

**FINANCIAL AGREEMENTS**

# The Truly Binding Financial Agreement – Is concise drafting the key?

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In a post *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 landscape, it has never been more important to draft financial agreements with precision, fairness and full disclosure. This paper concentrates on the drafting essentials to minimise the risk of a financial agreement being found not to be binding or being set aside. It covers:

1. Ensuring compliance with the relevant sections of the *Family Law Act 1975* (Cth) (FLA)
2. Independent legal advice and acknowledging that the advice has been received
3. Drafting to show full disclosure
4. Drafting for clarity and to avoid uncertainty
5. The pros and cons of a complex agreement
6. Drafting to demonstrate fairness in the terms – dealing with the test for “bad bargain”
7. Drafting to demonstrate no disadvantage or duress – is this a relevant consideration?
8. The problem of false recitals
9. Drafting lessons from *Thorne v Kennedy*
10. Other drafting tips.

## **1. Ensuring compliance with the relevant sections of the Family Law Act**

### *The basics*

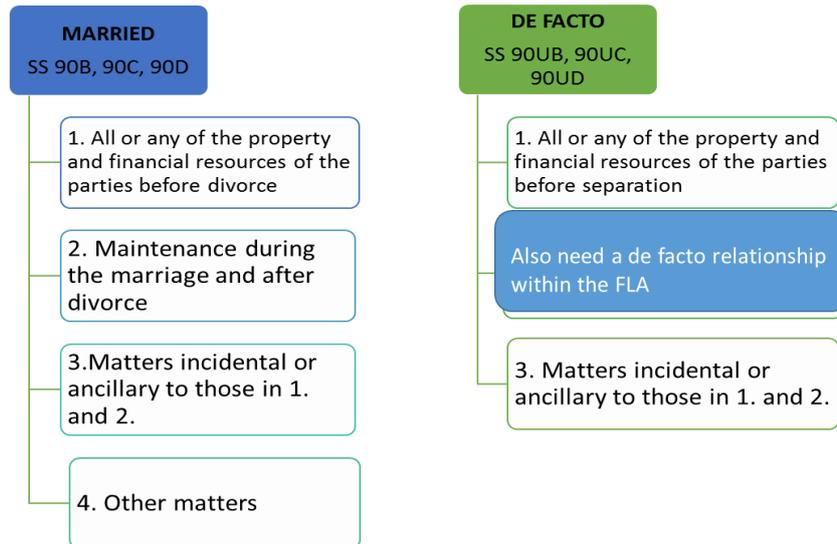
Before starting to draft a financial agreement, re-read s 90G(1) and (1A) (or the de facto equivalents of s 90UJ(1) and (1A)), s 90K (or 90UM noting that the de facto equivalent is differently worded) and s 90KA (s 90UN). This makes sure that the requirements and the wording are fresh while drafting. Sections 90G and 90G(1A) set out when an agreement is binding. Section 90K sets out when an agreement can be set aside and s 90KA deals with the enforceability of financial agreements.

The agreement also needs to comply with one of s 90B, 90C, 90D, 90UB, 90UC or 90UD, or be a termination agreement under s 90J or 90UK, so it is important to re-read the relevant section and check that the agreement covers matters that are within that section. There are subtle but important differences between them. As an example, s 90B states:

- (1) If:
  - (a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
    - (aa) at the time of the making of the agreement, the people are not the spouse parties to any other binding agreement (whether made under this section or section 90C or 90D) with respect to any of those matters; and
  - (b) the agreement is expressed to be made under this section;  
the agreement is a **financial agreement**. The people may make the financial agreement with one or more other people.
- (2) The matters referred to in paragraph (1)(a) are the following:
  - (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.

- (3) A financial agreement made as mentioned in subsection (1) may also contain:
- (a) matters incidental or ancillary to those mentioned in subsection (2); and
  - (b) other matters.
- (4) A financial agreement (the **new agreement**) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement.

By contrast financial agreements under Pt VIIIAB, which deal with de facto relationships, cannot contain “other matters” or deal with property and financial resources acquired after separation. A table setting out the types of agreements (except termination agreements) and the matters they can deal with is set out below:



With respect to Pt VIIIAB agreements, a de facto relationship within the FLA is required for the agreement to be effective. If it is a s 90UB agreement, the planned de facto relationship needs to commence or the agreement will not operate. The parties must be ordinarily resident in a participating jurisdiction (i.e. not Western Australia or overseas) when they make the agreement (s 90UA). In *Darrow & Malden and Ors* [2017] FamCA 497, the parties separated in 1993, and entered into the agreement in 2011, but did not “opt in” to the FLA. In *Teh & Muir* [2017] FamCA 138, the parties were never in a de facto relationship. The applicants engaged in unconscionable conduct and took advantage of the respondent’s dementia.

*When is an agreement binding?*

An agreement is binding if it complies with s 90G(1) (or s 90UJ(1)):

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

- (a) the agreement is signed by all parties; and
- (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
- (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
  - (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
- (d) the agreement has not been terminated and has not been set aside by a court."

The original version of s 90G required the wording of the advice required (not the same wording as the advice required by the current s 90G(1)(b)) to be a term of the financial agreement (*Black & Black* (2008) FLC 93-357). This is no longer the case, but a clause stating the advice has been provided, repeating the wording s 90G(1)(b), is usually included.

To mitigate the strict technical interpretation of s 90G following *Black & Black* and make it more difficult for financial agreements to be set aside, remedial sections were introduced into Pt VIIIA and Pt VIIIB relieving against the consequence of an agreement not meeting the requirements of s 90G(1)(b), (c) and (ca) (or s 90UJ(1)(b), (c) and (ca)). Section 90G(1A)–(1D) allows certain agreements which do not comply with s 90G(1) to be "saved". Section 90UJ is similarly worded. The effect of s 90G(1A) is that an agreement, provided that it is signed by all parties, which does not meet all the other requirements of s 90G(1) may be saved "if a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties". In considering this, any changes in circumstances after the agreement was executed are irrelevant. Of course, agreements entered into between 14 January 2004 and 4 January 2010 have the difficulty of interpretation of the transitional provisions identified in *Hoult & Hoult* (2013) FLC 93-566 and *Parker & Parker* (2012) FLC 93-499.

#### *Avoiding an agreement being set aside*

An agreement which is otherwise binding can be set aside on any of the grounds in s 90K (s 90UM). Section 90K provides that:

- "(1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
  - (aa) a party to the agreement entered into the agreement:
    - (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
    - (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
  - (b) the agreement is void, voidable or unenforceable; or ...
  - (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
  - (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
  - (e) in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
  - (f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
  - (g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.
- (1A) For the purposes of paragraph (1)(aa), **creditor**, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

- (2) For the purposes of paragraph (1)(d), a person has ***caring responsibility*** for a child if:
- (a) the person is a parent of the child with whom the child lives; or
  - (b) a parenting order provides that:
    - (i) the child is to live with the person; or
    - (ii) the person has parental responsibility for the child.”

*Other things to remember.*

- Section 90UM, which applies to agreements between de facto couples, is worded and numbered differently to s 90K;
- Section 90G(1A) (and 90UJ(1)) are not linked to s 90K (and s 90UM). An agreement cannot be “saved” under s 90G(1A) if it is at risk of being set aside under s 90K;
- Maintenance provisions must comply with s 90E and 90F (or s 90UH and 90UI); and
- A separation declaration may be needed for certain clauses to take effect (property and financial resources - s 90DA and 90UF; and in relation to superannuation splits - s 90XP and 90XB).

