Part VIIIAB Financial Agreements - Not quite Part VIIIA

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The technical requirements for Part VIIIA agreements are often discussed and it is usually assumed that the Part VIIAB requirements are the same. This is not the case. This paper looks at the requirements for entering into a Part VIIIAB agreement, the contents of a Part VIIIAB agreement and the grounds for setting one aside. Comparisons are made throughout to Part VIIIA agreements.

Requirements of a Part VIIIAB Financial Agreement

General

The requirements for a financial agreement to be binding under Part VIIIAB under the *Family Law Act 1975* are very similar to the requirements for financial agreements under Part VIIIA. Section 90UJ (similarly to s 90G in relation to Part VIIIA financial agreements) states:

> (1) Subject to subsection (1A), a Part VIIIAB 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.

The requirements of s 90UJ(1) are set out, hopefully in a manner which is simpler to follow, later in this paper. The circumstances in which an agreement can still be binding even if the requirements of s 90UJ(1) are not met are set out in s 90UJ(1A), and are beyond the scope of this paper.

Sections 90UJ(1) and (1A) do not apply to agreements made in non-referring states that become Part VIIIAB financial agreements under s 90UE.

An important matter is that a "Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other" (s 90UJ(3)). Unless the parties have also entered into a s 90B agreement (in contemplation of marriage) or subsequently enter into a s 90C agreement (during marriage) they will have the usual rights of married couples to property and spousal maintenance and not their rights under the Part VIIIAB agreement.

Part VIIIAB agreements must meet jurisdictional requirements. Part VIIIA agreements have far more limited prerequisites. They can be entered into if the couple meets the requirements of s 90B(1)(a), 90C(1)(a) or 90D(1)(a) by either contemplating marriage to each other, being married to each other or being divorced from each other. A Part VIIIB agreement cannot be in force (s 90B(1)(aa), 90C(1)(aa) and 90D(1)(aa).

Jurisdictional requirements - Geographic

The geographical requirements of Part VIIIAB are particularly restrictive. An agreement is not a Part VIIIAB agreement unless one of the following applies:

1. Both spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement (s 90UA). A "participating jurisdiction" is every State and Territory except Western Australia. South Australia has only been a participating jurisdiction since 1 July 2009. Besides the obvious impediment that residents of Western Australia cannot enter Part VIIIAB financial agreements (and South Australian residents could not do so before 1 July 2009), if one or both parties are ordinarily resident in an overseas jurisdiction, a Part VIIIAB agreement is not available; or

2. The agreement meets the requirements for a pre-transition time (of the State) agreement becoming a Part VIIIAB financial agreement (see items 91 and 92 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008)* ("Amendment Act")). This covers agreements made under State law which intended to oust that law, provided they were made before the relevant State or Territory referred its jurisdiction to the Commonwealth if it was not referred on 1 March 2009 (i.e. South Australian agreements are covered. Western Australian agreements will be covered if that State refers its powers).

3. The agreement meets the requirements for a pre-commencement time (of the Act) agreement becoming a Part VIIIAB financial agreement (see items 87 and 88 Amendment Act). This covers agreements made under State law which intended to oust that law, provided they were made before the relevant State or Territory referred its powers to the Commonwealth (all States and Territories except South Australia and Western Australia).

4. An agreement made in a non-referring State which meets the requirements of s 90UE(1). These are particularly technical and apply if:

   (a) 2 people (the *couple*) have made a written agreement, signed by both of them, with respect to any of the matters (the *eligible agreed matters*) mentioned in subsection (3); and
   (b) the agreement was made under a non-referring State de facto financial law; and
   (c) either:
      (i) a court could not, because of that law, make an order under that law that is inconsistent with the agreement with respect to any of the eligible agreed matters; or
      (ii) a court could not, because of that law, make an order under that law that is with respect to any of the eligible agreed matters to which the agreement applies; and
   (d) at the time the agreement was made, the members of the couple were not the spouse parties to any Part VIIIAB financial agreement that is binding on them with respect to any of the eligible agreed matters; and
   (e) at a later time (the *transition time*), the couple's circumstances change so that:
      (i) if the de facto relationship has not broken down--sections 90SB, 90SD and 90SK would not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters if the de facto relationship were to break down; or
      (ii) if the de facto relationship has broken down--sections 90SB, 90SD and 90SK do not prevent a court from making an order or declaration under this Part in relation to the eligible agreed matters; and
   (f) immediately before the transition time:
      (i) the agreement was in force under the non-referring State de facto financial law; and
      (ii) the couple were not married to each other.

I cannot categorically say what s 90UE means, but I think an agreement will be treated as a Part VIIIAB financial agreement in the following fact scenario. Jenny and Paul enter into an agreement under Western Australian State law in 2008. Western Australia has not referred its powers to the Commonwealth. The agreement was with respect to the distribution of their property in the event that Jenny and Paul separated and it ousted the jurisdiction of the Western Australian courts within s 90UE(1)(c).

They lived together for 4 years, separating in 2012, (thus meeting the FLA gateway requirement of 2 years under s 90SB). For the first year of cohabitation they lived in

Western Australia but for the rest of the time they lived in Victoria (thus satisfying the FLA gateway requirement of s 90SD(1)(b)(i) that they were ordinarily resident for at least one-third of their relationship in a participating jurisdiction. Of course, they could have been ordinarily resident in Victoria for 5 minutes if they satisfied the alternative condition in s 90SD(1A) of being ordinarily resident in Victoria when the relationship broke down or not resident in Victoria at all if the applicant made substantial contributions under s 90SM(4) in Victoria while resident in Western Australia). Immediately before they moved to Victoria the Western Australian agreement was in force and the couple were not married to each other.

The manner in which agreements entered into under State legislation of participating jurisdictions can be considered to be financial agreements under the *Family Law Act* was considered in *Drew & Vickery* [2010] FMCA fam 1307. The wife argued that although the agreement purported to finalise the property rights of the parties under New South Wales legislation, the Federal Magistrates Court had jurisdiction to deal with her property application. She said there were two discrete de facto relationships, the second ending after 1 March 2009 and over 12 months after the agreement was signed. She also argued that she entered into the agreement under duress. In the alternative, she argued that the parties had set aside the agreement by their conduct in resuming cohabitation. The husband argued that the second period of cohabitation was too short to establish jurisdiction, being only 4 or 6 months. Neville FM found that the Court had jurisdiction. As in the later case of *Dahl & Hamblin* (2011) FLC 93-480, the Court had jurisdiction because the parties were in a de facto relationship for at least 2 years but part of the 2 years was before 1 March 2009.

