

**PRINCIPLES OF FAMILY LAW:  
FINANCIAL AGREEMENTS**

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## Introduction

Financial agreements were introduced into the *Family Law Act 1975* on 27 December 2000. They are private agreements, not sanctioned by the Court, which can be entered into before, during or after a marriage or de facto relationship.

This paper looks at:

1. What is a financial agreement?
2. Formal requirements
3. Ousting jurisdiction
4. Financial agreements as pre-nuptial agreements
5. Financial agreements and property settlements
6. Financial agreements and spousal maintenance
7. Separation declarations
8. Independent legal advice
9. Court's power to set aside a financial agreement
10. Using contractual principles
11. Court's power to cure defects in a financial agreement
12. Third parties
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### 1. What is a financial agreement?

Financial agreements are a way in which parties to a marriage or de facto relationship can document their agreement as to the division of property, spousal maintenance and certain other issues. They can be entered into before, during or after the end of a de facto relationship or marriage. Parties are able to resolve issues privately, without a court order.

The term "binding" has become increasingly controversial as legal practitioners have realised that simply describing the agreement as a "binding financial agreement" will not make it one. In *Black and Black* (2008) FLC 93-357 the Full Court made it clear that only a Court can make the declaration that a financial agreement is "binding." It is not for the parties or their legal practitioners to declare it to be "binding." Although the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*

overtook and ameliorated the full effects of *Black and Black*, this aspect of *Black* still stands.

A "financial agreement" is defined in s 4(1) of the *Family Law Act* as "an agreement that is a financial agreement under s 90B, 90C or 90D but does not include an ante-nuptial or post-nuptial settlement to which s 85A applies". A Pt VIIIAB "financial agreement" is defined as an agreement made under s 90UB, 90UC or 90UD or covered by s 90UE.

In this paper the phrase "financial agreement" is used to cover agreements made under:

- s 90B - financial agreement made before marriage
- s 90C - financial agreement made during marriage
- s 90D - financial agreement made after divorce
- s 90J - termination agreement
- s 90UB - Pt VIIIAB financial agreement made before a de facto relationship commences
- s 90UC - Pt VIIAB financial agreement made during a de facto relationship
- s 90UD - Pt VIIIAB financial agreement made after the breakdown of a de facto relationship
- s 90UL - Pt VIIIAB termination agreement
- s 90UE agreement made in non-referring states that become Pt VIIIAB financial agreements
- s 90MH - superannuation agreement in a Pt VIIIA financial agreement
- s 90MHA - superannuation agreement in a Pt VIIIAB financial agreement

In the body of the paper, the references to the Act are mainly to Pt VIIIA financial agreements. There are usually similarly worded provisions for other agreements.

## **2. Formal requirements**

A financial agreement must meet certain requirements of Pt VIIIA or Pt VIIIAB. In summary, it must:

- be in writing

- specify the section it is made under, eg. s 90B, 90C, 90D, 90UB, 90UC, 90UD or 90UL
- be signed by all parties (s 90G(1)(b))
- be between parties who:
  - are contemplating entering into a marriage or a de facto relationship with each other; or
  - are in a marriage or de facto relationship; or
  - were in a marriage or de facto relationship

Third parties can also be parties to the agreement

- deal with:
  - property, financial resources and/or spousal maintenance of the parties
  - “matters incidental or ancillary” to those matters
  - "other matters" if the agreement is under Pt VIIIA
- not cover matters dealt with in a previous agreement which is still in effect
- before signing the agreement, each spouse party must be 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 the advice was provided, to that party of making the agreement (s 90G(1)(b))
- either before or after signing the agreement each spouse party must be provided with a signed statement by the legal practitioner, stating that the advice referred to in the previous paragraphs was provided to that party (whether or not the statement is annexed to the agreement) (s 90G(1)(c))
- a copy of the statement that was provided to a spouse party must be given to the other spouse party or to a legal practitioner for the other spouse party (s 90G(1)(ca))
- not have been terminated or set aside by a court (s 90G(1)(d))
- in certain circumstances, detailed below, the agreement will not be enforceable without a separation declaration

The above, save for the requirement for a separation declaration, are set out in s 90B, 90C, 90D, 90G and 90J and 90UB, 90UC, 90UD, 90UJ and 90UL.