## **2. *The Independent Legal Advice clause***

Section 90G(1)(b) (and s 90UJ)(1)(b) is worded similarly) requires that each spouse party to the agreement is given independent legal advice from a legal practitioner about:

- The effect on the rights of that party.
- The advantages and disadvantages at the time that the advice was provided, to that party of making the agreement.

The advice must be given by an Australian legal practitioner (*Ruane & Bachmann-Ruane and Anor* [2009] FamCA 1101; *Murphy & Murphy* [2009] FMCAfam 270).

*Burden of proof*

The nature of and burden of proving independent legal advice was considered by the Full Court of the Family Court in *Hoult & Hoult* (2013) FLC 93-566. Justice Thackray’s clear explanation (at [60]-[63]) has been generally accepted:

“In my view, the onus of establishing that an agreement is binding falls upon the party asserting that fact because the legislation provides that an agreement is binding “if, and only, if” the prescribed matters are established. It follows that the party relying upon the agreement must establish the existence of all those matters, including the giving of the requisite legal advice to both parties.

I recognise the potential forensic difficulty faced by a party who seeks to uphold a Financial Agreement when the other party claims not to have received the prescribed legal advice. However, the fact there is difficulty in proving something within the knowledge of only the other party and their solicitor does not mean the legal burden of proof passes to the party who seeks not to be bound by the agreement.

Importantly, however, I consider that once the party seeking to rely upon the agreement produces in evidence the certificate signed by the other party's solicitor, there is a forensic obligation on the other party to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate (especially when read with the recital in the agreement to the same effect).

This forensic obligation is properly conceptualised as the burden of introducing evidence and should not be confused with the burden of proof as a matter of law and pleading. For a discussion of the difference see *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164 especially at 167-168 per Barwick CJ, Kitto and Taylor JJ and 170-171 per Windeyer J."

### *Nature of the advice*

How comprehensive and accurate must the advice be? If a party seeks to establish that the advice was not given despite the prima facie evidence of a signed Statement of Independent Legal Advice, what must that party show?

There are different judicial views as to the nature of the advice that must be given. The following views may not all be current, but illustrate the most recent approaches taken by the courts:

- The advice need not be correct. Justice Strickland in *Senior & Anderson* (2011) FLC 93-470;
- It may not be possible to advise that there are both advantages or disadvantages. Justice Strickland in *Senior & Anderson* interpreted s 90G(1)(b) (the agreement was entered into on 27 July 2009, but the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) commenced on 4 January 2010 had retrospective effect)) as meaning:

“providing such advantages, if any, and such disadvantages, if any, as are apparent to the legal practitioner providing the advice.”

- The parties are required to simply obtain advice, which does not mean that it needs to be correct, accepted or followed. Justice Cronin in *Ruane & Bachmann-Ruane* [2009] FamCA 1101;
- The effect and implications of an amendment to the agreement were not explained to the wife in the same way that the terms of the original agreement were. Advice of a general nature was insufficient. Justice Strickland (the trial judge) in *Parker & Parker* [2010] FamCA 664;
- Advice given to the wife by her legal practitioner was incorrect. She was told that the agreement would not be binding. Justice Le Poer Trench said (at [325]):

“The point at issue in this case is that the legal advice was not only incorrect as to the fairness of the agreement, it was wrong as to the major and pivotal effect of the agreement, namely that the wife was surrendering her rights to seek any order

under Pt VIII of the *Family Law Act*. That is a substantially different circumstance to one where the party entering an Agreement understands that the agreement may be important in proceedings between the parties under Pt VIII of the Act as opposed to excluding the courts [sic] ability to consider any application under that Part.”

The agreement was not set aside on this ground (but on other grounds), as the husband was not aware of the wife’s erroneous advice. If he had been aware, perhaps there might have been a finding of unconscionable conduct rather than non-compliance with the advice requirement. *Pascot & Pascot* [2013] FamCA 945.

- The absence of a list of assets and liabilities at the time of giving advice does not necessarily mean that the advice required by s 90G was not given. Justice Murphy, the trial judge in *Hoult & Hoult* (2011) FLC 93-489 said (at [66]):

“A practitioner providing the required advice might, of course, feel more comfortable, or consider it prudent, to have a list of assets and liabilities so as to give the client examples of the permutations that *might* be possible and what may, or may not, be seen as ‘advantages’ or ‘disadvantages’ as a result. In addition, it might well be that advice which can be seen to be comprehensive in terms of a solicitor’s duties, or that which is desirable in light of s 90G’s ramifications, might have many components to which a list of assets and liabilities might pertain. The issue is not what prudence or practice might dictate, but what s 90G *requires* of any advice.”

The Full Court allowed the appeal. One of the grounds was that Murphy J should have concluded that the solicitor’s certificate, particularly when read in conjunction with the recital in the agreement, should have been treated at least as prima facie evidence of compliance with s 90G. It was remitted for re-trial.

- Advice must be given under the FLA and not (at [91]) about “the commercial terms of that agreement and make sure they were agreed to”. The fact that the wife had been given advice under the FLA by 2 previous legal practitioners was irrelevant as they did not sign the Statement. Justice Jarrett in *Adame & Adame* [2014] FCCA 42.
- Advice must be given by the legal practitioner signing the Statement. The fact that the wife had been given advice under the FLA by 2 previous legal practitioners was irrelevant as they did not sign the Statement. *Adame & Adame* [2014] FCCA 42.
- Advice must be given in the terms set out in s 90G(1)(b). The legal practitioner’s role is not to simply “give a certificate”, but to give the requisite advice. In *Renard & Geach* [2013] FCCA 617 Judge Small said (at [83]):

“It is difficult to see how that role could be fulfilled in even a 50 minute interview, as it would require detailed instructions being taken as to the assets and liabilities of the marriage, the husband’s current position, and the history of the relationship

before even looking at the agreement. I therefore consider that I do not need to make a finding on the exact length of time Mr Young spent alone with the husband ... as even on Mr Young's evidence, it was not in my view long enough to take comprehensive instructions and give detailed and comprehensive advice about the agreement."

Judge Small, in contrast to Murphy J in *Hoult*, considered that a list of assets and liabilities was necessary to give advice. Justice Aldridge in *Abrum* also disagreed with Justice Murphy.

- The rights which are being ousted by the agreement must be identified. Justice Aldridge in *Abrum & Abrum* [2013] FamCA 897 said (at [38]-[45]):

"Nonetheless, when s 90G(1)(b) speaks of "rights" it must be speaking of the entitlement to bring a case under s 79 and the factors that weigh in favour of that person's case under ss 79(4) and 75(2) otherwise it would have limited meaning.

In order to give advice about the effect of an agreement on the rights of a party, that is their rights under the Act in relation to property, a legal practitioner must establish what those rights are at the time the advice is provided. This is because s 90G(1)(b) requires advice to be given on the effects of the agreement upon the rights of that party and the advantages and disadvantages of the agreement. If their rights are not known then it is impossible to advise as to the effect of the agreement on them.

It is unhelpful to advise a person that a financial agreement might adversely affect his or her rights if those rights are not identified. A party must know more than some unknown or undefined right is being given up. He or she must have some idea, at least in general, of his or her present entitlements or rights (to use the words of the section) with which he or she may compare the provisions of the proposed financial agreement. It is only in that way that there can be actual advice about the effect of the agreement on those present rights.

It is quite clear that a person may choose to enter into an agreement where he or she may very well be much worse off than if he or she were left to rely on their rights under s 79 of the Act. Thus, there is a requirement for specific legal advice to be given. That is the safeguard the legislature imposes when it permits the parties to deal with their property by agreement and without possible interference from a court.

Accordingly, the advice must be real and meaningful. It must be directed to the parties' circumstances and their present rights.