In *Cording & Oster* [2010] FamCA 511, the Court followed *Kostres and Kostres* (2009) FLC 93-420 (and *Black & Black* (2008) FLC 93-357)) where the Full Court required a financial agreement to strictly comply with the Act. Whether *Black* and *Kostres* have been completely wiped out by the *Federal Justice System Amendment (Efficiency Measures)* Act No 1 2009 ("Efficiency Measures Act") has not been fully considered.

The agreement in *Cording & Oster* was entered into on 7 October 2008, prior to the commencement of the Victorian legislative changes on 1 December 2008 and the Federal changes on 1 March 2009, but it anticipated these changes. Ms Cording sought an order that the agreement was not binding and not a financial agreement under the Act. The parties separated in September or October 2009 after a 10 year period of cohabitation. Cronin J commented (at para 13):

> The thoroughly researched submissions of each party highlight the technicality with which this legislation is shrouded. That would certainly not assist ordinary

> Australians wishing to give certainty to their lives nor I suspect, was it so intended by parliament.

He found that the agreement was valid and binding within Part VIIIAB. He rejected the wife's argument that she was not given advice, saying that she seemed to be complaining about the quality of the advice, which was not a factor the Court was required to consider. It was an agreement made under a preserved law of an earlier participating law. Therefore, under item 88 of the Amendment Act it was a financial agreement under Part VIIIAB.

There are three useful examples of whether Part VIIIAB applies to State agreements set out in item 89 of the Amendment Act. They are:

Example 1: Amy and Ben made an agreement in a non-referring State and then moved to, and spent most of their relationship in, an earlier participating jurisdiction. Their relationship broke down after commencement, but before the non-referring State became a later participating jurisdiction. Their residence in the earlier participating jurisdiction means s 90UE of the new Act will cause Amy and Ben's agreement to become a Part VIIIAB financial agreement.

Example 2: Cathy and Don made an agreement in a non-referring State and did not move from that State. Their relationship broke down after commencement but before the non-referring State became a later participating jurisdiction. That State becoming a later participating jurisdiction is the only way that Part VIIIAB could only apply to Cathy and Don's relationship. This means this Division, and item 90, will apply. The effect of item 90 is that State law will continue to govern Cathy and Don's agreement.

Example 3: During their de facto relationship, Emily and Fred made an agreement in a non-referring State and did not move from that State. Their relationship broke down after the non-referring State became a later participating jurisdiction. That State becoming a later participating jurisdiction is the only way that Part VIIIAB could only apply to Emily and Fred's relationship. This means this Division, and item 92, will apply. The effect of item 92 is that Emily and Fred's agreement will become a Part VIIIAB financial agreement.

Jurisdictional requirements - Time

The time at which the agreement was made is important. Part VIIIAB applies to agreements entered into after 1 March 2009 in all States and Territories except South Australia and Western Australia (1 July 2009 in South Australia) or parties who separated after 1 March 2009 in all States and Territories except South Australia or Western Australia (or 1 July 2009 in South Australia). By contrast, Part VIIIA agreements, including pre-nuptial agreements between heterosexual couples, have been able to be made since 27 December 2000. Agreements made before these dates may be deemed to be Part VIIIAB financial agreements if they meet the transitional provisions applicable to agreements made under State legislation set out in the geographic requirements above.

Jurisdictional requirements - When is it a de facto relationship?

Although the legislation seems to clearly state what constitutes a de facto relationship, there has already been considerable litigation as to:

- whether a de facto relationship existed
- when a de facto relationship commenced
- when a de facto relationship ended

The phrase "de facto relationship" is defined in s 4AA(1) as one where:

(a) the persons are not legally married to each other; and
(b) the persons are not related by family...; and
(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis...

A Part VIIIAB financial agreement made under s 90UC or 90UD should include in the recitals when the de facto relationship will start or when it started and, if relevant, when it ended. It might also be useful, in case one party later challenges the existence of the de facto relationship or the length of it, to address the circumstances of the relationship listed in s 4AA(2):

(a) the duration of the relationship;
(b) the nature and extent of their common residence;
(c) whether a sexual relationship exists;
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(e) the ownership, use and acquisition of their property;
(f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
(h) the care and support of children;
(i) the reputation and public aspects of the relationship.

This is a large and litigious area of the law and it is beyond the scope of this paper to discuss the cases. However, useful cases to refer to when assessing whether a de facto relationship existed include *Jonah & White* [2011] FamCA 221, *Smyth & Pappas* [2011] FamCA 434, *Barry & Dalrymple* [2010] FamCA 1271, *Dahl & Hamblin* (2011) FLC 93-480 and *Moby & Schulter* (2010) FLC 93-447.

If a Part VIIIAB financial agreement is later set aside, the recitals will not be binding but may assist the parties to avoid a dispute as to the existence and length of their relationship and the court to resolve any dispute.

The Act specifically provides that "a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship" (s 4AA(5)). It will,

however, presumably be more difficult for a de facto relationship to be established whilst another relationship is on foot. For example, it will be harder to show mutual commitment to a shared life (s 4AA(2)(f)) and the public aspects of the relationship (s 4AA(2)(1)).

Jurisidictional requirements - Relationship

A Part VIIIAB agreement can only be entered into by people contemplating entering into a de facto relationship, who are in a de facto relationship or whose de facto relationship has broken down. They cannot already be spouse parties to a Part VIIIAB financial agreement (s 90UB(1)(b), 90UC(1)(b) and 90UD(1)(b)). Sections 90B(1)(1)(aa), 90C(1)(aa) and 90D(1)(aa) read similarly but with respect to Part VIIIA financial agreements. There seems to be no bar on parties entering into a Part VIIIA agreement if they already have a Part VIIIAB agreement or executing both at the same time. The Part VIIIAB agreement will, of course, cease to be binding upon marriage (s 90UJ(3)).

There also seems to be no express bar on parties entering into a Part VIIIAB financial agreement if they enter into a de facto relationship with their previous spouse subsequent to a marriage breakdown even if a Part VIIIA agreement applied to their marriage. However, there is no certainty that a court will consider itself bound by the Part VIIIAB agreement given cases such as *Matthews & Matthews* (2006) FLC 93-298 and *Sommerville & Sommerville* (2000) FLC 93-242 where parties reconciled and separated again.

