuant to 8(1) the agreement complied with ss 90G(1)(a), (b) and (c) as inserted by the 2009 amendments because:
* the agreement was signed by all parties;
* 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;
* the agreement has not been terminated and has not been set aside by a court;

and pursuant to item 8(6) it was unnecessary for the requirements of
ss 90G(1)(c) and (ca) concerning legal advisers’ certificates to be met.

1. By the application of item 8A in that the agreement complied with the requirements of sub-item 8A(2) because the parties had been provided with legal advice about the following matters as specified in that sub-item, being:
* the effect of the agreement on the rights of that party;
* whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement;
* whether or not, at that time, it was prudent for that party to make the agreement;
* whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable;

and there was no necessity for compliance with sub-item 8A(3).

1. Asearlier explained, by Ground 18 the husband argued that the trial judge fell into error by failing to hold that the 2009 amendments to s 90G did not operate retrospectively. For the reasons given, we disagree, and it follows that Ground 18 fails.

# Ground 1: The Constitutional validity of the retrospective provisions

1. As a consequence of our decision on the construction issue, the husband’s challenge to the constitutional validity of s 90G(1) as applied by items 8 and 8A must be considered. By Ground 1 the husband argues that the trial judge erred in failing to find that in so far as the *Federal Justice Systems Amendment (Efficiency Measures) Act (No.1) 2009* (Cth) purported retrospectively to alter the conditions under which a financial agreement between the parties to a marriage is valid and binding, it contravened Chapter III of the Constitution, and thus was not a valid enactment of the Commonwealth Parliament.
2. It is accepted that, but for the effect of the 2009 amendments, the financial agreement in this casewas not a binding financial agreement. Thus, until the 2009 amendments commenced, this court had jurisdiction to make a property order under s 79 of the Act in these proceedings. According to the husband, the effect of the 2009 amendments was an impermissible direction by Parliament to the court to apply the retrospective provisions of items 8 and 8A. The husband argued that this direction constituted an infringement of the separation of powers doctrine, being an interference with the independence of a Chapter III court. It was argued that the amendments expressly applied to pending proceedings and in this respect they are beyond power. It was appropriately conceded though that Parliament has the power to make retrospective legislation which, had there been no litigation pending, may have deprived the husband of the argument now advanced.
3. *Liyanage v The Queen* [1967] 1 AC 259 is the seminal authority about whether retrospective legislation affecting issues currently before courts is invalid. In that case, on separation of powers grounds, the Privy Council held that a law purportedly passed by the Parliament of Ceylon was invalid as an unconstitutional legislative direction. That retrospective legislation was directed to the trial of “particular prisoners … charged with particular offences on a particular occasion”. In the context of constitutional arrangements which protected the separation of legislative and judicial functions, this constituted an infringement by the legislature of judicial powers vested only in the judiciary. In so finding the Privy Council regarded as significant the ad hominem nature of the legislation and its retrospectivity, which was clearly aimed at the precise issues in the pending litigation and in a number of respects the judges were deprived of their judicial discretion.
4. The Privy Council explained that what would or would not constitute an impermissible interference with judicial power must be decided on a case by case basis. Factors to be considered include “the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings” (290).
5. The issue of legislative interference in pending cases was considered bythe High Court in *Australian Building Construction Employees & Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88. In reliance on
*R v Humby; ex parte Rooney* (1973) 129 CLR 231, the High Court said (96 – 97):

It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.

“Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action.”

…

It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings…

1. The issue was considered further by the High Court in *Polyukhovich v The Commonwealth of Australia and Anor* (1991) 172 CLR 501, a case which concerned the retrospective operation of criminal legislation. There, Deane J referred to the rule of construction that it is to be presumed Parliament does not intend that a statutory provision which affects rights or liabilities should operate retrospectively. Deane J went on to say, at 608:

… Nonetheless, the focus of civil litigation is upon the determination of rights and liabilities under the law as it exists at the time of the proceedings. Civil legislation which operates retrospectively in the sense that it extinguishes or alters pre-existing rights or liabilities or deems rights and liabilities which it creates to have existed at an earlier time may, depending on the circumstances, be susceptible of legitimate criticism as unfair or unjustified. Such legislation will not, however, contravene the doctrine of separation of powers merely because it retrospectively creates, extinguishes or alters civil rights and liabilities or because it requires the courts to recognise and enforce, in subsequent civil litigation, the retrospective operation of its provisions (cf., e.g., *Reg. v. Kirby; Ex parte Boilermakers’ Society of Australia* (79))…