The extent to which a financial agreement can deal with matters "incidental or ancillary" to property and spousal maintenance and to "other matters" is unclear. Some legal practitioners rely on s 90H to exclude the possibility of testators family maintenance claims and to include a provision for mutual wills. Section 90H provides:

A financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

As wills and estates law is State and Territory based, many legal practitioners consider s 90H does not allow these types of provisions to be included in financial agreements. The situation is different in New South Wales where the State legislation specifically permits testators to contract out of family provision claims.

Child support and child maintenance provisions can be included in Pt VIIIA financial agreements but the better view appears to be that they may make the agreement less stable, thus threatening any property and spousal provisions. A separate binding child support agreement can be made under the *Child Support (Assessment) Act 1989*.

Child support and child maintenance provisions can only be included in Pt VIIIAB agreements if the requirements of s 90UH(1) are met. This expanded version of s 90F (discussed later in this paper) applies to both spousal maintenance and child support or maintenance whereas s 90F in relation to Part VIIIA agreements only applies to spousal maintenance. Due to the wording of s 90UH(1), child support and child maintenance provisions can only be included for identifiable children.

The wording of s 90G(1) has twice been changed significantly since the commencement of Pt VIIIA. The *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* changed the wording retrospectively to require, *inter alia*, that:

- (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.

Although statements of legal advice, unlike certificates of legal advice, do not need to be annexed to the agreement, it is safer if they are annexed so that the parties do not need to keep track of three documents.

The 2009 amendments also introduced a discretion to enforce the agreement if the agreement does not comply with s 90G(1)(b)-(ca). This is explained later in this paper.

The transitional provisions of the 2009 Act make financial agreements valid if the pre 14 January 2004 wording of s 90G(1) was used even after the section was amended.

The earlier wording required legal advice to be given 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. Ousting jurisdiction**

If the statutory requirements of Pt VIIIA or Div 4 of Pt VIIIAB are met, the jurisdiction of the court under Pt VIIIA or Div 2 of Pt VIIIAB to deal with property and/or spousal maintenance issues is ousted. With respect to married couples under Pt VIIIA, s 71A applies. Section 71A states:

This part does not apply to:

- (a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or
- (b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.

Murphy J in *Fevia and Carmel-Fevia* (2009) FLC 93-411 said (at para 174):

Thus, the Court's power to make Pt VIII orders is curtailed only in respect of "financial matters" to which a "financial agreement" applies and only "if such financial agreement" is "binding".

The term "financial matters" is defined in s 4(1) *Family Law Act* as:

- (a) in relation to the parties to a marriage - matters with respect to:
  - (i) The maintenance of one of the parties; or
  - (ii) The property of those parties or of either of them; or
  - (iii) The maintenance of children of the marriage; or
- (a) in relation to the parties to a de facto relationship - any or all of the following matters:
  - (i) the maintenance of one of the parties;
  - (ii) the distribution of the property of the parties or of either of them;
  - (iii) the distribution of any other financial resources of the parties or of either of them.

A financial agreement can, for example, deal only with property leaving the Court with the ability to exercise its jurisdiction with respect to spousal maintenance.

#### **4. Financial agreements as pre-nuptial agreements**

Pre-nuptial agreements are entered into by parties "in contemplation of marriage".

The meaning of this phrase has not been determined by the Courts. Many commentators believe the parties should have a date set for the wedding and that a vague plan to marry at some future date is insufficient to bring the agreement under s 90B. It is usually accepted that an agreement cannot be both a pre-nuptial agreement (under s 90UB) and an agreement during a de facto relationship (s 90UC). The cautious and recommended approach in these circumstances is for parties to have two separate agreements. It is usually appropriate to include in a s 90B agreement, a clause that the agreement is ineffective if the parties have not married by a particular date, such as within 12 months. If there is a lengthy period between the date of the agreement and the date of the marriage, the circumstances of the parties may have changed significantly and the agreement may need to be reviewed.