Proper identification of a parties' rights can only be done by identifying the property of the parties then held and a consideration of the parties contributions (financial and non-financial) to the acquisition of that property and to the welfare of the children. Any other relevant factors under s 79(4), including s 75(2), would then need to be considered. Only by doing so can advice be given that complies with the terms of s 90G(1)(b).

In the present case Mr Lodge did not obtain any list of the parties' property and liabilities. He did not seek to ascertain what financial and non-financial contributions the parties had made to that property or to the welfare of the

children. He did not explore any of the other s 79(4) matters and the s 75(2) factors with the wife. In those circumstances he was entirely ignorant of the rights of the wife and could not give her therefore any advice about her rights. Mr Lodge did not suggest that he did so.

Similarly, advice about the advantages and disadvantages for a party making the agreement must involve a consideration and weighing of what would be their rights but for entering the agreement and those advantages and disadvantages after having entered the agreement. No doubt each would have its advantages and disadvantages and they need to be compared.”

- No evidence that the wife’s legal practitioner took any financial history on the wife or discussed what rights she had under Pt VIII of the FLA, particularly after she had children (she gave birth 8 days later with the parties’ first child). The 15-minute conference was inadequate to give the advice required under s 90G(1)(b), as well as advice in relation to Wills and testamentary dispositions, execute the agreement and certificate, and dictate the file note. Justice Watts in *Raleigh & Raleigh* [2015] FamCA 625 distinguishing from the facts in *Hoult* as the certificates annexed to the agreement indicated that advice was given on non-existent rights.

#### *Independence of advice*

The circumstances in which the legal advice given by a legal practitioner lacks independence is unclear. Obviously, each party must have their own legal practitioner and they cannot be from the same law firm. Circumstances in which the advice may arguably considered to be tainted is if the legal practitioner is:

- selected by the other party
- selected and paid for by the other party
- paid for by the other party, or
- paid for by the other party on the pre-condition that the costs are not greater than a certain amount.

The cases dealing with financial agreements under the FLA have confirmed the independence of the advice in at least the first three of the above four situations. For example, in *Adame & Adame* [2014] FCCA 42 the husband paid for two of the three legal practitioners seen by the wife. The first two refused to sign the Certificate of Independent Legal Advice. The third legal practitioner signed the Certificate of Independent Legal Advice on behalf of the wife, but was located and instructed by the husband and the file was opened in his name and emails were sent to his address. The husband had not provided the legal practitioner with the wife’s email address. The independence of the legal practitioner was accepted by Judge Jarrett who was satisfied that, contrary to the wife’s evidence, the agreement was signed by the wife without the husband being present. However, Judge Jarrett found that the advice did not meet the requirements of s 90G(1)

on another ground, because the legal practitioner who gave the advice required by s 90G(1)(b) was not the legal practitioner who signed the certificate. The legal practitioner who signed the certificate said he did not give the advice required under the FLA (despite signing the certificate) and that he was only concerned with the “commercial terms” of the agreement and whether those terms reflected the parties’ intentions. The fact that the file wasn’t opened in the wife’s name wasn’t an issue, but in other circumstances it may be a more important factor.

In *Logan & Logan* [2012] FMCAfam 12, Terry FM found that the wife had independent legal advice although there were strong indications that it was not. Arguments against the advice being independent despite the Federal Magistrate’s finding that it was, were:

- The parties jointly attended three of the wife’s four meetings with the wife’s legal practitioner without the husband’s legal practitioner being present.
- The wife’s legal practitioner had prepared wills for both parties.
- The wife’s legal practitioner effected the transfer of the home to the husband at the husband’s request.
- The only conference the wife had with the legal practitioner without the husband being present was the last of the four conferences, when she executed the agreement.
- The wife’s legal practitioner’s file note did not contain any reference to advice being given to the wife at the last conference and the husband did not contend that it was given at any of the previous three meetings.
- The husband ultimately paid the wife’s legal practitioner’s account.
- The wife’s legal practitioner 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 legal practitioner was made by the wife.

On appeal in *Logan & Logan* (2013) FLC 93-555, the duress and unconscionable conduct grounds were not pursued by the wife. The Full Court allowed the wife’s appeal as the trial judge mis-applied the burden of proof. Following *Hoult & Hoult* (2013) FLC 93-546, the onus of proof lay on the party seeking to establish that a financial agreement is binding. The husband could rely upon the Certificate signed by the wife’s solicitor and the forensic obligation was then thrown to the wife

to adduce evidence to disprove or at least throw into doubt the inference or conclusion drawn from the Certificate. In this case, there was evidence to displace the inference. The Full Court did not decide if that evidence was sufficient, but ordered a re-trial.

The wife unsuccessfully argued that her legal advice was not independent in *Balzia & Covich* [2009] FamCA 1357. She was taken by the husband to see the legal practitioner and she asserted that the legal practitioner was mainly her husband's legal practitioner. Justice Collier accepted that the husband was told to go away on the first occasion the wife saw the legal practitioner and that the husband had his own legal representation. The agreement was found not to be a valid agreement on other grounds.

In *Vance & Vance* [2012] FMCAfam 599, Baumann FM was satisfied that the wife received independent legal advice in circumstances where:

- Unbeknownst to the wife, the legal practitioner had acted for the husband five or six years prior and they fell out over fees. The fallout was important to the judge's finding;
- The husband arranged the appointment, paid the wife's legal fees, and accompanied the wife to the appointment;
- The legal practitioner had previously practised in family law but had spent the previous eight years concentrating on commercial, conveyancing, wills, estates and aviation law. The limited family law experience wasn't a factor.

Federal Magistrate Baumann found that the legal practitioner was independent and was not required, nor was he able to assess all the future financial permutations that this couple's financial journey could take. He agreed with Murphy J in *Hoult* (at [63]) that the legislation does not prevent parties from being "perfectly free to make a bad bargain".

Federal Magistrate Baumann concluded (at [48]):

"I am satisfied that Mr King was both independent and a legal practitioner ... I see nothing in a requirement prescribed by the relevant section to impose any obligation on the legal practitioner to have either specialist or other qualifications in family law. The section requires, by inference, some knowledge of this area of law otherwise it would be hard to be satisfied that the practitioner could be able to articulate the '*advantage and disadvantages*' of the agreement or the effect of the agreement on the rights of the party being advised. Mr King did have some experience in family law over many years."

In *Moreno & Moreno* [2009] FMCAfam 1109, the issue of the limitations placed on the wife's legal advice by the husband was not considered in the judgment. Federal Magistrate Demack noted that the husband told the wife he would only pay for one hour's advice. The wife was advised that it was not to her financial advantage to sign the agreement. The legal practitioner recognised the

reasons she might do so anyway. In the face of sensible advice (which the wife did not follow) and the fact that the agreement was set aside on other grounds, the limitation placed by the husband on legal advice was not an important factor. However, in other circumstances it might arguably have assumed greater importance.

In *Weldon & Asher* [2014] FCWA 11, Thackray J found that the husband had independent legal advice in circumstances where:

- The wife's sister identified potentially suitable legal practitioners whose names were given to the husband either by the wife or the wife's sister;
- The wife's sister made contact with the legal practitioners;
- The wife's sister may have even made the appointment for the husband;
- The wife's sister had a former professional relationship with the husband's legal practitioner.

In *Guest & Rasevic* [2016] FamCA 91, the parties both saw the wife's legal practitioner for the execution of the agreement. They thought that the husband had waived his right to independent legal advice. The wife conceded that the agreement was not binding after initially seeking that it be found to be binding under s 90G(1B).