Content

General

Section 90UB(2) applies to agreements between people "contemplating entering into a de facto relationship". Matters which can be dealt with in these agreements are:

(a) how all or any of the:
  (i) property; or
  (ii) financial resources;
  of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;
(b) the maintenance of either of the spouse parties.

Sections 90UC(2) and 90UD(2) read similarly. A limitation with s 90UD(2) is that a Part VIIIAB financial agreement can only deal with property acquired during the former de facto relationship and not property acquired after the end of the relationship. Similarly, s 90D excludes property acquired after divorce. It is possible that s 90UD(3), which allows a Part VIIIAB financial agreement to deal with "matters incidental or ancillary" to those mentioned in

s 90UD(2), can deal with post-separation property. There has been no judicial consideration of the effect of this provision and whether it "catches" post-separation property in a de facto relationship or whether s 90D(3) with respect to Part VIIIA financial agreements covers post-divorce property. There is probably a strong argument that it cannot do so because post-separation and post-divorce property appear to have been deliberately excluded from s 90B, 90UB, 90C and 90UC. The reason for the exclusion is unclear. The definitions of "de facto financial cause" and "matrimonial cause" in s 4(1) do not indicate a limitation for constitutional reasons or otherwise.

Sections 90B, 90C and 90D are worded differently to s 90UB, 90UC and 90UD. For example, s 90B(2) states that the matters which can be dealt with in the agreement are:

(a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with;
(b) the maintenance of either of the spouse parties:
    (i) during the marriage; or
    (ii) after divorce; or
    (iii) both during the marriage and after divorce.

A s 90B agreement can also, under s 90B(3), deal with:

(a) matters incidental or ancillary to these mentioned in s 90B(2);
(b) other matters.

However, a 90UB agreement can only deal with, under s 90UB(3) "matters incidental or ancillary" to those mentioned in s 90SB(2) and not "other matters". The effect of the distinction is unclear as the meaning of s 90B(3)(b) (and 90C(3)(b) and 90D(3)(b)) has not been extensively considered by the courts. The meaning of "other matters" is presumably more extensive than "matters incidental or ancillary" and gives greater scope for matters involving third parties to be included in a Part VIIIA financial agreement than in a Part VIIIAB agreement. The expanded wording in Part VIIIA may also give greater scope for post-divorce property to be dealt with as "other matters" than for post-separation property to be dealt with in Part VIIIAB agreements.

The alternative to s 90UD and 90D agreements if there is post-separation or post-divorce property is, of course, court orders. Leaving aside my usual preference for orders over financial agreements, where there is post-separation or post divorce property a court order will help achieve finality because they can deal with post-separation and post-divorce property and enable transfers of post-separation or post-divorce property to attract capital gains tax roll-over relief.

The meaning of the words “incidental or ancillary to’’ in s 90B(3), 90C(3), 90D(3), 90UB(3), 90UC(3) and 90UD(3) were considered in a different context by the High Court. Gibbs CJ in *Gazzo* v *The Comptroller of Stamps* (1981) FLC 91-101 was discussing the constitutionality of s 90 of the *Family Law Act 1975*. He quoted *Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 (at p 76,719):

> If such a provision is to be held valid, its validity must depend on the established principle that ‘every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter’.

Gibbs CJ also quoted from *Burton* v *Honan* (1952) 86 CLR 169 (at p 76,719):

> the Parliament may in the exercise of any of the substantive powers given by s 51 make all laws which are directed to the end of those powers and which are reasonably incidental to their complete fulfilment.

Adopting the above reasoning, a provision in a financial agreement to be within "incidental or ancillary to", must be:

- “necessary to effectuate its main purpose’’, or
- “reasonably incidental to [the]… complete fulfilment’’ of the property and/or spousal maintenance provisions

Bankruptcy

The bankruptcy of a party to a Part VIIIAB agreement has a different impact than the bankruptcy of a party to a Part VIIIA agreement. This distinction is particularly important if parties are considering whether or not to enter into an agreement under s 90UC (during a de facto relationship) or s 90B (when contemplating a marriage). Legal practitioners may need to advise on the distinction and draft the appropriate agreement.

The distinction arises because of the different ways in which the Act causes matters covered by Part VIIIA and Part VIIIAB financial agreements to oust the jurisdiction of the Act and because of the specific provisions of the *Bankruptcy Act* dealing with financial agreements.

Part VIII (which deals with property and spousal maintenance) 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 (s 71A(1)).

The phrase "financial matters" is defined in s 4(1) 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
(b) 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.

Division 2 of Part VIIIAB (dealing with maintenance, declarations of property interests and alteration of property interests) "does not apply to any of the following matters to which a Part VIIIAB financial agreement that is binding on the parties to the agreement applies:

(a) the maintenance of one of the spouse parties;
(b) the property of the spouse parties or of either of them;
(c) the financial resources of the spouse parties or of either of them" (s 90SA(1)).

However, s 90SA(1) does not apply to proceedings between a party to a de facto relationship and the trustee of a bankrupt party to a de facto relationship with respect to:

(a) the maintenance of the non-bankrupt spouse after the breakdown of the de facto relationship; or
(b) the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property (s 90SA(2)).

Part VIIIA does not have a comparable provision to s 90SA(2).

Following *ASIC v Rich* (2003) FLC 93-171, amendments were made to the Act and the *Bankruptcy Act 1966* to protect the position of the trustee in bankruptcy and creditors with respect to a financial agreement. These amendments included:

- creditors have standing to apply to set a financial agreement aside (s 90K(1A) Act. Section 90UM(2) applies to Part VIIIAB agreements). A creditor may seek to set an agreement aside if a party 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 (s 90UM(1)(b) or 90K(1)(aa)).
- it is an act of bankruptcy if a person becomes insolvent as a result of a transfer or transfers made under a financial agreement (s 40(1)(o) and s 40(7) *Bankruptcy Act*)
- the claw back provisions in the *Bankruptcy Act* can be used to recover property transferred under a financial agreement (s 40(1)(o) and s 120 *Bankruptcy Act*)
- a separation declaration must be made before a financial agreement comes into force or takes effect if it relates to property or financial resources (s 90DA(1) *FLA*. Section 90UF was introduced later with respect to Part VIIIAB agreements).