Usually, at least one of the parties wants to protect or preserve substantial initial contributions or an inheritance which is anticipated during the course of the relationship. They are often sought by parties who are entering a second marriage and have therefore accumulated significant assets which they want to protect for their children. The objective of a binding pre-nuptial agreement is usually easier to achieve where parties are older and both have assets, than where parties are younger and are likely to have children. If parties have children during the relationship the agreement is likely to be easier to set aside, particularly on the ground that there has been a

material change in circumstances relating to the children (s 90K(1)(d)). It is difficult to provide in a financial agreement for the significant changes in the circumstances of the parties which having children bring, including to incomes, earning capacities and needs. For this reason, some pre-nuptial agreements are drafted with a sunset clause to terminate the agreement upon the birth or adoption of a child. If the parties have children, the agreement may still be useful as a record of initial contributions.

It is important to refer to the grounds on which the financial agreement can be set aside in considering whether or not to act for a party seeking a pre-nuptial agreement. If there appears to be a great risk of the agreement being set aside, the legal practitioner may decide the risk of a professional negligence claim is too great.

## **5. Financial agreements and property settlements**

Financial agreements can be used to finalise the parties' entitlements at the end of a marriage or de facto relationship. They are more commonly used to finalise spousal maintenance entitlements than to finalise property entitlements. Legal practitioners are often more comfortable using consent orders to finalise property entitlements which have been approved by the Court rather than financial agreements which do not have Court approval. Court approval may give greater certainty.

The initial barriers which existed to using financial agreements at the end of a relationship (eg. absence of CGT rollover relief on property transfers under financial agreements, requirement to certify that advice had been given on the financial consequences of the agreement and as to whether the agreement was fair and reasonable taking into account reasonably foreseeable circumstances) have gradually been removed. However, the uncertainty created by *Black and Black*, the long delay in the Government passing the 2009 amendments to overcome *Black* and the introduction of a discretion to enforce in the 2009 amendments, mean that they appear to be less popular again, at least for dealing with the division of property after separation.

## **6. Financial agreements and spousal maintenance**

Financial agreements can be used after separation to oust the jurisdiction of the Court to deal with spousal maintenance. Sometimes property matters will be dealt with

separately in court orders and at other times the financial agreement will deal with both property and spousal maintenance.

The best way to protect against future spousal maintenance claims in a financial agreement is to ensure that the property retained by or transferred to the possible maintenance claimant is sufficient for that party not to be eligible for Centrelink benefits and to support themselves. This will not always be possible. Whether or not this has been achieved, if spousal maintenance protection is sought, s 90E and 90F must be addressed.

Section 90E states that a provision of a financial agreement that relates to the maintenance of a party to the agreement or a child or children is void unless the provision specifies:

- (a) the party, or the child or children, for whose maintenance provision is made; and
- (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

Section 90E appears to apply to both periodic and lump sum maintenance. Section 77A, which is a similar provision in relation to s 79 orders, refers only to lump sum maintenance. The meaning and effect of a figure specified as spousal maintenance under s 90E is unclear. Options when using s 90E include:

- Rely on s 90E and specify a large lump sum spousal maintenance
- Rely on s 90E but only specify a small sum such as \$1 on the assumption that the amount makes no difference

In *Ruane and Bachman-Ruane* [2009] FamCA 1101, Cronin J considered that the question of whether an agreement that provides for "nil" spousal maintenance complies with s 90E was not relevant to the proceedings before him and was a question "for another day". It is therefore unclear if \$1 is enough to comply with s 90E or whether a larger figure gives greater protection. The Full Court in *Caska v Caska* (1998) FLC 92-826 said:

Obviously at some time in the future a Full Court may have to address issues relating to the true meaning and operation of s 77A.

This has not occurred. Over 20 years ago, the Full Court described s 77A as ambiguous and obscure (*Penza and Penza* (1988) FLC 91-949; *Dein and Dein* (1989) FLC 92-014) but there has been no clarification since.

The ability of parties to contract out of spousal maintenance or oust spousal maintenance rights was restricted retrospectively to 27 December 2000 by the introduction of s 90F in December 2003. Under s 90F, a financial agreement cannot exclude or limit the power of a Court to make an order in relation to the maintenance of a party to a marriage:

if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.

Section 90F has the effect of reducing the utility of financial agreements where the ousting of the jurisdiction of the Court with respect to spousal maintenance is most highly desired by one party.