1. It is uncontroversial that the Commonwealth Parliament has the power to define, including by alteration, the jurisdiction of a federal court (s 77(i) of the Constitution; *Abebe v Commonwealth* (1999) 197 CLR 510).
2. The question for determination here is whether the retrospective effect of the 2009 amendments contravenes Chapter III of the Constitution as an impermissible usurpation of judicial power.
3. Senior counsel for the husband and the Attorney General made similar arguments to the trial judge as advanced before us. The trial judge accepted the arguments advanced by the Attorney-General as do we. This retrospective legislation did not direct the court as to the manner and outcome ofthe exercise of its discretion in a particular case. The effect of the 2009 amendments was to establish a general legal regime concerning financial agreements which applied to all relevant individuals. Thus, although the husband was affected by the legislation, it was not directed at him and is not ad hominem in nature.
4. From commencement, Part VIIIA provided the requirements for a binding financial agreement and for a court to resolve disputes as to whether those requirements have been met. As part of the general legal regime concerning financial agreements, the subject legislation did no more than permissibly adjust those requirements. In our view, the retrospective adjustment of the
s 90G(1) requirements did not result in an interference with the judicial process or compromise the court’s capacity to function in accordance with accepted notions of judicial power. Contrary to the submissions advanced by the husband, the 2009 amendments do not impermissibly interfere or affect the court’s jurisdiction. The court retained jurisdiction in relation to Parts VIII and VIIIA of the Act and would itself determine how those provisions were to be applied.
5. Ground 1 therefore fails.

# Grounds 2, 3, 11, 12 and 15: The legal advice provided in this case

1. Grounds 2, 3, 11, 12 and 15 challenge the trial judge’s findings in relation to the adequacy of the provision of legal advice for the purposes of s 90G(1)(b).
2. In essence, these grounds challenge the trial judge’s findings of fact and his ultimate conclusion at [265] to the effect that he was satisfied that the solicitors provided each of the parties with the advice required by the operative s 90G(1)(b). Ultimately, the process by which his Honour reached that conclusion resulted from his acceptance of the evidence given by the two solicitors, relevantly in relation to the husband, in preference to his evidence.
3. Before we commence our consideration of these grounds, it is necessary to refer to findings made by the trial judgein relation to the factual background to the execution of the agreement, following which we will discuss the relevant terms of the agreement.
4. First, however, as to credit, the trial judge concluded that the wife’s evidence was generally reliable. On the other hand, the husband was found to be an unimpressive witness who had a tendency to reconstruct his evidence to suit his case ([40] and [56]).Thus his Honour treated the husband’s evidence with caution ([87]), and in relation to matters such as the parties’ living arrangements preferred the wife’s evidence ([146] and [157]. His Honour’s credit findings were not challenged.
5. Sometime during 2004 the husband settled his property dispute with his first wife, as a consequence of which he transferred property and paid her about
$7 million ([160]).
6. The trial judge found that the husband initiated discussions with the wife about a pre-nuptial agreement about six to twelve months prior to the agreement being signed. That is, negotiations commenced sometime between September 2004 and April 2005 ([73] and [160]). The husband’s evidence was that “[o]ne of the reasons for those discussions was that I had been through a protracted and messy property settlement with my former wife” ([67]).
7. Relationship difficulties arose in around June-July 2005 such that for about three to five weeks the parties were in conflict and the husband lived primarily at W and the wife primarily at M. This situation was resolved by late July or early August 2005 following which they made arrangements for an October 2005 wedding ([159]).
8. In early August 2005, the husband instructed a solicitor, Mr Sanews, to prepare a pre-nuptial agreement ([161]). Mr Sanews sent the first draft of the agreement (“husband’s draft”) to the wife in September 2005, with she in turn retaining Mr Smith, who is a solicitor, in relation to it ([138] to [139]). The draft is headed “Binding Financial Agreement”. Essentially, the husband proposed that the wife would become a joint owner (with him) of a property at H and, subject to provisions in relation to mortgages secured against that property, she would receive “the equity in [H] in full satisfaction of all claims she might have against the husband”. The trial judge was satisfied that the effect of the husband’s agreement was that the wife would receive assets worth approximately $3.25 million ([345]). The unsigned certificates attached to this draft complied with the s 90G(1)(c) requirement as then in operation.
9. In response to Mr Smith’s advice that the complex nature of the husband’s draft made the amount the wife would receive uncertain, she instructed him that in the event of divorce she would like to receive $1.5 million. Mr Smith said she was entitled to a larger amount, which resulted in instructions to him to make a counter-offer for a payment of $3.5 million. He redrafted the agreement (“the wife’s draft”), with this version of the agreement submitted to Mr Sanews by email on 23 September 2005 ([60]). This was one week prior to the date upon which the parties were scheduled to marry. The wife’s draft attached certificates that referred to advice being given but in accordance with the pre 2004 s 90G(1)(b) requirements, and thus the certificates did not comply with
s 90G(1)(c) as then in operation.
10. The terms were eventually agreed and the wife executed the agreement in the presence of Mr Smith on 28 September 2005. The solicitor executed a certificate which certified that he gave advice in accordance with pre 2004
s 90G(1)(b) requirements. The husband executed the agreement in the presence of his solicitor on 29 September 2005. His solicitor signed a certificate in identical terms to the one executed by Mr Smith. A typographical error in clause 25 was corrected in relation to which the solicitors exchanged initialled changes to the agreement on 5 and 6 October 2005. In the agreement both parties acknowledged in recital W that they had been provided with advice in accordance with the then operative provisions of s 90G(1)(b).
11. The parties married in early October 2005.
12. Turning then to the terms of the agreement, and because of its importance, recital W is here repeated:

W. Each party has sought, obtained and given due consideration to individual and independent advice from a separate qualified legal practitioner and prior to executing this Agreement as to matters including but not limited to:

i. The effect of this Agreement on the rights of each party to apply for property and maintenance orders under the provisions of the Act and as amended and otherwise to seek relief at law and in equity.

ii. The advantages and disadvantages at the time the advice was provided, for each party to enter into this Agreement.

1. Paragraphs 1-3 of the agreement record that the agreement covers all financial matters between the parties excluding child support. Between paragraphs 4 and 25 the agreement deals with the acquisition and distribution of separate and shared property. At paragraph 25, the agreement records that in the event of the breakdown of the marriage, up to and including four years, the wife will receive $3.25 million and, otherwise $4.25 million.
2. The parties and their legal advisers signed each page of the agreement and initialled handwritten amendments to paragraphs 23(b) and 25.
3. Annexures “A” and “B” to the agreement are the legal advisers’ certificates, which are described as being s 90G certificates. In their respective certificates, both solicitors certified:

… that, in relation to an agreement in writing proposed to be entered into between [the husband] and [the wife] (“the parties”), [each solicitor] advised [husband or wife] (“my client”) independently of the other party and before he or she signed the agreement as to the following matters:

1. The effect of the agreement on the rights of my client;

2. Whether or not at that time it was to the advantage, financially or otherwise, of my client to make this Agreement;

3. Whether or not, at that time, it was prudent for my client to make this Agreement; and

4. Whether or not at that time in the light of such circumstances as were at that time reasonably foreseeable, the provisions of the Agreement were fair and reasonable.