Transfers pursuant to court orders under the Act are protected by s 59A *Bankruptcy Act.* However, transfers pursuant to a financial agreement can be clawed back under s 120(1) *Bankruptcy Act* if the transfer was within the previous 5 years and the transferee gave less than market value for the property transferred.

In summary, the effect of the above appears to be:

1. A Part VIIIA agreement (which meets the requirements of the Act) ousts the jurisdiction of the Court to make orders under Parts VIII, VIIIB and VIIIA with respect to financial matters and financial resources.

2. A Part VIIIAB agreement (which meets the requirements of the Act) ousts the jurisdiction of the Court to make orders under Part VIIIAB and Part VIIIB with respect to maintenance, property and financial resources of the parties.
3. A Part VIIIAB financial agreement is of no effect to proceedings between:
    - a non-bankrupt spouse and a bankruptcy trustee regarding the maintenance of the non-bankrupt spouse
    - a non-bankrupt spouse and a bankruptcy trustee regarding vested bankruptcy property
4. Whilst a non-bankrupt spouse can still bring proceedings for spousal maintenance or claim against property vested in a bankruptcy trustee, despite the existence of a Part VIIIAB agreement covering these matters, a non-bankrupt spouse with a Part VIIIA agreement cannot do so, without first setting the agreement aside.
5. The rights of the bankruptcy trustee and the parties to the marriage are the same with respect to a Part VIIIA or Part VIIIAB agreement in the application of the *ASIC v Rich* amendments.

Sutherland v Byrne-Smith [2011] FMCA 632 is an example of the claw-back provisions. A financial agreement and a transfer pursuant to a financial agreement were set aside under s 120 *Bankruptcy Act*. The Federal Magistrates Court found that the transferee gave no consideration or gave consideration which was less than the market value of the property. As the de facto relationship was less than 2 years, the *Family Law Act* was found not to apply, although whether it ought to apply because "substantial contributions" were made within s 90RD(2) (c) and 90SM(4)(a), (b) or (c) was not considered. The entitlements of the de facto parties as against the trustee were dealt with on trust principles.

Spousal maintenance

A spousal maintenance provision is void unless it complies with s 90UH. Section 90UH(1) states:

> A provision of a financial agreement that relates to the maintenance of a spouse party to the agreement... is void unless the provision specifies:
> (a) the party... 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...

Section 90UH(1) does not apply to a Part VIIIAB financial agreement covered by s 90UE being an agreement made in a non-referring state that became a Part VIIIAB financial agreement.

In *Adamidis and Adamidis* [2009] FMCA fam 1104, Lapthorn FM severed two recitals from the agreement as s 90E was not complied with. The rest of the agreement was still binding

upon the parties. The same result was reached in *Otero and Otero* [2010] FMCA fam 1022.

There is no power under the Act for the court to make an order for the maintenance of one of the parties in an ongoing de facto relationship. Section 90SE(1), unlike s 74(1) in Part VIII, enables maintenance only to be ordered after the breakdown of a de facto relationship, not during the relationship.

Whether or not the same distinction is made with respect to financial agreements is unclear although the wording under Parts VIIIA and VIIIAB is different. Sections 90B(2) and 90C(2) provide that a financial agreement can deal with:

> (b) the maintenance of either of the spouse parties:
> (i) during the marriage; or
> (ii) after divorce; or
> (iii) both during the marriage and after divorce.

Section 90D(2) simply refers to "the maintenance of the spouse parties". Sections 90UB(2), 90UC(2) and 90UD(2) refer to "the maintenance of either of the spouse parties" without specifying the time at which maintenance is sought.

The uncertainty as to whether Part VIIIAB covers spousal maintenance during a de facto relationship is perhaps clarified by a comparison of the definitions of "matrimonial cause" and "de facto financial cause" in s 4(1) with the latter clearly restricting the jurisdiction of the court to maintenance after the breakdown of the de facto relationship whilst the court has jurisdiction with respect to proceedings for maintenance during a marriage (there is a similar distinction with respect to property). In the Explanatory Memorandum this is explained as a restriction imposed by the referral of powers from the States and Territories. As the Act only gives the Court power to order maintenance after the breakdown of a de facto relationship and not during it, there appears to be no reason for an express provision enabling a financial agreement to oust the jurisdiction of the Court to deal with spousal maintenance during a relationship. The Court has no jurisdiction to make orders anyway.

In *Corney & Hose* [2010] FMCA fam 1462 the wife sought the severance of a recital in a Part VIIIAB financial agreement which stated that neither party at any time make any claims upon the other for payment of spousal maintenance. She also sought an order for maintenance of $500 per week. There was no dispute that the formal requirements of s 90UJ had not been complied with, but the husband argued that the wife was estopped from invoking non-compliance with s 90UH. The parties were separated. His Honour said (at para 6):

> I am satisfied that s 90UH, like s 90B, 87A, and 77A has the purpose of protecting the revenue. This is an important consideration when bearing in mind the “social purpose” of the legislation, a phrase I borrow from cases such as *Fevia & Carmel-Fevia*. If the purpose of section 90UH is to protect the revenue, I am unable to accept

> the contention that parties can choose to, in effect, opt out of a statutory provision which was designed not to protect their private interests but the much broader public interests. In these circumstances, the estoppel argument articulated on behalf of the de facto husband cannot succeed.

He found that the recital was void and ordered interim spousal maintenance of $500 per week.

Executing the Agreement

What is required?

The following seem to be the minimum requirements for an agreement to be binding under s 90UJ(1) (and s 90G(1)). I then deal with best practice. The minimum requirements are:

1. The agreement is signed by all parties.
2. Each spouse party must receive independent legal advice from a legal practitioner. Third parties do not need independent legal advice.
3. The advice must be given before signing the agreement. Section 90UJ(1)(b) is unclear as to whether the advice must be given to both parties before either party signs the agreement, but the Court and legal practitioners appear to assume that the advice can be given to the party signing the agreement after the first party has already received their advice and signed. In *Sawyer & Sawyer* [2011] FMCAfam 610 the Court accepted that the wife received advice on the agreement after she signed it so the requirements of s 90G(1) were not met.
4. The advice must cover "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 effect of inadequate or incomplete advice will hopefully be resolved by the Full Court when it hands down its decision in *Parker & Parker*. Until then, we have conflicting decisions such as *Parker & Parker* [2010] FamCA 664 and *Ruane & Bachmann-Ruane* [2009] FamCA 1100.
5. Each legal practitioner must sign a Statement which confirms that the advice was provided.
6. A copy of the Statement must be provided to the legal practitioner's client either before or after the agreement was signed.
7. A copy of the Statement must be given to the other spouse party or to their legal practitioner.

