

## Financial Agreements: drafting and the Brangelina pre-nup

*By Jacky Campbell and Sherika Ponniah*

When Brad Pitt and Angelina Jolie separated in 2016, both camps breathed a sigh of relief that their reported Fort Knox-style pre-nuptial financial agreement had come to the rescue in protecting the couple's \$400 million asset pool. But what does it take to create an "iron-clad" financial agreement at a time when legislation and case law is still very grey?

A financial agreement must meet the requirements of Pt VIII A (or similar provisions in Div 4 of Pt VIII AB) although the legal advice requirements are subject to s 90G(1A) and 90J(1)(a) and the agreement may be found by a court to be binding despite the requirements not being met. When drafting a financial agreement or giving advice as to whether an executed agreement is binding, it is important to refer to the precise wording of the Act as it existed (or it is deemed to have existed) at the time. When drafting the agreement it is also important to be aware of the grounds on which a financial agreement can be set aside under s 90K or s 90UM. Even if it is binding, it may be set aside on grounds associated with the circumstances in which the agreement was signed or subsequent events.

The current minimum requirements are that:

- it is in writing (s 90B(1)(a), 90C(1)(a), 90D(1)(a), 90UB(1)(a), 90UC(1)(a) or 90UD(1)(a))
- it specifies whether it is made under s 90B, 90C, 90D, 90UB, 90UC or 90UD
- it is signed by all parties (s 90G(1)(a) or 90UJ(1)(a))
- it is between parties who are in one of the following categories:
  - "who are contemplating entering into a marriage with each other" and can also include one or more other people (s 90B(1)(a))
  - "to a marriage" and can also include one or more other people (s 90C(1)(a))
  - "to the former marriage" and can also include one or more other people (s 90D(1)(a))
  - "who are contemplating entering into a de facto relationship with each other" (s 90UB(1)(a))
  - who are "in a de facto relationship" (s 90UC(1)(a))
  - to a de facto relationship which has broken down (s 90UD(1)(a))
- it deals with property, financial resources and/or spousal maintenance of the parties or "matters incidental or ancillary" to those matters (s 90B(2), (3), 90C(2), (3), 90D(2), (3), 90UB(2), (3), 90UC(2), (3) and 90UD(2), (3)). Agreements under s 90B, 90C or 90D can deal with "other matters" if made on or after 21 November 2008. However, "other matters" cannot be dealt with in Pt VIII AB financial agreements.
- it does not cover matters dealt with in a previous agreement between the parties which is still in effect (s 90B(1)(aa), 90C(1)(aa), 90D(1)(aa), 90UB(1)(b), 90UC(1)(b) and 90UD(1)(b)). The previous agreement must be terminated either by a separate written agreement being a termination agreement under s 90J(2) or 90UL(2), or a provision in the new agreement terminating the previous agreement (s 90B(4), 90C(4), 90D(4), 90UB(4), 90UC(4) or 90UD(4)). However, a Pt VIII AB agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other.
- before the agreement was signed by that party, independent advice was provided by a legal practitioner to that party about:
  - the effect of the agreement on the rights of that party
  - the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement (s 90G(1)(b) or 90UJ(1)(b))
- before or after the agreement was signed, the party who was advised by that legal practitioner, was provided with a signed statement by the legal practitioner stating that the advice was provided (s 90G(1)(c) or 90UJ(1)(c))

- a copy of the statement was provided to the party or to a legal practitioner for the other party (s 90G(1)(ca) or 90UJ(1)(ca))
- it has not been terminated or set aside by a court (s 90G(1)(d) or 90UJ(1)(d))
- it has a separation declaration in certain circumstances. This is required if:
  - – the financial agreement deals with property or financial resources and the parties are not divorced (s 90DA(1)(a) or 90UF(1))
  - – if the parties are splitting superannuation in the financial agreement (s 90MP and 90MQ).

In the interests of creating an “iron-clad” financial agreement similar to the reported Brangelina agreement, however, practitioners should go above and beyond these minimum requirements.

For a list of suggested best practice requirements, subscribe to a free trial of *Australian Family Law & Practice* and see para 32-500.

© Copyright - CCH and Jacqueline Campbell. This paper uses some material written by the author for publication in *CCH Australian Family Law and Practice*. The material is used with the kind permission of CCH