1. Thus, the certificates certified to the provision of advice in accordance with the originally enacted s 90G(1)(b) but not in accordance with the 2003 amendments which governed the agreement when it was signed. On the other hand, recital W records that the parties received advice in accordance with the then operative form of s 90G (2003 amendments). It follows that recital W and solicitors’ certificates are potentially in conflict. As has already been discussed, and without recourse to s 90G(1A), there are two methods by which the agreement will be binding. Because neither method requires a certificate or solicitor’s statement, the solicitors’ certificates might be considered irrelevant. However, the certificates provide contemporaneous evidence that each party received advice and as will be seen, bolster and do not detract from the wife’s case.
2. The person who seeks to establish that a financial agreement is binding carries the onus of proof (*Hoult & Hoult* (2013) FLC 93-546). Applied to the facts in this case, this means that it fell to the wife to establish that the parties received legal advice in accordance with s 90G(1)(b). As a consequence of recital W and by tendering the signed agreement and the certificates, prima facie the wife was able to discharge her legal onus.
3. However, once the husband put in issue whether the required legal advice had been provided, there was an onus on him to adduce evidence which would disprove or at least throw into doubt the inference or conclusion to be drawn from recital W and the certificates (being that legal advice had been given) (*Hoult* at [62] and [261]). Therefore, it was necessary for the parties to give evidence about the provision of advice, and evidence was also adduced from their respective solicitors.
4. Although there appeared to be some suggestion in the husband’s case before us that in a case such as the present the court is required to consider the accuracy of the legal advice provided, we did not understand that issue to be ultimately pressed. But in any event we note that in the recent Full Court decision of
*Logan & Logan* [2013]FamCAFC 151, and relying on *Hoult*, it was held that the only enquiry necessary is as to whether advice was given, and not as to the content of that advice.
5. Turning then to the findings of the trial judge in relation to the evidence given by the solicitors.
6. Summarised, the findings made by his Honour in relation to the evidence of the husband’s solicitor are as follows:
* the husband instructed his solicitor in early August 2005 to prepare a draft financial agreement [59];
* the agreement was prepared in accordance with the husband’s instructions and involved an adjustment to the wife of about $3.25 million [59];
* the husband’s agreement “reflected significant input by the husband” [61];
* “[m]uch of the information contained in the draft agreement would not have been available to [the husband’s solicitor] without the husband’s input and specific instructions” [61];
* there were discussions between the husband’s solicitor and the wife’s solicitor in relation to the husband’s draft, which resulted in a draft prepared by the wife’s solicitor [60];
* the agreement drafted by the wife’s solicitor “… was the subject of intense scrutiny by the husband. The draft with the husband’s comments on them showed that the husband was very concerned about the content of that Agreement” [62];
* the husband read the agreement and was familiar with the substance of it [62]; and
* the husband’s solicitor had at least three meetings in relation to the agreement with the husband and a number of discussions [103].
1. The trial judge found that the legal work associated with the agreement was solely undertaken by the husband’s solicitor who made handwritten notes of his discussions with the husbandand that in relation to the matter generally, the husband’s solicitor’s recollection “was reasonably good” [105]. Because the solicitor’s file could not be located his handwritten notes were unavailable. Those records stored electronically were produced and assisted the solicitor’s recollection of his consultations with the husband.
2. His Honour found that the solicitor provided legal advice to the husband both generally and specifically [106]. In particular, he advised that the husband was wise to enter into the agreement and that there were advantages to him. He told the husband that he thought the amount to be paid to the wife was very high but that the husband could rely on the document and be successful in holding the wife to it [106].
3. As can be seen, the trial judge examined the evidence of the husband’s dealings with his solicitor in relation to the agreement before it was signed, and it was the totality of their dealings and not merely the occasion upon which the agreement was signed, that underpinned his Honour’s findings ([59]-[64]). There is no proper basis upon which we could interfere with his Honour’s findings about what passed between the husband and the solicitor.
4. It was however submitted by the husband that when his Honour took into account that the husband signed recital W, he erred. This challenge is made on the basis that recital W is no more than an admission by a lay person about matters of mixed fact and law. It follows, that such an admission could not provide the basis for a finding by the court (*Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317).
5. The words used in recital W do not require the application of a standard fixed by law in order to gain meaning. In our view, they constitute an admission as to a matter of fact, the fact being the provision of legal advice in the manner and of the type described. It follows that the words used in recital W constituted admissible evidence against the husband (and the wife) of the truth of the matters there stated. As a consequence, his Honour was entitled to take into account, in the manner he did, the terms of recital W in forming his view that the husband (and the wife) had been provided with the advice referred to therein.
6. We turn then to the other evidence which his Honour took into account in finding himself satisfied that the wife had been provided with the required advice.
7. The wife’s solicitor gave oral and written evidence which his Honour accepted. The wife’s initial consultation with her solicitor lasted two hours. During that consultation the solicitor provided the wife with advice in relation to the agreement following which he negotiated with the husband’s solicitor on her behalf ([141]). He was able to recall some of the advice he gave to the wife and deposed to giving her advice in relation to the effect of the agreement on her rights and the advantages and disadvantages at the time the advice was given of her entering into the agreement. He failed to appreciate that the certificate which he signed differed to the one originally provided but, because of the advice he had given, he would not have hesitated to sign a certificate in the correct form. The wife gave evidence to the effect that she received the advice which her solicitor said he provided. Thus the trial judge had evidence that advice was provided in accordance with recital W and the two forms of certificates. We would not interfere with the trial judge’s decision to accept the wife and her solicitor’s evidence.
8. It follows that Grounds 2, 3, 11, 12 and 15 fail.