Best practice

Ideally, legal practitioners should observe higher standards than the minimum requirements. The amount of litigation to date regarding the interpretation of Part VIIIA is a helpful reminder

that the simplest and less risky way of achieving a binding financial agreement is to follow the requirements of s 90UJ(1) (or 90G(1)). Not all of this litigation involves large asset pools. In *Senior & Anderson* (2011) FLC 93-470 the pool was modest but is fast being eaten up by litigation.

The interpretation of s 90UJ remains unclear, the wording is complex and although the Federal Government, by enacting the Efficiency Measures Act, has tried to move the Court away from the strict compliance interpretation of *Black & Black* (2008) FLC 93-357, that approach was not expressly rejected. Instead, the Efficiency Measures Act:

(a) saved many agreements through the introduction of transitional provisions

(b) changed the requirements for an agreement to be binding, attempting to make them easier to meet

(c) allowed agreements which did not meet the requirements of the Act to be held to be binding under s 90UJ(1A) if the Court is satisfied that it is unjust and unequitable if the agreement is not binding on the spouse parties.

My recommended best practice requirements are:

1. The agreement is signed by all parties and the Statements are signed by their lawyers in the same location and at about the same time, perhaps in different meeting rooms or even in the same room. Murphy J suggested in *Fevia & Carmel-Fevia* (2009) FLC 93-411 that the requirements of s 90G(1) before it was amended by the *Efficiency Measures Act* (at para 191) "can all be accomplished readily (and "strictly") if all contemplated events were to occur on the one occasion: advice having previously been given".
2. Each page of the agreement should be signed by each party.
3. The Statements are annexed to the agreement so that they are easier to locate later.
4. A detailed letter of advice is given by the legal practitioner to their client about the final version of the agreement at least a week or so before the agreement is signed by the client.
5. The client signs a copy of the letter of advice prior to signing the agreement, acknowledging that the letter and agreement have been read and understood.
6. If the agreement is altered after the advice is given, updated written advice is given. It is best to avoid handwritten amendments as they may cause evidentiary difficulties later. The whole agreement should be amended and re-printed and fresh advice given. The fresh advice needs to be documented, preferably by letter.
7. Although there is no requirement under the current Act that each party be given a copy of the agreement (only copies of the two Statements), each party should

promptly receive a copy of the agreement to reduce the risk of allegations of duress and unconscionable conduct. It is also good practice in any event, for lawyers to provide clients with copies of agreements they have signed.

8. It is best to have one original rather than multiple originals which may be different. There is less risk of uncertainty as to the terms.

9. Signing the Statements of Independent Legal Advice and exchanging copies of the Statements before the Agreement is executed, may assist in proving later that the advice was provided to each party before they signed the agreement rather than after (under s 90UJ(1)(b)).

10. Detailed filenotes of conversations should be kept of advice and the exchange of documents, if not done by letter.

11. Make sure the legal practitioners are truly independent. In *Logan & Logan* [2012] FMCAfam 12, Terry FM found that the wife had independent legal advice although there were indications that it was not. Another court might have decided this case differently. Why take the risk? The arguments against the advice being independent were:

    - The parties jointly attended 3 of the wife's 4 meetings with the wife's lawyer without the husband's lawyer being present
    - The wife's lawyer had prepared wills for both parties
    - The wife's lawyer effected the transfer of the home to the husband at the husband's request
    - The only conference the wife had with the lawyer without the husband being present was the last of the 4 conferences, when she executed the agreement
    - The wife's lawyer's file note did not contain any reference to advice being given to her at the last conference and the husband did not contend that it was given at any of the previous 3 meetings
    - The husband ultimately paid her lawyer's account
    - The wife's lawyer told her when she sought parenting advice after the agreement was signed, that he could not assist her because he had acted for both parties in the property matter

    After 23 years of marriage the wife received 15% of the pool, but in upholding the agreement, the Court seemed to be swayed by a finding that the wife was not under any special disability, felt guilt about ending the marriage and that the initial approach to the lawyer was made by the wife.

Setting aside

A Part VIIIAB financial agreement may be set aside on one of the grounds listed in s 90UM(1) or may be found not to be binding if it does not meet the requirements in s 90UJ(1). Under s 90UM(1), a court may make an order setting aside a Part VIIIAB financial agreement or a Part VIIIAB 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

(b) 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

(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 section 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 defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or
  (iii) with reckless disregard of those interests of that other person; or

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

(f) 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

(g) 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 de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (4)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

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

(i) 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

(j) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB; or

(k) if the agreement is a Part VIIIAB financial agreement covered by section 90UE--subsection (5) applies.

Section 90UM(5) provides:

(5) This subsection applies if:

(a) at least one of the spouse parties to the agreement was not provided, before signing the agreement, 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 to that party of making the agreement; or

(b) if this advice was provided to at least one of the spouse parties to the agreement--that party was not provided with a signed statement by the legal practitioner stating that this advice was given to that party;

and it would be unjust and inequitable, having regard to the eligible agreed matters (within the meaning of section 90UE) for the agreement, if the court does not set the agreement aside.

A comparison with s 90K(1) in relation to setting aside Part VIIIA agreements follows:

S 90UM(1)	**S 90K(1)**
(a)	(a)
(b)	(aa)
(c)	(ab)
(d)	No equivalent section necessary.
(e)	(b)
(f)	(c)
(g)	(d)
(h)	(e)
(i)	(f)
(j)	(g)
(k) This is a curious ground and is discussed further below.	No equivalent section

Section 90UM(1)(K) is a curious ground. It means that a s 90UE agreement (the requirements for which are discussed earlier in this paper) can be challenged on a different ground to Part VIIIa or other Part VIIIAB agreements. This ground appears to be similar to the "saving" provision of s 90G(1A) and 90UJ(1A). However, it is not the same. The latter provisions are aimed at finding an agreement to be binding despite one or more of s 90UJ(1)(b), (c) or (ca) (or s 90G(1)(b), (c) or (ca)) not being satisfied. Section 90UM(5) does not refer to s 90UJ(1)(b), (c) or (ca) but encapsulates much of the same wording.