More recently in *Purdey & Millington* [2018] FCCA 213, the wife had limited English and there was no interpreter when she was given advice. The husband's legal practitioner suggested a legal practitioner for the wife. There was a dispute as to who made the appointment for the wife to see the legal practitioner, but the trial judge found that the husband probably made the appointment and that he was present when the wife saw the legal practitioner. The agreement was held not to be binding. Judge Jones found that the evidence before the court was sufficient to throw into doubt the inference which could be drawn from the wife's legal practitioner's statement attached to the financial agreement certifying that the wife was given independent legal advice, for the following reasons:

1. The arrangement for the wife to be provided with legal advice was not independently made by the wife. Rather, the husband arranged for the wife to attend on Ms J on the recommendation of Mr K, his legal practitioner, who drew up the financial agreement;
2. There was no record held by Sydney Legal House, the firm Ms J worked for when she met with the wife, of the wife as a client. The capacity in which Ms J acted was questionable;
3. Ms J received the financial agreement at the commencement of her meeting with the wife and the meeting took no longer than 20 minutes. In Judge Jones' opinion, this was insufficient time for Ms J to have explained to the wife, who had limited English speaking skills, the wife's rights under the relevant statute, the effects of the financial agreement on her rights and the advantages and disadvantages of the financial agreement. She referred to *Abrum & Abrum* [2013] FamCA 897 (quoted above), where Aldridge J set out the

obligations upon a legal practitioner purporting to give legal advice under s 90G(1)(b) of the Act (at [35]-[45]). In Judge Jones' opinion, it would not have been possible for Ms J to have complied with these obligations in a time period of ten to 20 minutes;

4. The husband was responsible for and paid the fee for the meeting between Ms J and the wife;
5. The husband was present for the duration of the meeting between Ms J and the wife;
6. The absence of any file notes of the meeting support an inference that there was a lack of proper engagement by Ms J with the wife, a lack of competent legal service and a lack of the provision of any legal advice at all.

In the circumstances it was not appropriate for the agreement to be held binding under s 90G(1A).

**Proving compliance with s 90G(1)**

Although s 90G(1) does not require the Statements of Independent Legal Advice to be annexed to the agreement (as required in the first version of s 90G(1)), the better view is that they should be so, as to ensure that they stay together and that there is clarity about which agreement the advice was given.

Lawyers should be cautious about how they prove compliance with s 90G(1)(c) and (ca) (and s 90UJ(1)(c) and (ca)). Some lawyers draft a one page receipt or acknowledgement where the party acknowledges receipt of the advice, receipt of the Statement of Independent Legal Advice from their lawyer and receipt of the Statement of Independent Legal Advice from the other legal practitioner at the same time. Sometimes, receipt of a copy of the full executed agreement is also acknowledged. Section 90G(1) requires the parties to receive the Statements of Independent Legal Advice of each other, but not a fully executed copy of the agreement. A signed acknowledgement of receipt of the Statements of Independent Legal Advice of both legal practitioners and the fully executed agreement is good practice, but not a legislative requirement. An example of a receipt is:

I Joseph Robert Williams acknowledge that the Section 90B Financial Agreement ("Agreement") between me and Alice Louise Davis ("Alice") dated the 15<sup>th</sup> day of May 2019 was signed by me and Alice and that:

1. The signed copy of the Agreement was given to me.
2. Before signing the Agreement, I received independent legal advice from my legal practitioner, David Phillips, about:
  - 2.1. The effect of the Agreement on my rights; and
  - 2.2. The advantages and disadvantages, as the time that the advice was provided to me of making the Agreement.
3. I have received a signed Statement from my legal practitioner, David Phillips, stating that I received independent legal advice about:
  - 3.1. The effect of the Agreement on my rights; and
  - 3.2. The advantages and disadvantages, as the time that the advice was provided to me of making the Agreement.
4. I have received a signed Statement from Alice's legal practitioner stating that before signing the Agreement Alice was provided with independent legal advice from her practitioner about:
  - 4.1. The effect of the Agreement on her rights; and
  - The advantages and disadvantages, as the time that the advice was provided to her of making the Agreement.

Dated the      day of      2019

SIGNED by the said      )

Joseph Robert Williams      )

in the presence of:      ) .....

There are several different steps in complying with s 90G(1) and, although some can occur at the same time, they cannot all occur at the same time unless both parties and their lawyers meet to sign the Agreement and Statements and exchange the statements. If there is not a joint meeting, it is better to either divide the receipt into 2 separate receipts or acknowledgements or have the receipt or acknowledgement signed by the party who signed first after the final step has occurred. If Joseph signs first, Joseph can only acknowledge 2 and 3. Alice then signs the agreement and can sign a receipt in the above terms. Joseph then can acknowledge receipt of the signed agreement and 1 and 4.

Of course, a written acknowledgement or receipt of the advice does not mean that a court cannot go behind that acknowledgement, just as it can go behind a statement of independent legal advice, e.g. *Hoult & Hoult* (2013) FLC 93-546 and *Logan & Logan* (2013) FLC 93-555. The acknowledgement and the Statement of Independent Legal Advice are prima facie evidence that the events occurred.

In *Fevia & Carmel-Fevia* (2009) FLC 93-411 one party did not receive a copy of the agreement until 7 years after it was executed. In *Suffolk & Suffolk [No 2]* [2009] FamCA 917 it was 4 years. These cases were decided when s 90G(1) required one party to have an original of the agreement and the other a copy. There was no temporal requirement in the provision, but the courts seemed to be prepared to read it in. In *Purdey & Millington* [2018] FCCA 213, the fact that the wife was not given a copy of the agreement shortly after she had signed it (although it was no longer a legislative requirement) was a factor in finding the agreement not binding under s 90G(1A). Non-provision or delayed provision of a copy of the executed agreement in a timely fashion seems to be problematic and understandably so.

### **3. Drafting to show full disclosure**

Disclosure isn't a requirement for financial agreements but it does help to ensure it is not set aside. There are several ways to deal with disclosure of each party's financial position:

1. If there are proceedings before the court, the parties can rely on their financial statements and affidavits, and their compliance with their duty of disclosure. This is ideal – provided it is accurate – as it is open, transparent and on the court record.
2. The parties can provide summaries of their financial positions in the financial agreement, either in the recitals, in schedules to the agreement or both.
3. The parties can annexe sworn financial statements to the agreement.
4. The parties can do full mutual disclosure, even if there are no proceedings before the court. This might include formal valuations of real estate and businesses, or at least market appraisals of real estate and an accountant's estimate of the value of businesses.

5. The parties can do limited mutual disclosure (such as recent tax returns and assessments, recent financial statements and tax returns of entities and recent superannuation member statements) and not all other possibly relevant financial documents such as bank accounts.
6. The parties provide no formal disclosure, but include a recital in the agreement that they waive any right to proper disclosure.
7. The parties include a recital in the agreement that they have full or sufficient knowledge of the other party's affairs to enter into the financial agreement without formal disclosure.

Whatever approach is taken, it should be clear from the recitals how or if the parties have provided disclosure.

Difficulties can arise when one or both parties have a number of entities. The entities need to be referred to precisely, and not just as "the husband's entities" or "the Marshall group". The difficulties are exacerbated in agreements entered into before or during a relationship, as the way a business operates may change, particularly where one of the parties is involved in a business with other family members. The operations of the business may be moved from one entity to another, or a trust may be interposed, directorships and shareholdings may change and new entities formed. How can they still be quarantined?

In *Acker & Acker* [2014] FamCA 891, the wife alleged that the agreement was obtained by fraud, by reason of non-disclosure by the husband of a material matter. He disclosed "what were described as beneficiary interests in wholly discretionary trusts the wife foreshadows that she will contend at all material times the property of the trusts was actually in the whole or at least partial ownership of the husband" (at [10]). There is no reported decision as to the outcome. Both parties agreed that the Family Court matter could not be determined until a tax dispute was resolved by the Administrative Appeals Tribunal. The husband in this case probably considered that he had provided proper disclosure of his interests in the trusts in the financial agreement, but he still ended up in court after separation with the nature of his interests in dispute.