# Grounds 7-10, 13 and 14: Sections 90K(1) and 90KA – is the agreement tainted by fraud or unconscionable conduct?

1. This issue is raised in Grounds 7-10, 13 and 14, and the husband submits that his Honour erred in finding no basis for the husband’s assertion that the wife “induced the husband to enter into the financial agreement by fraud or unconscionable conduct.”
2. The husband had sought that he was entitled to equitable relief as a result of the wife’s conduct, and that the agreement be set aside pursuant to ss 90K(1) and90KA of the Act. Those sections provide as follows:

**90K Circumstances in which court may set aside a financial agreement or termination agreement**

* + - 1. A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or

(aa) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(ab) a party (the agreement party ) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement--a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

 …

**90KA Validity, enforceability and effect of financial agreements and termination agreements**

The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

(a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and

(b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and

(c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

1. The specific conduct of the wife alleged by the husband to be actionable was a statement that “she intended the marriage to be a long one, that she loved him and wanted to have his children”. It is said that the wife “never had such intention”, and instead “she wanted to have the benefit of the financial agreement”.
2. In order to address this claim it was necessary for his Honour to make certain findings of fact not only as to the lead up to and the making of the agreement, but also as to what occurred thereafter. His Honour did this and invariably accepted the evidence of the wife in preference to that of the husband.
His Honour then concluded as follows:
3. I do not accept that the husband was induced by the wife to enter into the Agreement or the marriage. The husband had wanted a financial agreement and had instructed his legal practitioner to prepare that agreement. He did that because of the events surrounding his property settlement with his former wife. He wanted both the agreement and the marriage, and he was successful in those endeavours.
4. The husband asserts that the wife set up the arrangements and made false promises of love and a desire for children. The wife’s behaviour was not indicative of fraud, it was indicative of a prudent person seeking legal advice conscious of her own needs. I do not accept that it was a pre-determined attempt to obtain one half of [H property].
5. Senior counsel for the husband submitted that it was sufficient evidence to make probable the husband’s version. I do not agree.
6. The Agreement, sensibly, had provisions in it in the event that the marriage was to end in the short to medium term or in the medium to longer term. I am conscious of the evidence of the witnesses supporting the husband’s case. I am not satisfied that that evidence establishes the basis for the equitable relief sought by the husband. Some of the evidence is taken out of context and a number of witnesses are strongly aligned to the husband.
7. I do not accept the husband’s assertions that the wife’s discussions about children and love were representations which were made in the context of fraud, duress or unconscionable conduct. They were simply the discussions that couples in close relationships have from time to time. The wife was questioned about the timing of the purchase of [H property] and the possible sale of [M property]. Her recollection in regard to some aspects of the timing of events at that time, 2005, was faulty, but that did not impeach her evidence. It is clear that the husband commenced negotiations to purchase [H property] in about May 2005 although the purchase was not completed until some time after the parties married. I find that the wife participated in some of the arrangements for the sale of [M property]. I am not satisfied that these facts establish the unconscionable conduct, fraud or equitable fraud as asserted on behalf of the husband. I do not find that the wife had no regard to conscience. I am not satisfied that her behaviour was in any way irreconcilable with what is right or reasonable.
8. We are not persuaded that the trial judge erred in his assessment of the evidenceof the parties and his consequent findings of fact. There is of course a presumption that a decision of a trial judge is correct, and the onus is on an appellant to demonstrate that the trial judge made an error. This is always a difficult task where the challenge is to a trial judge’s findings on credit, because they enjoy advantages that an appeal court lacks. Lord Sumner in
*SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47 said this:

… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probability of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge’s conclusions of fact should, as I understand the decisions, be let alone.

(See also the analysis of Coleman J in *Vernon & Vernon* [2010] FamCAFC 215)

1. The husband’s senior counsel in his written submissions laid great store in the evidence of three witnesses (Mr Q, Ms N, and Mr W) as supporting “the inference that the [wife] intended her marriage to the [husband] to last no longer than was necessary to obtain the financial benefits in the agreement, and that she procured the agreement as a condition of the wedding, keeping her real intentions from the [husband].” However, his Honour not only made specific findings about the evidence of these witnesses (see [113]-[119], [120]-[124] and [88]-[93]), but as is apparent his Honour was not satisfied that that evidence “establishes the basis for the equitable relief sought by the husband”.
2. It was open to his Honour on the evidence before him to make these findings, and to repeat, we have not been taken to anything which satisfies us that
his Honour erred in his assessment of the credibility and reliability of the evidence of the parties or these witnesses.
3. In these circumstances there is no merit in these grounds of appeal.