A table setting out the distinctions follows:

Section 90UJ(1A)	**Section 90UM(1)(k) & (5)**
A Part VIIIAB agreement which does not	A s 90UE agreement can be set aside if

meet the requirements of s 90UJ(1)(b), (c) or (ca) can be found to be binding.	does not meet one or more technical requirements.
The agreement must be signed by all parties (s 90UJ(1A))	By reference back to s 90UE(1)(a), the couple (but not all parties) must have signed the agreement.
One or more of s 90UJ(1)(b), (c) or (ca) are not met. These are positive obligations requiring: - the provision of independent legal advice about particular matters to each spouse - A Statement signed by a legal practitioner stating that the advice was provided is given to the client either before or after signing the agreement - A copy of the Statement was given to the other spouse party or to their legal practitioner	One or more of s 90UM(5)(a) and (b) applies. These are negative requirements which invoke the section if: - at least one of the spouse parties was not provided with independent legal advice about certain matters before signing the agreement - the advice was provided to at least one of the spouse parties but that party was not provided with a signed Statement from the legal practitioner There is no reference to any failure to exchange Statements
A court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement.	A court is satisfied that it would be unjust and inequitable if the court does not set the agreement aside.
In determining whether it would be unjust and inequitable, any changes in circumstances from the time the agreement was made are to be disregarded.	In determining whether it is unjust and inequitable the court must have regard to the eligible agreed matters within the meaning of s 90UE. The eligible agreed matters are set out in s 90UE(3) as: (a)how all or any of the: (i) property; or (ii) financial resources; of either member, or both members, of the couple at the time when the agreement is made, or at a later time and during a de facto relationship between them, is to be distributed; (b) the maintenance of either member of the couple; in the event of the breakdown of a de facto relationship between them,

	or in relation to a de facto relationship between them that has broken down, as the case requires.

Some of the cases which have considered the grounds in s 90K(1) and 90UJ(1) are discussed later in this paper. Most are in relation to Part VIIIA not Part VIIIAB but the distinction is not important. Some of them may be affected by the outcome of current appeals such as *Parker* and *Noll & Noll* [2011] FamCA 872.

Consequence of setting aside

If the agreement is set aside or found not to be binding, the Court can make a property or maintenance order under s 90UM(6), which is similarly worded to s 90K(3). These provisions appear to be designed to help ensure that the parties are not hindered in obtaining relief by the time which has elapsed since either separation. With respect to Part VIIIA, s 44(3B)(c)(ii) allows a further 12 months for maintenance or property proceedings to be instituted after a financial agreement is set aside or found to be invalid. Leave may be granted out of time under s 44(3)(d) if the court is satisfied under s 44(4):

(a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or

(b) in the case of proceedings in relation to the maintenance of a party to a marriage--that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

The wording of the comparative provisions applying to Part VIIIA and Part VIIIAB agreements is, unsurprisingly, different. Under s 44(5) a property or spousal maintenance application under Part VIIIAB can only be made within 2 years after the end of the relationship. This is defined as "the standard application period". Unlike for married couples, there is no reference to the time running from the date on which a Part VIIIAB financial agreement is set aside. Whilst s 90UM(6) enables a court which has set aside a Part VIIIAB financial agreement to make orders, there does not appear to be the automatic safety net of a further 12 months for an application to be made. It is unclear whether this means for Part VIIIAB:

(a) that the application still needs to meet the standard s 44 (5) requirement of the application being made within 2 years after separation;

(b) that the application cannot be made outside of the 2 years unless leave is granted under s 44(6);

(c) there is no time limit (an unlikely interpretation); or

(d) the application ought to be made promptly.

Leave may be granted to a party to apply after the end of the application period. The wording of s 44(6) is similar to s 44(4) save that it does not refer to marriage. A further complication is that the s 90UM(6) cannot give the court jurisdiction which it otherwise does not have. The circumstances of the parties may have changed. The court must find that the threshold tests for making an order under s 90SM (for property) or s 90SF (for maintenance) are met. These include:

(a) Geographical requirements under s 90SK (for property) or s 90SD (for maintenance). These are different than for Part VIIIAB financial agreements. For example, s 90SK provides:

(1) A court may make a declaration under s 90SL, or an order under s 90SM, in relation to a de facto relationship only if the court is satisfied:

(a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the *application time*); and

(b) that either:

(i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or

(ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

in one or more States or Territories that are participating jurisdictions at the application time;
or that the alternative condition in subsection (1A) is met.

(1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.

(b) The de facto relationship broke down after 1 March 2009 or couples have opted in under s 86A *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008.*

(c) The gateway requirements of s 90SB. A court may make an order under s 90SE, 90SG or 90SM, or a declaration under s 90SL, in relation to a de facto relationship only if the court is satisfied:

(a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or

(b) that there is a child of the de facto relationship; or

(c) that:

(i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and

(ii) a failure to make the order or declaration would result in serious injustice to the applicant; or

(d) that the relationship is or was registered under a prescribed law of a State or Territory.

Alternatively, parties who separated prior to the commencement of the Amendment Act may choose for Parts VIIIAB and VIIIB and s 114(2A) to apply to their relationship by both signing a 'choice' to opt into the Act under item 86A of the Amendment Act.

The consequences of a Part VIIIAB agreement being set aside are potentially more disastrous for the parties than for a Part VIIIA agreement. If a Part VIIIA agreement is set aside, the same court which set it aside, can decide whether or not to make orders to preserve or adjust the rights of the parties (s 90K(3)). If a Part VIIIAB agreement is set aside, although the wording of s 90UM(6) is similar to s 90K(3), the Court cannot make orders unless it has jurisdiction to do so. The party seeking an order will need to satisfy the geographic requirements, length of relationship etc discussed above. It is easy to envisage that a party could act so as to increase the difficulty of the other party being able to establish jurisdiction by, for example, refusing to opt into the Act.