The disclosing party can't disclose a non-existent entity and it is difficult to protect an entity which doesn't yet exist. A party's interest in an entity at the end of the relationship may be different to the interest when the agreement was executed.

Superannuation may be a problem in pre-separation agreements, because of the difficulties of identification of the fund and giving procedural fairness, working out a split, naming the fund and ensuring the terms are enforceable. (See s 90XJ).

Tax can also be problematic in pre-separation agreements. It is impossible to predict if parties or entities will have significant liabilities and what tax consequences there may be in the future if property is to be transferred, particularly as tax law and the parties' circumstances may change. Often the best that can be done is to advise the client that it is impossible to predict the future and that possible tax consequences on disposition and transfer should be considered when making decisions about the acquisition of property during the relationship.

If the intention of the parties is that the weaker party will not have any tax consequences from the agreement or from their involvement in the stronger party's entities, then this should be clear in the agreement, and appropriate indemnities given.

#### *Checking instructions*

It is important to remember that although full and frank disclosure is not a requirement for a financial agreement, establishing that there has been such disclosure is done to ward off a potential application to set aside a financial agreement under s 90K(1) or s 90UM(1).

Mistakes can be made by clients when giving instructions as to their financial positions, so it may be sensible to protect your client by:

- Obtaining ASIC searches of both parties and of any entities;
- Obtaining title searches (including index searches) of real estate of both parties;

- Having the client's accountant check that the financial position of the client is accurately described in the financial agreement.

Post-separation, lawyers are likely to do title searches and ASIC searches, but that are also important pre-separation.

There are pros and cons for detailed disclosure being provided by parties entering into a financial agreement. On the one hand, by parties providing full details of their financial positions, if there are any errors, it may be easier for the other party to successfully apply to set the agreement aside for non-disclosure, misrepresentation or other grounds under s 90K. On the other hand, if the parties do not provide full details of their financial positions in the agreement, it may be more difficult to defend an application for the agreement to be set aside for non-disclosure of a material matter.

#### **4. Drafting for clarity and to avoid uncertainty**

A financial agreement is a contract. To draft a contract, it is necessary to look at what the client wants to achieve. The following questions must be considered first:

- What is the goal?
- How is it to be done?
- Who is to do it?
- When is it to be done?
- How is it to be enforced if it is not done?

Both the agreement and any letters of advice should be easy for the client to read and understand. The agreement also needs to be enforceable as a contract, not as a set of orders. The clauses of the agreement should be drafted as a contract and not just copied from orders. The style is different and if the terms of the agreement are drafted in the same form as orders they may not be enforceable as they may lack clarity and certainty. Precedent clauses can help with the first draft of an agreement. The draft must be checked carefully and altered to fit the precise and unique facts of the particular case.

Care should be taken in using precedent agreements. Collier J in *J & J* [2006] FamCA 442 was critical of the use of precedent agreements without sufficient thought as to whether or not it was appropriate. Collier J concluded at [34]:

“However I am left in the position of having a very uncomfortable suspicion that the precedent that has been used has not been properly amended. I am further left unable to state with any certainty what was actually done and what was actually explained to each of the parties and the manner in which the document was actually executed and witnessed.”

In *Squibb & Graham* [2018] FCCA 1906, the trial judge considered that the agreement had the hallmarks of having been downloaded from the internet, but it was rectified to refer to the FLA and instead of referring to s 90KA, to refer to s 90B as being the type of agreement.

#### *Matters to be covered*

What clauses should be included in an agreement? As a starting point:

1. What property is excluded?
  - 1.1. Define the excluded property;
  - 1.2. Are there any circumstances where the financially weaker party will receive some of the otherwise quarantined property?
2. How will other (joint and separate) property be dealt with?
  - 2.1. Who retains the house or will it be sold?

- 2.2. When will the other party vacate the home?
  - 2.3. How will property be valued?
  - 2.4. The arrangements for any sale;
  - 2.5. How will the net proceeds of sale be distributed?
  - 2.6. How will liabilities be dealt with (including tax)?
3. Will superannuation be split?
    - 3.1. If so, how?
    - 3.2. How will procedural fairness be given?
    - 3.3. Who will retain any self-managed superannuation fund and clauses to give effect to this? What if parties don't have one when the agreement is entered into but create one later?
    - 3.4. The operative time for a payment split is the beginning of the 4<sup>th</sup> business day after the day on which a copy of the agreement is served on the trustee accompanied by the other documents specified in s 90XI(1).
4. Spousal maintenance
    - 4.1. Is the right to spousal maintenance ousted?
    - 4.2. Will one party receive maintenance for a fixed period?
    - 4.3. How will the requirements of s 90E be met?
    - 4.4. Can the requirements of s 90F be met?
5. What contingencies have the parties considered?
  6. Recitals – give sufficient background;
  7. Schedule of the parties' assets and liabilities;
  8. Statement of Independent Legal Advice;
  9. Separation declaration (if applicable).

#### *Uncertainty and incompleteness*

A contract may be held void for uncertainty or incompleteness if the intention of the parties cannot be determined objectively. The terms "uncertainty" and "incompleteness" are defined as:

- *Uncertainty.* The agreement, or an essential term of it is too vague or ambiguous for the court to determine the parties' rights and obligations. The court cannot enforce an agreement or an essential term which is not definite and clear.

- *Incompleteness*: The agreement is incomplete because the parties failed to reach agreement on an essential term. Not everything necessary for the agreement to be implemented has been agreed.

### *Uncertainty*

Points to note about uncertainty include:

- Courts are reluctant to strike down an agreement which parties intend to be binding. They endeavour to uphold contracts wherever possible.
- Courts try to objectively ascertain the parties' intentions.

Clauses and agreements otherwise void for uncertainty may be saved by:

- applying an external standard such as the standard of reasonableness
- if the parties have acted on the agreement, their actions may clarify the uncertainty
- severing the uncertain part from the contract if it is not important.

### *Kostres & Kostres (2009) FLC 93-420*

The Full Court found that an agreement was void for uncertainty. The 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. The agreement was particularly difficult to interpret as it used terms which were ambiguous or did not reflect the wording of the FLA, such as "acquired", "assets", "joint funds" and "from their own moneys".

### *Parke & Parke [2015] FCCA 1692*

This case involved two clauses in a financial agreement which created ambiguity and uncertainty. Pursuant to one clause, the wife's half interest in a real property was excluded property which she retained in the event of a separation. However, pursuant to another clause the wife was required to transfer her 50% share to the parties' son X within 60 days of a separation. A complicating factor which was not foreseen, at least by the husband when the agreement was entered into, was that X refused to accept a transfer of the wife's half interest in the property and the agreement did not have a default provision setting out what was to occur in the event that X refused to accept the transfer.

The trial judge, Howard J, found that the clauses were essential terms of the agreement because they dealt with what was to happen in the event that the parties separated and the clauses could not be severed from the agreement. He set the agreement aside. The husband's appeal was discontinued by the husband's legal personal representative after the husband's death.

Example:

An example of an attempt to quarantine the husband's initial contributions, being his interest in a family group of entities, didn't work. The agreement didn't anticipate that the home would be put in the wife's name for asset protection reasons. The agreement stated:

*6. Unless excluded by the operation of previous paragraphs hereof, all assets and resources accumulated by Joseph and Alice jointly during their relationship shall be considered as joint assets ("the joint assets").*

*7. The joint assets will be registered in joint names or in the names of entities in which Joseph or Alice have joint, director or beneficial ownership and joint control.*

The matter settled on the basis that the wife kept the home because:

- the agreement did not anticipate that “joint property” might be in the sole name of one of the parties;
- The quarantining of the husband’s business interests may not have been effective as the structure had changed.

