

Financial agreements - more legislative amendments coming in 2016

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Changes are pending in Federal Parliament to the financial agreement provisions in the *Family Law Act 1975* ("the Act"), particularly in relation to the following:

1. Requirements to be binding;
2. Grounds for setting them aside; and
3. Spousal maintenance.

The *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* ("the Bill") includes significant amendments to Pt VIII A (financial agreements for married couples) and Div 4 of Pt VIII AB (financial agreements for de facto couples) of the Act. The amendments affect financial agreements entered into by prospective, current or former parties to a marriage, or to a de facto relationship, with some changes being retrospective. The Bill was tabled in Parliament on 25 November 2015, but further consideration of the Bill has been deferred until February 2016. If the Bill is passed, the laws affecting financial agreements will change for the fourth time since 2000 when financial agreements were first introduced. The Bill includes other changes, the details of which are not included in this article, but are summarised at the end.

Overview of amendments

The Explanatory Memorandum states that the Bill "is aimed at strengthening the primary public policy objective underlying the financial agreement provisions". It aims to do this by:

- Removing uncertainties around the requirements for entering, interpreting and enforcing agreements;
- Making changes to the spousal maintenance provisions;
- Introducing a statement of principles outlining the binding nature of financial agreements; and
- Reinforcing the binding nature of agreements to offer certainty to parties.

Some of the changes are structural. Tables are included in s 90GA, s 90UJA and s 90UM(4) to clarify the provisions which apply to particular periods. Many of the reported cases about whether a financial agreement is binding¹ involve errors by legal practitioners as to when changes to the terms of s 90G occurred and using the incorrect wording of s 90G in the agreement. A table will help legal practitioners know which wording is required at different times.

¹ e.g. *Balzia & Covich* [2009] FamCA 1357; *Senior & Anderson* (2011) FLC 93-43; [2011] FamCAFC 129

There was wide consultation on an earlier draft of the Bill, which was entitled *Civil Law & Justice Legislation Amendment Bill 2015: Family Law* ("the Exposure Draft"). The Bill responds to many of the criticisms. For example, in the Exposure Draft, new terms such as "informed", "in good faith", "materially prejudices" and "as it thinks necessary" were used. These were excluded from the Bill. Using these phrases had the potential to add an extra layer of complications and confusion, thus creating new opportunities for litigation.

The terminology used in Pt VIII A (and Div 4 of Pt VIII AB) will be closer to that used in Pt VIII (which deals with property and maintenance orders), giving greater clarity to the meaning of those provisions and the benefit of case law on Pt VIII.

Outline & objects of Pt VIII A and Div 4 of Pt VIII AB *Family Law Act*

The existing Act does not include an outline or objectives with respect to financial agreements. By introducing them, the Explanatory Memorandum explains:

"The new section would reinforce that parties to a marriage should be able to take responsibility for resolving their financial affairs, and that the intention and purpose of financial agreements is to provide certainty and finality to these parties about the resolution of their financial affairs."

Proposed s 90AL and 90AM provide a simplified outline of Pt VIII A, and explain the object of Pt VIII A and the principles underlying it. Sections 90UAA and 90UAB are similar provisions with respect to Div 4 of Pt VIII AB.

The proposed object of Pt VIII A is to provide for prospective, current or former parties to a marriage to make a binding agreement that excludes the power of the court to make orders under Pt VIII about either or both of the following matters:

- “(a) how property or financial resources either or both parties had before divorce are to be dealt with if the marriage breaks down;
- (b) the maintenance of either party during the marriage or after divorce.”²

The principles underlying the object are that:

- “(a) prospective, current or former parties to a marriage should be able to take responsibility for resolving the matters described in paragraphs 1 (a) and (b) without involving a court; and
- (b) such parties who make an agreement about those matters should have certainty that the agreement will bind those parties unless:
 - (i) they make another agreement to terminate the agreement; or
 - (ii) a court sets the agreement aside under this Act.”³

² s 90AM(1)

³ s 90AM(2)

There has been much litigation regarding how the Act should be interpreted with respect to financial agreements. The interpretation of provisions of the Act will, if the Bill is passed in its current form, favour an interpretation that leads to a binding agreement. This is because the resolution of these disputes will be affected by the Bill as s 15AA of the *Acts Interpretation Act 1901* requires that in interpreting legislative provisions "... the interpretation that would best achieve the purpose or object of the Act ... is to be preferred to each other interpretation".