## **7. Separation declarations**

A separation declaration under s 90DA is required before a financial agreement between a married couple is effective to the extent that it deals with property or financial resources:

- (a) at the time when the agreement is made; or
- (b) at a later time and before the termination of the marriage by divorce.

A s 90 DA separation declaration is not required if:

- the agreement deals with spousal maintenance
- the parties are divorced or one or both of the parties have died (s 90DA(1A)).

A separation declaration can only be made when the parties have separated. The declaration need only be signed by one of the spouse parties. The declaration must state:

- (a) The spouse parties have separated and are living separately and apart at the declaration time;

- (b) in the opinion of the spouse party/spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed (s 90DA(4)).

The separation declaration can be an annexure to the financial agreement or a separate document. It appears that it can also be a clause in the agreement.

A different separation declaration is also required if the parties are splitting superannuation in the financial agreement (s 90MP and 90MQ). There are two options for the wording. A s 90MP(4) declaration must state that the parties are married but are separated at the declaration time. If the withdrawal value of the member's superannuation is more than the low rate cap component for that year (\$150,000 in 2009/10 and \$160,000 in 2010/11) a s 90MP(3) declaration is required. This must state that the parties have been separated for more than 12 months.

## **8. Independent legal advice**

Section 90G(1)(b)(ii) requires that each legal practitioner advise their respective clients on various matters including "the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement." Until 14 January 2004 when the relevant part of the *Family Law Act 2003* commenced, the burden of advice was more onerous and was a significant disincentive to legal practitioners to certify financial agreements.

To make a financial agreement binding, each party to the agreement must receive independent legal advice before signing the agreement 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 (s 90G(1)(b)).

The legal practitioner must be a "lawyer" within s 4 *Family Law Act*. Cronin J in *Ruane and Bachman-Ruane* [2009] FamCA 1101 said that a "lawyer" is a person enrolled as a legal practitioner of a Federal Court or the Supreme Court of a State or Territory in Australia.

Although the practitioner is not required to certify that the agreement was accepted, but only that the advice was given, the wording of s 90G(1) suggests that the

statement of legal advice may not be enough to confirm that the appropriate advice was given. The Court may look behind the statement but there is as yet no interpretation of the new wording.

### **9. Court's power to set aside a financial agreement**

Under s 90K(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);
- (aa) either 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;
  - (ii) with reckless disregard of the interests of a creditor or creditors of the party;
- (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 s 90SM, or a declaration under s 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;
- (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;
- (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 ..., a party to the agreement will suffer hardship if the court does not set the agreement aside;
- (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;
- (f) a payment flag is operating ... 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...;
- (g) the agreement... covers at least one superannuation interest that is an unsplitable interest...

Section 90UM is similarly worded with respect to Pt VIIIAB agreements, save that the sub-paragraphs are consecutively numbered and the following paragraphs are included:

- (c) 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 (the other 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 s 90SM, or a declaration under section 90SL, in relation to the other de facto relationship; or
  - (iii) with reckless disregard of those interests of that other person; or
- (d) 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 marriage with a spouse party; or
  - (ii) for the purpose, or for purposes that included the purpose, of defrauding the interests of that other person in relation to any possible or pending application for an order under s 79, or a declaration under s 78, in relation to the marriage (or void marriage): or
  - (iii) with reckless disregard of those interests of that other person.

For the interpretation of some of the above grounds, particularly s 90K(1)(a) and (d), the case law on s 79A is relevant although the wording of the sections is not precisely the same. For other grounds, particularly the contractual grounds of s 90K(1)(b) and (e), the contractual principles are discussed in the next section.

There are four important distinctions between s 79A and s 90K(1). These are:

- fraud, including non-disclosure. Under s 79A(1)(a) the non-disclosure must be "relevant". Under s 90K(1)(a) the non-disclosure must be "material", which appears to be a higher test
- the impact of a change in circumstances relating to the care, welfare and development of a child. Under s 79A(1)(d) the change must be "exceptional". Under s 90K(1)(d) the change must be "material". Section 90K appears to be

a lower threshold. Under s 79A(1)(d) a change in a child's primary residence is insufficient grounds to set a s 79 order aside, but under s 90K(1)(d) it arguably may be sufficient

- contractual principles can be used to find an agreement void, voidable or unenforceable or unconscionable
- the rights of creditors and de factos of parties entering into a financial agreement are specifically protected under s 90K(1)

The issue of disclosure under s 90K(1)(a) is usually addressed by ensuring that the body of the agreement or annexures to the agreement summarises the asset, liability and income positions of the parties. Failure of a party to fully disclose their financial position means that the agreement is at risk of being set aside. If the disclosure of each party is accurately summarised in the agreement, this reduces the risk of it being set aside. Particularly in pre-nuptial agreements, it is important that the disclosure is fully detailed in the agreement as it may be many years after the agreement was made that the parties need to try to prove the disclosure which occurred.