### *Incompleteness*

An agreement is void for incompleteness if the parties failed to reach agreement on an essential term. Important points to note about incompleteness are:

- If it is clear that the parties intended to form a binding contract, the courts may imply an omitted term into the contract to save it.
- If an agreement provides the formula or machinery necessary to clarify an essential term, the agreement is not void.
- Tools which are helpful to save contracts from voidness for incompleteness may also be useful to save contracts from voidness for uncertainty (e.g. if only part of the agreement is incomplete, it may be severable).

Incompleteness and the limitations of the doctrine of rectification were discussed in *Fevia & Carmel-Fevia* (2009) FLC 93-411; [2009] FamCAFC 816, where it was unclear whether an annexure was part of the agreement. The agreement was incomplete. In *Fevia*, Murphy J quoted from *Sindel v Georgiou* [1984] HCA 58; (1984) 154 CLR 661 where the High Court said (at [13]):

“Rectification is a remedy which cures the erroneous expressions of the parties’ true intentions in a contract which is already binding. It is not a remedy which brings a contract into existence in a situation in which the parties have not by their own acts arrived at the concluded contract.”

### *Garvey & Jess* [2016] FamCA 445

Justice Carew rejected the argument of the wife that the financial agreement was void for uncertainty as the parties only had an “agreement to agree”. The agreement provided that in the event of a breakdown of the relationship, the parties would “equally divide the joint assets”. Justice Carew said (at [340]) in relation to financial agreements generally:

“It is important, in my view, to have regard to the context in which agreements of this kind are entered into. They are not commercial agreements but arise as a result of a personal relationship which at the time of making is presumably a happy one. Parties to such agreements aim to avoid dispute as to how their assets should be divided if their relationship breaks down at some future time which may be decades away. The future circumstances of the parties cannot possibly be known at the time of entering into such an agreement.”

She concluded (at [41], [44]):

“In my view, the deed is not void for uncertainty because:

- a. The deed evinces an intention:
  - i) to be legally bound;
  - ii) to oust the jurisdiction of the court pursuant to Part VIII;
  - iii) to divide the assets in the proportion provided for in the deed.
 It is not an ‘agreement to agree’.

- b. While the term 'joint assets shall be equally divided' is an essential term, it is not uncertain nor is it incomplete because on the application of the objective test of a reasonable bystander, the term would be construed to mean that whatever assets they own jointly when the marriage breaks down are to be divided equally whether *in specie* or upon sale;
- c. At the time of making the agreement the parties could not possibly have known what assets they may own at the relevant time and therefore it could not be said that the failure to allocate a mechanism for implementing the essential term of equally dividing the joint assets would have caused the husband or the wife to have refused to have entered into the deed because at that time they could not have known what mechanism would have been appropriate e.g. it was argued on behalf of the wife that the agreement should have stated who was to retain which asset or class of asset – in my view, such a suggestion would prove an impossible task when the nature and value of assets in the future could not be known at the time of entering into the agreement...

Applying the principles identified above, the term I would imply is to the effect that the parties will do all things necessary to give effect to the terms of the deed and in the event of dispute, a court may determine the method of implementing the terms of the deed. Such a term would be reasonable, would give business efficacy to the deed, "goes without saying", is capable of clear expression and does not contradict any express term of the deed."

This decision is unaffected by the appeal in *Jess & Garvey* (2018) FLC 93-827.

### *Plain English*

Using plain English is important. Parties should be given what they are paying for: an agreement and an advice letter that they can read, understand, abide by, refer to at a later date and enforce if necessary. Traditional legal wording rarely achieves these objects.

Complicated words and sentence structure may be acceptable in some cases. It will depend upon the parties. Matters to consider in assessing the complexity of language which is appropriate for the parties include:

- How old are they? Clearer wording and better oral explanations may be required for the very young and very old.
- What level of education did they achieve? Different assumptions may be made about a party who finished school at 15 as opposed to one who completed a university degree.
- How fluent are they in English: reading, speaking and listening?
- What type of education did they have? A tertiary qualification does not mean that the client has a good understanding of legal and financial matters. For example, a recent graduate of a garden landscaping or nursing course will probably have less understanding of these matters than a recent accounting graduate.
- What work experience do they have?
- How recent is the work experience?

- What is the health of the client? For example, is the client suffering from depression, high blood pressure or a physically debilitating illness?
- Are the parties familiar with legal terms?
- How familiar are they with terms used about companies, trusts, financial statements, tax, a particular business operated by one or both of the parties etc?

#### *Guidelines for writing plain English*

Some principles for making documents and letters easier to understand include:

1. Use legal paragraph numbering. This means you might have a paragraph numbered 1.1.1.1 rather than 1(a)(i)(A).
2. Avoid large blocks of text. Try to limit the number of lines in a paragraph to five. Qualifying clauses, exceptions and conditions should be in subparagraphs or separate sentences. However, it may be clearer to repeat common words to avoid overly long and elaborate paragraphs.
3. Use short rather than long words.
4. Use short rather than long sentences.
5. Try to balance precision and simplicity, ambiguity and complexity. Vagueness may provide flexibility but there should still be a method of achieving clarity. This may be by reference to case law or legislation (eg, terms or phrases such as “separated under the one roof”, “ordinary course of business” and “good faith”) or by using a dispute resolution procedure (eg, value of business to be determined by an accountant appointed by the President of the Institute of Chartered Accountants in Australia, a valuation of real estate to be determined by a valuer appointed by the President of the Australian Institute of Valuers).
6. Use terms used in the *Family Law Act 1975* where possible, as these terms have case law to support their meanings and the interpretation of the agreement will be clearer and more certain.
7. Use complex terms sparingly and define them when they are first used. Consider where best to put the definitions. A list of terms on the first page may discourage further reading but putting definitions in the body of the agreement may force the reader to search back for the definition later.
8. Replace jargon and legalese with short, common words. Do not use old-style or unnecessary legal words and phrases like “whereas”, “hereinbefore”, “whereof”, “hereinafter”, “herein”, “aforesaid”, “wherefore”, “said” (as an adjective), “same” (as a pronoun), “and/or”, “provided

that” and Latin phrases. Limit the use of “such... as”. For example, rather than “take such steps as are appropriate” say “take appropriate steps”.