Fraud

It is unclear whether the meaning of fraud with respect to the setting aside of financial agreements is the same as for setting aside court orders. Section 90K(1)(a) allows a court to set aside a financial or termination agreement on the ground that:

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

Cronin J said in *Jeeves and Jeeves (No 3)* [2010] FamCA 488 (at para 485):

> The simple use of the word “Fraud” in s 90K must be read widely because of the inclusion of the reference to non-disclosure of a “material matter”. Thus it encompasses knowledge and intention relating to financial matters that, if known, would create a different picture to that portrayed on the surface. It is hardly distinguishable from the s 90K(1)(e) reference to conduct that was in all of the circumstances unconscionable. Fraud no longer means just the unlawful use of pressure to enter into such an arrangement.

His Honour said (at para 488):

> Did the wife enter into the financial agreement on the basis of an inducement that what she was presented with was a true and accurate representation of the parties’ financial circumstances? Again, the wife faces the problem of her own evidence that she did not believe the husband to be truthful.

The wife unsuccessfully appealed.

In *Green and Kwiatek* (1982) FLC 91-259 the Full Court of the Family Court adopted the classic common law definition of Lord Herschell LC in *Derry* v *Peek* (1889) 14 AC 337 (at p 374):

> Fraud in this context consists of a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth, or

> recklessly, without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact so acted upon.

The real uncertainty about fraud when dealing with financial agreements is the extent of the duty of disclosure.

Duty to disclose

Neither Division 2 of Part VIIIAB or Part VIII set out a duty of disclosure in relation to financial agreements. The duty is in the *Family Law Rules* (Chaper 13) and the *Federal Magistrates Court Rules* (Part 24). The duty is almost a negative one - If a party doesn't disclose their financial circumstances, the agreement is at greater risk of being set aside under s 90UM(1)(a) or perhaps s 90UM(1)(e) or (h).

In *Grant and Grant-Lovett* [2010] FMCAfam 162 the fact that the parties had been married for 12 years did not reduce the parties' duty to disclose. Altobelli FM found that there was insufficient evidence of disclosure and very little disclosure in the agreement. The wife had failed to disclose her interest in a trust.

In *Stoddard and Stoddard* [2007] FMCA fam 235, the husband signed the agreement when he did not know that the wife had drawn-down on the loan account, thus increasing the debt secured against a certain property and decreasing the wife's exposure to that debt. The husband argued that the situation amounted to either fraud (the non-disclosure of a material matter) or misrepresentation leading to voidness, voidability or unenforceability. Altobelli FM accepted this submission. The draw-down by the wife was a pre-emptive strike that put her in a position of advantage over the husband. At the time of signing the agreement the wife had manipulated the borrowings so that she was liable for less and the husband was liable for more.

The court accepted the definition of fraud as submitted on behalf of the wife who relied on the Full Court's decision in *Green and Kwiatek* (1982) FLC 91-259 at 77,456. It is possible though, that in the context of s 90K(1)(a) and 90UM(1)(a) fraud has a broader meaning as it may consist of non-disclosure of a material matter. While fraud at common law may require a representation, fraud under s 90K(1)(a) and 90UM(1)(a) may be constituted by omission i.e. non-disclosure of a material matter. (Cronin J in *Jeeves* seems to agree with this view).

In any event, if a representation was needed, Altobelli FM found that there were two false representations made by the wife. The first representation was to the effect that one property had "been purchased wholly with funds brought to the relationship by the wife". This was false because the wife used joint funds to increase her equity in the property. The second was that the debt on one property would be shared equally. This was also false because the

effect of the wife's actions was to shift a greater burden of the debt onto the husband. The wife's actions amounted to "non-disclosure of a material matter".

Uncertainty

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. At the time, both parties mistakenly believed that the husband was an undischarged bankrupt. They did not tell their lawyers this. The parties' mistaken belief about the husband's status led to them acquiring 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 satisfied that it could read words into the agreement.

Mistake

In *Stoddard and Stoddard* [2007] FMCAfam 735 the husband argued that the agreement should be set aside because of mutual mistake. If, at the time of the agreement, both parties assumed that the property purchase would be completed but it had, prior to signing the agreement, already been terminated they would have been operating under a mistake. However, even if there was a mistake, Altobelli FM did not accept that such a mistake would vitiate the agreement. The terms of the agreement were clear. Both parties knew what they were doing. The mistake affected them equally. Any mistake did not affect the fundamental nature of the agreement between them.

Misrepresentation

In *Stoddard and Stoddard* [2007] FMCA fam 735 the wife withdrew funds from the mortgage without the husband's knowledge, thus increasing the debts to be borne by the husband and improving her net asset position. Altobelli FM found that there had been non-disclosure of a material matter amounting to fraud within s 90K(1)(a). In addition, he found that there had been a misrepresentation entitling the husband to have the contract voided, or set aside, under s 90K(1)(b).

Duress

In *Blackmore and Webber* [2009] FMCAfam 154, Bender FM set aside a financial agreement as she found that the pressure placed on the wife by the husband to sign the agreement was "illegitimate" in accordance with the test in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSW LR 40. The husband produced the agreement for the wife's signature less than five days before the marriage and threatened her that the marriage would not take place unless she signed it. At the time, the wife was pregnant, about to return

to Thailand where her family expected her to return as a married woman, and she faced the risk of not being able to return to Australia as her visa was about to expire.

In *Moreno and Moreno* [2009] FMCAfam 1109, Demack FM set aside the agreement on the basis of, *inter alia* duress, saying (at para 38):

> I accept that the wife feared for her visa status if her marriage did not continue and that issue was a motivator for her in signing the agreement. She did not want to return to Russia as a failure, with a failed marriage. She had left behind family and friends who believed her to be making a new life in Australia and she could not bear to return under such circumstances. Further, she wanted her marriage to work. She wanted to remain married to Mr Moreno; she just wanted him to stop being aggressive to her…

Kostres and Kostres [2008] FMCAfam 1124 was potentially an "ink on the tuxedo" case. The agreement was signed by the parties two days before the wedding but this was not a ground on which the husband sought to set aside the agreement aside.

In *Tsarouhi and Tsarouhi* [2009] FMCAfam 126, Riley FM set aside a financial agreement entered into by the wife under duress and found that the husband had taken unconscionable advantage of the wife's special disadvantage. The wife took $21,480 from the parties' joint home loan account by forging the husband's signature. If these funds were notionally added back to the pool and treated as received by her, the financial agreement resulted in the wife receiving 21% of a pool of $311,500 after 23 years of marriage. Two children aged 10 and 17 lived with the husband and the 22 year old lived with the wife. Riley FM found that the wife signed the agreement based on a desire to prevent prosecution. Riley FM applied the rule stated by Porter J in *Mutual Finance Ltd v John Whetton & Sons Ltd* [1937] 2 KB 38 (at p 395):

> Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking was given owing to a desire to prevent prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place...