Section 90G - when a financial agreement is binding

Section 90G is to be amended again – for the third time since the commencement of Pt VIIIA on 27 December 2000. As the Explanatory Memorandum states:

"The wording of existing s 90G is confusing and has led to differing judicial interpretations, and has been further complicated by two sets of amendments following its initial introduction".

A new s 90J, which covers termination agreements, reproduces the new s 90G provisions. Similar changes are proposed with respect to s 90UJ and 90UL, which deal with financial agreements and termination agreements binding on de facto parties.

The objective of repealing the existing s 90G and substituting a new s 90G, 90GA and 90GB is to give clarity as to when financial agreements are binding. Currently, there are three forms of s 90G that apply to financial agreements depending on when the agreement was made. The Bill introduces a fourth version. Each version of s 90G requires different independent legal advice to be given. Currently, locating earlier versions of s 90G to check against a financial agreement necessitates trawling through Amending Acts and interpreting transitional provisions. As the Explanatory Memorandum points out, the different versions make navigating the s 90G requirements "undesirable and unnecessarily complex". It has led to difficulty in interpreting s 90G and made it difficult for legal practitioners to advise their clients. The Bill proposes that the different versions of s 90G be tabulated, to make it easier to understand the requirements at different times.

The versions of s 90G prior to the passing of the Bill are:

1. Financial agreements made from 27 December 2000 to 13 January 2004 must deal with:
 - "(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";
2. Financial agreements made from 14 January 2004 to 3 January 2010 must deal with either the matters required for the previous period or those required for the following period;
 3. Financial agreements made from 4 January 2010 to the present must deal with:
 - "(a) the effect of the agreement on the rights of that party; and
 - (b) the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement".

A fourth version will apply from the commencement date of the new s 90G. The proposed s 90G(1) will provide that, for the purposes of the Act, a financial agreement made after 26 December 2000 is only binding on the parties if and only if the following conditions are met:

- "(a) the agreement is signed by all parties; and
- (b) either:
 - (i) all the conditions in s 90GA (about legal advice relating to the agreement) that are relevant to the agreement are met; or
 - (ii) a court has made an order under s 90GB declaring that the agreement is binding; and
- (c) the agreement has not been terminated (before, on or after the commencement of this section); and
- (d) the agreement has not been set aside by a court (before, on or after the commencement of this section)."

Under s 90GA(2), either before or after signing the agreement, each spouse party must have been provided with a signed statement by a legal practitioner confirming that, before the agreement was signed, that party was provided with independent legal advice about the matters described in the table for the agreement at the relevant time.

From the commencement of s 90GA, the advice must be regarding "the effect of the agreement on the rights of that party under this Act". The existing requirement to cover "the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement" has been removed. The Explanatory Memorandum points out that this change substantially simplifies the obligation on legal practitioners by limiting the requirement for independent legal advice.

Although not dealt with in the Bill, the issue of whether financial agreements entered into after the commencement of s 90GA but which use the pre-90GA wording of s 90G applicable since 4 January 2010, and refer to "advantages and disadvantages" will undoubtedly arise. A similar issue was considered in *Collagio & Collins*⁴ where the breadth of the advice given was greater

⁴ [2015] FamCA 263

than s 90G required but the agreement was still held to be binding. Of greater concern is whether it is appropriate for the Bill to reduce the protection of clients by lowering the legal advice requirements for parties surrendering their rights under Pt VIII.