9. Dates are clearer if the form “12 December 2020” is used rather than “12th December 2020”.
10. Say “must” or “must not” to impose an obligation, not “shall” or “shall not”.
11. Preferably use “if” to introduce a set of facts rather than “where”. “Where” suggests place. If the event is uncertain use “when”. For example, rather than “where a party remarries”, use “if a party remarries”.
12. Avoid superfluous words. For examples of simplified wording, there is a longer table in the *Australian Family Law & Practice Manual* – paragraph 33-510. Some examples are:

Superfluous term	Simpler term	Superfluous term	Simpler term
in the event that	if	cease	stop
subsequent to	after	provide	give
prior to	before	request, require	ask
despite the fact that	although	retain	keep
not able	unable	is entitled to, has the option of	may
does not include	excludes, omits	is required to	must
not ... unless, except	only if	in respect of, in relation to, in connection with, with respect to, as to, concerning	about, for
not ... until	only when	does not have any force or effect	has no force, has no effect
attained the age of 65 years	at least 65 years old, 65 years or over	in accordance with	under
commence	begin/start	in consequence of, as a result of	because of
expiration, termination	end	is void or of no effect	has no effect
for the duration of	during	notwithstanding the fact that	despite
subsequent	later	on behalf of, for and on behalf of	for
ascertained in accordance with the formula	calculated	otherwise than	except
exceeds	is more than	pursuant to, by virtue of	under, because of
alter, amend	change	shall be deemed to be regarded	is taken to be, treated as
any act or thing done, step taken, or decision made	anything done	any act, matter or thing	anything

attain	reach	exclusively	only
the provisions of this agreement	in this agreement	mutatis mutandis	with appropriate changes
		utilise	use

The above guidelines are in part drawn from the following publications:

- “The Elements of Style” (W Strunk & E B White, 4th edn, Massachusetts, Allyn & Bacon).
- “The Penguin Guide to Plain English” (H Blamires, Penguin 2000).
- “Plain English Manual” (Office of Parliamentary Counsel [www.opc.gov.au/publications/plain-english-manual](http://www.opc.gov.au/publications/plain-english-manual)).
- “A Plain English Handbook” (US Securities and Exchange Commission, August 1998 — obtainable from [www.sec.gov/news/extra/handbook.htm](http://www.sec.gov/news/extra/handbook.htm)).

### *Using FLA terminology*

Terminology used in the FLA is referred to at point 6 of the *Guidelines for Writing Plain English* above. Examples of terms which a court has found difficult to interpret because they were ambiguous or did not reflect the wording of the FLA are:

- “acquired”, “assets”, “joint funds”, “from their own money”. *Kostres* (2009) FLC 93-420 discussed above.
- “matrimonial property”. *Gibbs & Gibbs* [2015] FamCA 630

## **5. The pros and cons of a complex agreement**

A simple agreement is easier to draft, but it may be too simple to cover all possible contingencies. To avoid the risk of an agreement being set aside because of one of these contingencies, many agreements include a recital to confirm that the parties have considered those contingencies. An example of a recital of drafting for contingencies is:

*Before executing this Financial Agreement, each party has had regard to the possibility that one or both of them may be subject to a change of circumstances including any or all of:*

1. *The birth of a child or children or adoption of a child or children;*
2. *Serious illness or injury of one of the parties or a child;*
3. *Death of one of the parties;*
4. *A significant increase or decrease in the value of the property and financial resources set out in Schedules A, B and C;*
5. *The bankruptcy of one of the parties.*

A formula which gives cascading entitlements with the effluxion of time, the number of children or some other factor, are more complex to draft and implement.

The reason for including a cascading formula is to more closely match the increased property entitlements of a party under s 79 (or s 90SM) in longer relationships where there will almost certainly have been greater contributions (parenting, homemaking, financial and non-financial) of the financially weaker party to at least partially offset the greater initial financial contribution of the financially stronger party, than in a short relationship. If the agreement does not adequately

provide for the other party in the event of one of the contingencies, then there may be a greater risk of the agreement being set aside or, at the very least, an application being made with all the associated financial and emotional stress. It may be better to provide for the contingency, but more complex and lengthy agreements are more likely to have inconsistencies in their drafting.

Simpler agreements set out clearly the respective entitlements of the parties, with perhaps a payment or transfer of property calculated as a percentage of certain property or a defined lump sum. If giving a percentage, the property of which the party receives a percentage needs to be described.

Sometimes, agreements are drafted so as to oust the jurisdiction of the court to deal with property but allow maintenance claims to still be made. Of course, the weaker party must still establish a need for maintenance, but allowing the weaker party the right to apply for maintenance may mean that the agreement can be more simply drafted and is not as much at risk of being considered a bad bargain (and set aside if there are vitiating factors, such as undue influence), than if the right to apply for spousal maintenance is ousted.

Ousting the right to apply for spousal maintenance may be ineffective in any event. Section 90F(1) provides that a financial agreement cannot exclude or limit the power of a court to make a maintenance order if s 90F(1A) applies – which states:

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

What then is the relevant time when “the agreement came into effect” for the purposes of s 90F(1A)?

Section 90DA provides that in relation to s 90B and s 90C financial agreements, an agreement comes into effect in relation to provisions dealing with property and financial resources when a separation declaration is made.

The ability to make a financial agreement dealing with spouse maintenance is set out in s 90B(2)(b) and s 90C(2)(b), which are not referred to in s 90DA.

It appears that a provision asking for the ability to apply for maintenance to be ousted is determined at the time the agreement is entered into, and is therefore more likely to be effective.

Exceptions are some agreements entered into during a relationship when the parties already have children or, as in *Raleigh*, where the wife gave birth 8 days later.

Including a right to seek maintenance may help establish that the parties did consider possible contingencies, such as childbirth, care of children, injury and ill-health, and not merely state these possibilities in a recital may help uphold the agreement.

However, a financially weaker spouse with the primary care of the children who is in employment, may not be able to make a successful maintenance claim. This means that more consideration should always be given to ensuring that the weaker party is not left with an extraordinary small share of the property (in s 79 terms), so that there is less motivation to attack the agreement.

Another option is to include a sunset clause so that the agreement no longer operates if the parties, for example, have a child. The difficulty with these is that they have not been tested and non-compliance with s 90J(1) may be a problem. Section 90J(1) states:

“(1) The parties to a financial agreement may terminate the agreement only by:  
 (a) including a provision to that effect in another financial agreement as mentioned in subsection 90B(4), 90C(4) or 90D(4); or  
 (b) making a written agreement (a **termination agreement**) to that effect.”

A termination provision included in the original agreement may be ineffective if the requirements of s 90J(1) are not met. Therefore, to achieve the same outcome, a financial agreement can be drafted carefully with two parts:

1. The first part applies until a certain event occurs or does not occur;

2. After that time, the second part of the agreement applies. The parties' rights under Pt VIII or Div 2 of Part VIIAB of the FLA could be restored, unaffected by the agreement. Alternatively the parties' rights after that time are affected to a lesser extent than in the first part.

A requirement that the parties review an agreement if they have a child is almost certainly unenforceable if the intention is that the parties are forced to enter into a new agreement in different terms, it may encourage the parties to do it, but cannot force them to do it.

## **6. Drafting to demonstrate fairness in the terms – dealing with the test for “bad bargain”**

Since *Thorne v Kennedy* there is more concern among legal practitioners that the agreement not result in a “bad bargain” for one of the parties. There is, of course, no requirement that the terms of a financial agreement meet the “just and equitable”, “proper” and “appropriate” standards under s 79. It is rarely the case that both parties will be advantaged by the agreement. One party is almost always disadvantaged by the agreement.

However, if an agreement gives the weaker party entitlements which are close to the range of their entitlements, then that party is less likely to seek to set aside the agreement and less likely to succeed.

*What is a bad bargain?*

In *Fewster & Drake* [2016] FamCAFC 214; (2016) FLC 93-745, the Full Court was looking at s 90K(1)(d) and said (at [65]):

“It is to be recalled that, subject to compliance with the statutory requirements, people are free to enter such binding financial agreements as they see fit. There is no statutory provision which enables a binding financial agreement to be set aside merely because it is unfair: *Hoult & Hoult* [2013] FamCAFC 109; (2013) FLC 93-546 at 87,283 and 87,296 - 87,298.”

In relation to the hardship required by s 90K(1)(d), the Full Court said that s 90K(1)(d) required (at [68]):

“something more than unfairness. In *In the Marriage of Whitford* [1979] FamCA 3; (1979) FLC 90-612 (“*Whitford*”) at 78,144-78,145 the Court said that hardship is:

...akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment...

...

In ordinary parlance, hardship means something more burdensome than “any appreciable detriment”. We consider that in subsec. 44(4) the word should have its usual, though not necessarily its most stringent, connotations.”