## **10. Using contractual principles**

The law of contract is relevant to the setting aside and enforceability of financial agreements. Its relevance arises from:

- s 90K(1)(b) - The ability of the Court to set aside an agreement because it is void, voidable or unenforceable
- s 90K(1)(e) - The ability of the Court to set aside an agreement because a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable
- s 90KA - Deals with the validity, enforceability and effect of financial agreements and termination agreements

Section 90KA states:

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.

The contractual principles which can be relevant under s 90K and 90KA include mistake, duress, undue influence, unconscionable conduct, uncertainty, incapacity, misrepresentation, rectification and part-performance. There have only been a few cases where these principles have been considered.

In *Kostres and Kostres* (2009) FLC 93-420, the Full Court found that an agreement was void for uncertainty. A financial agreement was entered into two days before the marriage. Both parties mistakenly believed that the husband was an undischarged bankrupt but did not tell their legal practitioners this. Due to the parties' mistaken belief about the husband's status, they acquired assets in the wife's name rather than in the parties' joint names. Both parties sought that words be "read into" clause 6 of the agreement.

The Full Court was not prepared to read words into the agreement, saying (at paras 124, 127, 129):

The principle that words 'may generally be supplied, omitted or corrected, in an instrument, when it is clearly necessary to avoid absurdity or inconsistency' is a well recognised principle in the law of contract ...

We are of the view that, while common law principles of construction undoubtedly apply and can be used to avoid absurdity, the terms of the agreement must accurately reflect the intention of the parties at the time of the making of the agreement, and be unambiguous. In other words, the meaning to be given to expressions used in the agreement must be clear and their meaning certain. ... Any term which a reasonable person would imply should be uncontroversial. These requirements are particularly important when the financial agreement is one made, as in this case, in contemplation of marriage, and deals with unidentified property or financial resources which may be

acquired or contributed to by parties in the future and subsequently divided between them, or retained by one party, in the event their marriage breaks down irretrievably. ...

While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. This is particularly so when regard is had to provisions of Pt VIII A in the overall context of the Act.

The husband in *Fevia and Carmel-Fevia* (2009) FLC 93-411, *inter alia*, relied on the equitable principles of rectification and part performance. This case must be relied on carefully as it pre-dates the 2009 amendments to s 90G(1). The husband argued that the annexure which set out the husband's asset position in more detail than set out in the body of the agreement could be attached to the wife's copy after she signed the agreement without invalidating the agreement. He said that this was not a material alteration to the agreement. The omission of the annexure in the copy signed by the wife could also have been cured by rectification of the document.

Murphy J rejected the husband's arguments, saying (at paras 156, 158–160):

... Here, the inclusion, or exclusion, of specified property must be central to the intention of the parties. If the core intention of the parties is to exclude matters the subject of agreement from the operation of Pt VIII, mutuality of intention about (relevantly) the specific property to be excluded is central to the true intention of the parties...

In my judgment 'the annexure', when looked at as a whole, represents — even looking at it '*as liberally and reasonably as possible*' — a material alteration to the document signed by the wife (or, put another way, the agreement which the wife believed she was entering). There was no implied authority for the husband to make such an alteration.

For those reasons, too, I am not satisfied, either, that the agreement including 'the annexure' reflects the antecedent agreement reached between the parties. Any agreement had at its core the inclusion (or exclusion) of property which would be excluded from the operation of the Act. There is no evidence before me to the effect that the inclusion of 20 additional, unvalued, entities in the agreement (thereby excluding those entities from the operation of Pt VIII of the Act) was ever part of an agreement between the parties.