Section 90GA also sets out extra conditions for agreements entered into after 3 January 2010. Helpfully, these are set out in a tabulated form and are outlined below:

1. After 3 January 2010, but before the commencement of s 90G - the statements of independent legal advice must be exchanged between the spouse parties or their lawyers;
2. After the commencement of s 90GA - not only must a copy of the statement be given to the other spouse party or to a legal practitioner of the other spouse party, but the spouse party must give a written acknowledgement that they were provided with independent legal advice about the effect of the agreement on their rights under the Act before signing the agreement (noting that this written acknowledgement can be made either before or after signing the agreement) and the acknowledgement must be given to the other spouse party or to a legal practitioner of the other spouse party

The new requirement of an acknowledgement aims to increase certainty by limiting the potential for parties to dispute the validity of financial agreements on the basis that they were not provided with independent legal advice.

The agreement, statement and acknowledgement may be separate documents and do not need to be part of the same document.⁵ The statements and acknowledgement can, therefore, be annexed to the agreement or be separate documents.

In determining whether an agreement is binding, a court is not to consider whether the advice described in s 90GA(2) was actually provided.⁶ The Explanatory Memorandum states that this means "that the court should not go behind the statement provided by a legal practitioner to examine the content of advice". This removes the uncertainty raised by such cases as *Hoult & Hoult*;⁷ *Logan & Logan*,⁸ although in *Wallace & Stelzer*⁹ the Full Court said:

"... that the only enquiry necessary is as to whether the advice was given and not as to the content of that advice".¹⁰

Section 90GB is an amended version of the former s 90G(1A) and, according to the Explanatory

⁵ s 90GA(4)

⁶ s 90GA(5)

⁷ (2013) FLC 93-546; [2013] FamCAFC 109

⁸ (2013) FLC 93-555; [2013] FamCAFC 151

⁹ (2013) FLC 93-566; [2013] FamCAFC 199

¹⁰ at 103

Memorandum, reflects the policy of s 90G(1A). If an enforcement application is made to a court seeking a declaration that the financial agreement or a termination agreement is binding on the parties to the agreement and the s 90GA requirements are not all met, then the court must make the order if it 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).

The transitional and savings provisions for s 90G and 90J aim to ensure that the decisions of courts made under previous provisions cannot be re-litigated because of amendments made by the Bill.

Maintenance

Maintenance provisions in financial agreements are only effective if s 90E (or s 90UH for de facto couples) is complied with. The current wording is that a maintenance provision 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 is to be amended to replace the words "the value of the portion" of the relevant property with the words "the amount or proportion of the value" of the relevant property. This will make the s 90E requirement easier to meet, by not requiring a dollar figure. A percentage can be used instead.

A further change to s 90E (and s 90UH) gives clarity as to whether a dollar figure must be placed on the value of the maintenance and removes the uncertainty about giving a "nil" value. Not only, as the Explanatory Memorandum points out, can there be practical difficulties associated with ascribing an actual dollar figure for maintenance to be provided at an unspecified time in the future, but the wording of the existing s 90E is unclear as to whether parties can nominate a "nil" value for maintenance. Although some legal practitioners believed it was possible, many legal practitioners nominate a nominal \$1.00 figure if they do not want to allocate a large lump sum. The amendments do not address whether there is any better protection offered by a lump sum figure, intended to represent say 2-3 years of realistic periodic maintenance, or a small amount such as \$1 or even nil. Of course, this remains uncertain in relation to property orders as well.

The downside of these amendments is that the wording of s 90E (and s 90UH which is similarly amended with respect to Pt VIIIAB agreements) will be different to that used in s 77A with

respect to s 79 orders and s 90SH with respect to s 90SM orders. The small body of law which deals with the interpretation of s 77A and s 90SH will not be particularly useful when dealing with s 90E and s 90UH.

The amendments to s 90E apply to all financial agreements made before, on, or after the commencement of the amendments (item 5(1) of the Bill). This, for example, retrospectively validates provisions (if they were invalid) which give a "nil" value for maintenance.