In *Higgins & Moruba* [2018] FamCA 467, Thornton J said (at [80]):

“The Court in *Fewster & Drake* made it clear ... that individuals are free to enter into binding financial agreements as they see fit and there is no statutory provision which enables one to be set aside merely because it is unfair. The wife’s argument, that there is hardship because she would obtain a different outcome under a s 79 application under the Act compared to the binding financial agreement is therefore not relevant to the Court’s consideration of whether there is hardship. Therefore, the order the wife seeks for full disclosure is not justified on this basis.”

The finding of a bad bargain will not be made in isolation of a vitiating factor, such as fraud, undue influence or unconscionable conduct, so in drafting, negotiating and executing an agreement it is important that legal practitioners and their clients avoid falling foul of vitiating factors. For example, ensuring that there is a trail of correspondence between lawyers negotiating the terms of the

agreement, that the stronger party does not advocate “sign this agreement or there will be no marriage” and that there is ample time for the terms of the agreement to be considered before the wedding, are strongly recommended.

### **7. *The problem of false recitals***

Recitals are statements at the beginning of a contract which set out preliminary matters, such as factual background and the reasons for the contract.

The false recitals which are most commonly problematic include:

1. Recitals which set out the financial positions of the parties or refer to schedules which do, may not accurately set out the true position. On the one hand, by parties providing full details of their financial positions, if there are any errors it may be easier for the other party to successfully apply to set aside under s 90K(1)(a) or 90UM(1)(a) because “the agreement was obtained by fraud” (including non-disclosure of a material matter). On the other hand, if the parties do not provide full details of their financial positions in the agreement, it may be more difficult to defend an application for the agreement to be set aside for non-disclosure of a material matter.

2. In *Thorne v Kennedy*, the agreement included an “acknowledgement” that the wife was able to support herself without an income tested pension, allowance or benefit, taking into account the terms and effect of the agreement when the agreement came into effect. This statement was designed to ensure that the agreement, in compliance with s 90F, ousted the jurisdiction of the court to make an order for spousal maintenance.

As the plurality in the High Court said, this statement was made (at [20]) despite the wife’s “extremely limited personal means”. The plurality made no findings on whether the s 90F declaration was effective, as submissions were not made with respect to it – either in the Full Court of the Family Court or in the High Court – but the plurality appeared to express doubt as to whether the wife was bound by her “acknowledgement”. The High Court drew the attention of the parties to the issue, but because of the way the case was presented it was significant only (at [20]) “as a matter of contextual construction”, which suggests that the incorrect statement may have assisted the plurality to reach the conclusions it made that there had been undue influence and unconscionable conduct.

3. If there are recitals which indicate that there has been a mutual exchange of disclosure when there has not been or state that there has been a mutual waiver of disclosure, particularly where there is unequal bargaining power, it may be easier for the court to find that there was undue influence or unconscionable conduct.

### **8. *Drafting to demonstrate no disadvantage or duress – is this a relevant consideration?***

Recitals or clauses confirming that neither party has been subject to duress, undue influence or unconscionable conduct are often included in financial agreements. The problems with these clause include:

- They are technical terms and even with the benefit of legal advice a party may not know what they mean;

- Duress, undue influence or unconscionable conduct may still be established from the surrounding circumstances.

A better approach is to try to remove the possibility of these vitiating factors being established. From *Thorne v Kennedy* we know that an agreement is more likely to be upheld if:

- The terms of the agreement were negotiated between the parties rather than one party being told to sign the first version. Ensure there is a paper trail for the negotiations;
- The negotiated changes are substantive, or at least not just correcting minor drafting errors;
- There was time for “careful reflection”. The time required will vary depending upon the literacy, education and other circumstances of the weaker party. A recital can be included in the agreement setting out the period during which the terms of the agreement were negotiated. Again, a paper trail of this is important;
- The terms of the agreement were negotiated between lawyers rather than through the parties.

## 9. Drafting lessons from *Thorne v Kennedy*

Following the High Court judgment in *Thorne v Kennedy*, whilst there are many uncertainties, there are some drafting lessons:

1. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing where there has been undue influence in the particular context of pre-nuptial and post-nuptial agreements. They need to be considered when taking instructions, negotiating, drafting and advising on financial agreements. They are repeated here because of their importance:
  - 1.1. Whether the agreement was offered on a basis that it was not subject to negotiation;
  - 1.2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
  - 1.3. Whether there was any time for careful reflection;
  - 1.4. The nature of the parties' relationship;
  - 1.5. The relative financial positions of the parties; and
  - 1.6. The independent advice that was received and whether there was time to reflect on that advice.
2. An agreement which is fair and reasonable, perhaps close to a party's s 79 entitlements, is more likely to be upheld.

3. Ensure there is mutual disclosure.

## **10. Other drafting tips**

The following checklist is not intended to be comprehensive, but lists a few tips to make sure that that things don't go wrong:

1. Check the names of the parties are correct.
2. Check the section of the FLA under which the agreement is made is correct, e.g. s 90B or s 90C. The parties' circumstances may have changed since the first draft.
3. Read that section of the FLA and check that the agreement covers matters which can be covered in that type of agreement.
4. How will the parties provide disclosure? See Part 3 of this paper.
5. If there is a list of assets and liabilities, it may need to be reviewed and updated if the drafting and execution of the agreement takes some time.
6. Have detailed and contemporaneous file notes of conferences, including the times the conferences started and ended and who was present.
7. Give the client a letter of advice about the final version of the agreement a few days before the agreement is signed.
8. Update the advice if amendments are made to the agreement, making sure that the advice is given in relation to the final version of the agreement, not just the amendments.
9. Don't include general statements in the agreement which are not true – e.g. mutual disclosure has occurred, party able to support themselves without Centrelink.
10. Follow s 90G(1) (s 90UJ(1)). Look at the wording of this section before your client comes into the office to sign the agreement, when you write to the other lawyer and before you close the file. Create a checklist and keep it on the file.
11. Avoid, if possible, provisions relating to superannuation in agreements entered into before separation, as the s 90XJ(1) requirements may not be met.
12. Post-separation, finalising a property settlement in court orders is almost always preferable. A financial agreement ousting the jurisdiction of the court to deal with spousal maintenance may be a useful adjunct.

13. Property acquired after the end of a de facto relationship or after a divorce cannot be dealt with in a financial agreement.
14. If there are spousal maintenance provisions, ensure you have complied with s 90E or 90UH and s 90F or 90UI.
15. If it is a Pt VIIIAB financial agreement, make sure there is a de facto relationship in existence or that one will exist. If it is a s 90B agreement, there needs to be a marriage before the agreement can be effective. Do you need both a s 90B and s 90UC agreement? Will you do a combined agreement or separate ones? See *Piper & Mueller* (2015) FLC 93-686.
16. Check for uncertainties and inconsistencies in drafting. Use terms which are in the FLA.
17. Have another senior lawyer read the agreement.
18. Have you covered all the assets and potential assets?
19. Have you read the most recent cases on financial agreements, particularly of the Full Court and the High Court?
20. Are there potential claims in overseas jurisdictions now or later?
21. Don't forget the kids. If the parties may have children, then provide for this.

### **Conclusion**

Drafting financial agreements which are truly binding is not an easy task. The longer and more complex the agreement, the more that can go wrong.

*Thorne v Kennedy* has not changed the fact that agreements which follow the wording of the FLA, and give the weaker party enough so it is not a "bad bargain", are more likely to be binding and not set aside. One party will always be disadvantaged by the agreement, but *Thorne v Kennedy* alerted lawyers to the fact that a bad bargain may be an indication of a vitiating factor.