I reject, also, for the reasons just given, the assertion on behalf of the husband that '*the inclusion of "the annexure" in the document did no more than accurately state the disclosure which had already occurred*'. In my view, it

materially altered the property to be excluded from the operation of Pt VIII which was a central concern — arguably **the** central concern — of the parties' intended agreement.

The husband also unsuccessfully relied on the doctrine of part performance. Although the husband did not succeed in his contractual arguments, it was clear from the judgment that the principles of rectification and part performance were arguable and might succeed in another case.

## **11. Court's power to cure defects in a financial agreement**

The 2009 amendments to the *Family Law Act* gave the Court the ability to cure defects in a financial agreement, even if the agreements were entered into prior to the commencement of the 2009 amendments.

Section 90G(1A)-(1C) states:

- (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.

The effect of these provisions is that if the independent legal advice and statements of legal advice requirements in s 90G(1)(b)(c) and (ca) are not satisfied, the Court can declare the agreement is binding on the parties to the agreement if the Court is satisfied that it would be unjust and inequitable if the agreement were not binding on the parties. Whilst this may give legal practitioners some reassurance if they have not met the requirements of s 90G(1), it also creates uncertainty.

## **12. Third parties**

A problem with financial agreements prior to the November 2008 amendments to the *Family Law Act* was that only parties to a marriage or a couple contemplating marriage could be parties to a financial agreement. This limited their use as they were unsuitable if the parties wanted third parties such as related companies or trusts to be bound by the agreement.

Third parties can apply to set aside a financial agreement and the effect of a financial agreement on creditors can be a ground to set one aside under s 90K(1)(aa). As a result of *ASIC v Rich and Rich* (2003) FLC 93-171 the *Family Law Amendment Act 2003* expanded the jurisdiction of the Court to deal with applications by third party creditors to set aside financial agreements. A financial agreement can be set aside if it was entered into for the purpose of defeating or defrauding a creditor of either party or with reckless disregard for the interests of a creditor of either party.

The *Bankruptcy Act 1966* also prohibits the misuse of financial agreements as a means of avoiding payment to creditors. Financial agreements are excluded from the definition of "maintenance agreement" in the *Bankruptcy Act* to ensure that trustees can use that Act's "clawback" provisions to recover property transferred prior to bankruptcy pursuant to such an agreement. An act of bankruptcy occurs when a person is rendered insolvent due to assets being transferred under a financial agreement. This allows the trustee to claim property transferred under the agreement as divisible property in the bankrupt's estate.

## **13. Tips for legal practitioners advising on financial agreements**

1. Consider and discuss other options for formalising the agreement with the client such as consent orders, child support agreements and binding child support agreements.
2. Keep accurate and detailed file notes.
3. Obtain full details of the financial positions of both parties.
4. Advise the client of the grounds for setting the agreement aside.

5. Consider and discuss with the client the circumstances which may change their needs. Although this has not been a specific requirement of s 90G(1) since 14 January 2004 it is prudent to raise matters which are:
  - (a) reasonably foreseeable in the particular relationship, eg. moving overseas;
  - (b) reasonably foreseeable in many relationships, eg. unemployment or business failure, birth of a child, serious injury or illness of a party or a child, reconciliation, retirement, inheritance.
6. Set out in the financial agreement any reasonably foreseeable circumstances which have been considered and taken into account.
7. Advise the client that the terms of the agreement must be followed. If the parties do not abide by the agreement, the Court may refuse to enforce it. See *Drew and Drew* (1985) FLC 91-601 and *Turner and Turner* (1987) FLC 91-820 in relation to s 87 maintenance agreements.
8. Confirm advice in writing. The letter of advice should be sent to the client before the agreement is executed by the client.
9. The contents of the agreement and any letters of advice should be discussed with the client.
10. Keep a copy of the agreement, any advice letters, and preferably the whole file indefinitely.

### **Conclusion**

Financial agreements can be a useful tool for parties trying to sort their financial affairs before, during or after a marriage or de facto relationship.

The law is, however, relatively complex and there have been many changes to the wording of Pt VIIIA since it was introduced. The interpretation of the Part remains uncertain and further developments in case law are expected. Legal practitioners need to be aware of the circumstances in which they may be unsuitable or may not achieve the client's stated purpose. A comprehensive legal advice letter is an essential accompaniment to any financial agreement.

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