Duress was argued but not proven in *Wallace and Stelzer* [2011] FamCA 54 where:

- the husband instigated the discussions about a financial agreement
- the amount to be paid to the wife was the amount that the husband first offered
- the agreement was discussed over at least six months including two months of arm's length negotiations
- the husband was fully aware of the terms
- the husband received advice in accordance with s 90G
- the wedding was small and, on the husband's evidence, the date could have been

changed

• the husband was capable of independent thought. Although the agreement was signed shortly before the wedding, it was not signed in an atmosphere of crisis or threat. He was not so infatuated by the wife that he was emotionally or pathologically dependent upon her

• the husband had the ability to form a judgement about the agreement and that it was in his own best interests

• the husband was not at any special disadvantage and was trying to protect his own financial position

• the husband indicated to the wife that he would not marry her unless she signed an agreement

• the parties had been in a de facto relationship for over 7 years prior to the date of the agreement and their marriage. It was not an "ink on the tuxedo" agreement

Benjamin J found (at para 169) that at the time the agreement was executed its terms and provisions were well known to the husband and in his conscious thought. He believed he was bound by it. After separation he was advised that the certificate attached to the agreement was incorrect in form and he decided to challenge the agreement. He was unsuccessful.

Unconscionability

Riley FM in *Tsarouhi and Tsarouhi* [2009] FMCA fam 126 found that the agreement was entered into under duress and should be set aside, but also found that it should be set aside for unconscionability. She said (at para 50):

> *Amadio* makes it clear that the circumstances leading to a special disadvantage are not limited to those listed in that case. I consider that the wife's fear of prosecution, combined with her limited education, caused her to be at a special disadvantage vis-à-vis the husband.

In *Jacobs and Vale* [2008] FMCA fam 641, the husband sought to set aside a financial agreement made five days before the marriage on the grounds that:

(a) the wife's conduct leading to the making of the financial agreement was unconscionable under s 90K(1)(e) and in equity under s 90K(1)(b)
(b) the wife's conduct in denying the husband an interest in the property beyond that provided for in the financial agreement would lead to her unjust enrichment from his contributions.

The husband alleged that he signed the agreement in a 30 minute conference with a lawyer without having seen the agreement previously. It was not contemplated by the agreement that the husband would supervise construction of the home and give up his full time employment as he did. The parties disagreed about whether the wife refused to marry without the agreement, although the wife conceded that she told the husband that without

the agreement in place by the time they married, her parents would not financially assist them.

The wife sought summary dismissal of the husband's application or, alternatively, an order for security for her costs of $30,000. His Honour refused the application for summary dismissal without deciding the issue of unconscionable conduct, but said (at para 28):

> Whether the principles to be applied when determining a claim of unconscionable conduct for the purposes of s 90K(1)(e) are the same as those set out above and which might otherwise lead the court to conclude that the financial agreement is voidable at the election of Mr Jacobs does not yet need to be decided. Sub-sections 90K(1)(b) and 90K(1)(e) are probably directed at different matters – the former to the circumstances in which the agreement was formed and the latter to the overall circumstances in which it might be argued that the retention of a benefit derived from a joint endeavour which has failed to the exclusion of the other party or parties to that endeavour is unconscionable (see *Muschinski* v *Dodds* (1985) 160 CLR 583).

The husband consented to the security for costs order.

Intention to rescind

An intention to rescind an agreement can be implied from conduct. In *Drew and Vickery* [2010] FMCA fam 1307 the parties entered into an agreement under the *Property (Relationships) Act 1984* (NSW) which set out the rights of the parties in the same way as a financial agreement under the FLA does. After a period of separation of about 2 years, there was a further period of cohabitation of about 4 months. Neville FM preferred to say that the parties were estopped from relying on the NSW agreement rather than that by their conduct they had set it aside. He said (at paras 74, 80):

> However, in my view, what is clear on the evidence is that, at the initiative of Mr Vickery, the de facto relationship was revived or resumed. In doing so and inviting the relationship (and the co-habitation) to resume, by that deliberate conduct he must be taken as having waived his ability to rely on the earlier termination agreement. Indeed, by resuming their cohabitation, in my view both parties must be taken as having waived whatever rights they had under that agreement. Their conduct in resuming cohabitation could, and in my view, should be taken as setting aside the ... agreement...
>
> I appreciate that, to speak formally, there is a distinction between parties being estopped from relying upon an agreement, on the one hand, and on the other, setting aside the agreement. For my part, I should be taken as preferring the view that the parties, by their conduct, should be estopped from relying on the earlier termination agreement. However, in the event that that view were to be held erroneous, in the alternative and on the authority of the decision in *Sommerville* and the cases cited therein, I would also take the view that, by their conduct, the parties should be taken to have set aside the earlier agreement. On either view, the relevant period (or periods) of the de facto relationship readily meet the durational qualification in s 90SB(a).

In *Wallace and Stelzer* [2011] FamCA 54, Benjamin J did not accept that the wife's discussions about children and love were representations made in the context of fraud, duress, undue influence or unconscionable conduct. The husband was not lured into the agreement by the wife's use of intimate relations. Intimacy may wax and wane throughout a relationship. He found that the wife did not make false promises of love and a desire for children solely for the purpose of obtaining a half interest in a real property.

Conclusion

The legislation dealing with financial agreements, whether under Part VIIIA or Part VIIIAB is complex even without reference to the transitional provisions of s 90G(1) and 90UJ(1).

The checklist of pre-requisites before parties can enter into a Part VIIIAB financial agreement is greater than for Part VIIIA financial agreements. Litigation and legislative change with respect to Part VIIIA agreements suggests that the difficulties for legal practitioners with respect to Part VIIIAB agreements will be considerable, and, perhaps even worse than they are for Part VIIIA agreements.

My view is that legal practitioners cannot assume that the advice they give to satisfy s 90G(1) in relation to Part VIIIA agreements can be replicated when giving advice under s 90UJ(1) in relation to Part VIIIAB financial agreements.