Death of maintenance payer or payee

Sections 90H and 90UK currently provide that a financial agreement continues to operate despite the death of a party to the agreement and is binding on the legal personal representative of the deceased party. The proposed s 90H(2)-(4) and s 90UK(2)-(4) cover maintenance obligations in the event of the death of the payee or the payer. The existing s 90H and s 90UK will become s 90H(1) and s 90UK(1) respectively.

The expanded s 90H and 90UK will mean that provisions for ongoing spousal maintenance will terminate on the death of either party except as the agreement otherwise provides. Death will not prevent the recovery of arrears of maintenance due before the death. The changes will make these provisions consistent with existing s 82(8) and 90SJ(5) which deal with the recovery of maintenance payable under a court order.

Maintenance will be able to be recovered if paid after the death of either party (s 90H(5) and 90UK(5)). This is consistent with s 82(7) and 90SJ(4) which deal with court orders for maintenance.

The new s 90H and 90UK will apply to financial agreements made on or after the commencement of the Bill and are not retrospective.

Maintenance and re-marriage or re-partnering

The proposed s 90HA (and s 90UKA for de facto relationships) specifies that ongoing spousal maintenance obligations under an agreement will terminate in the event of the party receiving the maintenance remarrying or entering into a de facto relationship with a person other than the spouse party, unless the agreement expressly provides otherwise. The exclusion for reconciliations recognises that it is not uncommon for parties to attempt to reconcile. It is not intended that ongoing maintenance obligations be extinguished in those circumstances. Without this exclusion, if parties reconcile and then separate again, the payee will have no remedy because their maintenance was finally dealt with by the agreement. To terminate the maintenance obligation, a couple which reconciles will need to enter into a termination

agreement. There may, however, be disputes about whether the parties have, by their conduct, terminated the agreement. See the discussion by Cronin J in *Ruane & Bachman-Ruane*¹¹ and *Kostres & Kostres*¹² as to the application of estoppel to financial agreements. The change is not retrospective.

A major difficulty with this amendment will be defining when a party has commenced a de facto relationship. Costly litigation about whether a de facto relationship has met the jurisdictional requirements in Pt VIIIAB for a property settlement or maintenance order to be made is frequent. A possible solution, or at least a partial solution to this problem, which was suggested by the Law Institute of Victoria in its submission with respect to the Exposure Draft, was that the payee be in a relationship which met at least one of the criteria in s 90SB with respect to the new de facto relationship. This proposal was not adopted in the Bill.

Setting aside a financial agreement

Section 90K of the Act, which sets out the circumstances in which a court may set aside a financial agreement or termination agreement has been amended. Section 90K(1)(d) is to be replaced and will provide that a court can only set aside an agreement where, if the court did not set aside the agreement, a child or an applicant with caring responsibility for a child of the marriage would suffer hardship for reasons described in a new s 90K(2A). The new s 90K(2A) provides that the test for determining hardship depends upon when the financial agreement was entered into:

1. For agreements entered into before a separation declaration is made - the test is a "material change in circumstances that relate to the care, welfare and development of the child of a marriage";
2. For agreements entered into at the same time as, or after the making of a separation declaration (i.e. after separation) - the test is "circumstances of an exceptional nature that relate to the care, welfare and development of the child of the marriage".

Sections 90UM(1)(g) and 90UM(4A) are similarly worded but apply to de facto relationships.

For agreements entered into after separation, the test for setting aside a financial agreement for circumstances relating to children is, therefore, now "exceptional" rather than "material", which is in line with s 79A and s 90UN relating to property settlement orders. The body of case law developed under these provisions will apply.