# Ground 6: Interest

1. The trial judge ordered the husband pay interest from 13 July 2007 to 1 March 2010 at 6.5 per cent per annum and thereafter at the rate prescribed by r 17.03 of theFamily Law Rules 2004 (Cth). Interest is to be calculated on $3.25 million until the date upon which the husband paid the wife $100,000, and thereafter on the amount of $3.15 million. Interest would continue to accrue until the wife received the principal amount due.
2. In the husband’s written outline of submissions the husband’s senior counsel suggested that “there can be no basis for interest to run at a time prior to the judgment below”, but in his brief oral submissions on this point at the hearing before us, Mr Rayment QC confirmed that the husband’s case was that the imposition of interest should be limited to the date of commencement of the 2009 amendments. That accords with the ground of appeal which only challenges the trial judge’s imposition of interest earlier than the commencement of the 2009 amendments, namely on 4 January 2010.
3. Before discussing this ground, we observe that despite his Honour identifying the correct date of commencement of the 2009 amendments in [355] of his reasons, and indicating in [359] of those reasons that in his order he would specify the date of commencement, in [346] his Honour incorrectly referred to that date as being in February 2010, and then, as can be seen, he ordered that interest at a commercial rate be paid from 13 July 2007 until 1 March 2010 instead of until 4 January 2010. We will return to this issue shortly.
4. The significance of 13 July 2007 is that on this date the husband’s solicitor informed the wife that the husband repudiated the agreement and said he was not bound by it. The trial judge found that because of the husband’s considered repudiation of an agreement which the trial judge said was binding, interest was payable. In addition, his Honour took into account that the husband had the benefit of funds to which the wife was entitled and explained that having informed her in April 2007 that their marriage was at an end, he had sufficient time between that date and 13 July 2007 to arrange finance and conduct an orderly implementation of the terms of the agreement ([344] to [351]).
5. The asserted error by the trial judge is that his Honour should have taken into account that between 13 July 2007 and 24 January 2008 (the date of the Full Court judgment in *Black & Black*) the state of the law as to the binding nature of the agreement was uncertain, and then from 24 January 2008 until the commencement of the 2009 amendments it was clearly arguable that the agreement was not binding on the basis of the decision in *Black & Black*. Indeed, the wife on 26 February 2008 conceded that the agreement was not binding, and that concession was only withdrawn on 15 October 2008.
6. It was not until the amending legislation commenced that it could be said with any certainty that the agreement was binding. Accordingly, we find that there is merit in this ground, and what we would propose to do is to set aside paragraph 2(i) of the orders made by the trial judge and then, given
his Honour’s error as to the date of the commencement of the 2009 amendments, vary paragraph 2(ii) such that it reads that interest is payable from 4 January 2010 instead of from 2 March 2010.

# Conclusion in relation to the appeal and notice of contention

1. We have thus concluded that the trial judge was correct in determining that the 2009 amendments can have a retrospective operation which is constitutionally valid. We have also concluded that he was correct in determining that those amendments operated on the facts of this case to render the financial agreement binding.
2. For the reasons we have given, the appeal has been unsuccessful save in relation to the payment of interest.
3. There was before us an amended notice of contention but it was not directed to the order relating to the payment of interest, and accordingly it need not be further considered.

# COSTS

1. At the conclusion of the hearing, we sought submissions concerning the costs of the appeal. However, the husband requested to be able to file brief written submissions within seven days, which request we granted. Senior counsel for the wife though indicated that if the appeal is dismissed there should be an order for costs in the wife’s favour. On the other hand, if the appeal succeeds then he submitted that a costs certificate should issue.
2. The husband filed written submissions on 13 February 2013 and they provided in summary that if the appeal succeeds the husband should have his costs, but if the appeal is dismissed then there should be no order as to costs. Further, the husband submitted that if the appeal succeeds on issues “debated by the Commonwealth, costs ought to follow the event”.
3. We note that in the written submissions no application for a costs certificate was made by the husband in the event the appeal succeeded on a question of law and there was no order for costs.
4. No application for costs was made by the Attorney-General and any application for an order for costs against the Attorney-General is resisted.
5. The husband has succeeded in relation to one of numerous grounds of appeal. His summary of argument did not address the point upon which he secured a measure of success; it also took but moments of this two day hearing and was not one of the central issues in the appeal. In relation to the major issues, the husband has been unsuccessful. We do not agree with the husband’s counsel’s submission that the wife’s change in position from having determined not to rely upon the agreement, to then seeking to rely upon it, was not justified. The wife’s substantial success in this appeal constitutes justifying circumstances pursuant to s 117(2) of the Act. In our view, the wife is entitled to have her costs of the appeal.

**I certify that the preceding one hundred and thirty-five (135) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Finn, Strickland and Ryan JJ) delivered on 11 December 2013.**

Associate:

Date: 11 December 2013