The Explanatory Memorandum explains that the difference in tests reflects the possibility that, for

¹¹ [2009] FamCA 1101 at paras 54-55

¹² [2009] FamCAFC 222; (2009) FLC 93-423

agreements made prior to separation, a substantial period of time may have elapsed and the circumstances of the couple may have changed in ways not contemplated by the original agreement. For example, a couple may have had a child since making the agreement whose needs may not be appropriately reflected in the agreement. If the agreement is entered into at the time of or after separation, a higher bar is considered appropriate, as the couple should be able to anticipate the future financial needs of the children. Perhaps the wording of the Explanatory Memorandum should read that the parties will be in "a better position to anticipate the future financial needs of the children", as such foresight is not absolute. The amendment, at least in relation to separated couples, improves consistency between s 90K and s 79A, and will make it more difficult for agreements to be set aside because of changes in circumstances relating to children.

Section 90K(1)(g) is to be repealed. This provision currently enables the court to set aside an entire financial agreement or termination agreement if it covers a superannuation interest that is an "unsplittable interest" under s 90MD in Pt VIII B. An "unsplittable interest" is defined in reg 11(1A) of the *Family Law (Superannuation) Regulations 2001* as:

"For sub regulation (1), the superannuation interest of the member spouse must be:

- (a) an interest other than 1 in respect of which the whole or remaining part of the benefits are being paid to the member spouse as:
 - (i) a lifetime pension or fixed-term pension that the member is no longer entitled to commute; or
 - (ii) a lifetime annuity or fixed-term annuity; and
- (b) an interest with a withdrawal benefit in relation to the member spouse of less than \$5,000".

It makes sense that an agreement should not be able to be set aside solely on ground (b), as a superannuation interest of less than \$5,000 is only a very small part of the property dealt with in an agreement. The ground does not satisfy the *de minimus* test. It is strongly arguable that ground (a) should have remained as a ground, as a party may be able to manipulate their superannuation entitlements so that the other party does not receive the split to which they are otherwise entitled under the agreement.

The amended s 90K(1)(d) applies to agreements made on or after the commencement of the amendments. However the repeal of s 90K(1)(g) also applies to agreements made before the repeal.

What was missed?

There are areas where financial agreements currently encounter difficulty, but which the Bill

makes no attempt to address. These include:

1. Whether an agreement entered into under Pt VIIIAB (before or during a de facto relationship) can be enforceable under Pt VIIIA if the parties later marry;
2. Ideally, s 44 of the Act would have been amended to provide that de facto parties have the right to institute proceedings within the latter of either 2 years from separation or 12 months from the date the financial agreement is set aside. This would give de facto couples the same rights as married couples under s 44(3B) of the Act;
3. A provision in an agreement which provides for the parties to split any future superannuation may not be possible to implement. Section 90MJ(1)(a) requires the interest to be identified in the agreement. An unknown future interest cannot be identified.

Proposed amendments in the Bill relating to other matters

The Bill proposes amendments to aspects of the Act other than the financial agreement provisions, including:

- Removal of the 21-day time limit on the ability of State and Territory courts to revise, vary, discharge or suspend a parenting order when making a family violence orders;
- Clarifying that the Family Court is a court of law and equity, as well as a superior court of record;
- Allowing the making of an offer to be disclosed to a court, although disclosing the terms of the offer would still be prohibited;
- Removing any doubt that registrars, like judges, have immunity when conducting conferences about property matters;
- When the court can make a summary decree to dismiss unmeritorious applications;
- Costs orders against *guardians ad litem*;
- Powers of arrest;
- The definition of “family counselling”;
- Making it an offence to retain a child overseas;
- Location orders for the purposes of the *Hague Convention on the Civil Aspects of International Child Abduction*.

These proposed changes are not dealt with in this article.

Conclusion

The legislation covering financial agreements is complex. The plethora of changes since 2000

and the differing interpretations by the courts has increased the complexity. Past "fixes" have been unsuccessful. Whether these proposed amendments make financial agreements a more viable option than they are at present is difficult to predict.

The Bill will hopefully give greater certainty to financial agreements and reduce the amount of litigation with respect to whether financial agreements are binding. The past versions of s 90G are more accessible. When there are disputes about the interpretation of legislative provisions, the new objective and principles may help increase certainty and clarity.

The Bill addresses some significant problems with financial agreement, and hopefully does not create too many more problems.

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