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FINANCIAL AGREEMENTS

Part VIIIAB financial agreements—not quite Part VIIIA

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It might be assumed that financial agreements between de facto partners under the *Family Law Act 1975* ("the Act") have the same requirements and consequences as financial agreements between couples who are intending to marry, married or divorced. This is not so. As a result, the legal advice required to be given is different for each type of agreement, a pertinent distinction of which lawyers need to be aware in the wake of *Parker and Parker* [FN1 (2012) FLC 93-499] where the Full Court was prepared to look behind the Statement of Independent Legal Advice at the actual advice given and find that the requirements of s 90G(1) (or s 90UJ(1) for Pt VIIIAB financial agreements) had not been met.

General Requirements

In broad terms, the two main types of agreements under the Act are:

- Pt VIIIA financial agreements between heterosexual couples intending to marry (s 90B), who are married but not separated (s 90C), who are married but separated (s 90C) and who are divorced (s 90D)
- Pt VIIIAB financial agreements between heterosexual and same sex couples who are intending to enter into a de facto relationship (s 90UB), in a de facto relationship (s 90UC) or are separated (s 90UD)

Agreements can also be made to terminate an existing agreement (termination agreement) or to deal solely with superannuation (superannuation agreement). For a Pt VIIIAB financial agreement to be binding it must meet the requirements of s 90UJ(1), which are similar to the s 90G(1) requirements for Pt VIIIA financial agreements. If a financial agreement does not meet the requirements of s 90UJ(1) it may still be binding under s 90UJ(1A), (similar to s 90G(1A)) if the court finds it is unjust and unequitable for the agreement not to be binding.

Jurisdictional requirements - Time

The time at which an agreement is made is important in determining whether it is under the Act. Part VIIIAB applies to agreements entered into after 1 March 2009 in all States and Territories except South Australia or Western Australia and to de facto couples who separated after 1 March 2009 in the same States and Territories. It applies to South Australia after 1 July 2010. [FN2 Part VIIIA financial agreements, which cover heterosexual couples intending to marry or who are married or divorced, have been possible since 27 December 2000]. Earlier state agreements made under the relevant State or Territory

legislation may be deemed to be Pt VIIIAB financial agreements if they meet the transitional provisions [FN3 items 87-90, 91-92] of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008)* ("Amendment Act")).

Jurisdictional requirements - Relationship

A Pt VIIIAB financial agreement can only be entered into by a couple contemplating entering into a de facto relationship, who are in a de facto relationship, or whose de facto relationship has broken down.

A non-exclusive list of factors which the court takes into account in determining the existence of a de facto relationship is set out in s 4AA(2) of the Act. Since the Amendment Act commenced there has been considerable litigation as to whether de facto relationships exist, when they commenced and when they ended. A Pt VIIIAB financial agreement usually includes in the recitals the commencement date of the relationship and, if relevant, when it ended. As one party may later challenge the length of the relationship, (or even the existence of it), the recitals ought to ideally address the circumstances of the relationship. Even if a Pt VIIIAB financial agreement is later set aside, the recitals may still be useful.

The Act specifically provides that "a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship" [FN4 s 4AA(5)]. It is more difficult, but not impossible, for a de facto relationship to be established whilst another de facto relationship is on foot. For example, it is harder to show mutual commitment to a shared life under s 4AA(2)(f) and the public aspects of the relationship under s 4AA(2)(i).

This large and litigious area of the law is beyond the scope of this paper. [FN5 Useful cases to refer to when assessing whether a de facto relationship existed include *Jonah & White* [2011] FamCA 221, *Smyth & Pappas* [2011] FamCA 434, *Barry & Dalrymple* [2010] FamCA 1271, *Dahl & Hamblin* (2011) FLC 93-480 and *Moby & Schulter* (2010) FLC 93-447]

Effect of marriage

Part VIIIAB financial agreements cease "to be binding if, after making the agreement, the parties to the agreement marry each other" (FN6 s 90UJ(3)). Unless the parties entered into a Pt VIIIA agreement in contemplation of marriage or during the marriage the parties will have the usual rights of married couples under Pt VIII to apply for property and spousal maintenance orders. By contrast, a Pt VIIIA financial agreement entered into by a de facto couple prior to marriage under s 90B continues to be binding if the parties marry.

If a couple divorces, reconciles and enters into a de facto relationship they can enter into a Pt VIIIAB financial agreement. However, there is no certainty that a court will consider itself bound by that agreement. In cases such as *Matthews & Matthews* [FN 7 (2006)FLC 93-298] and *Sommerville & Sommerville* [FN 8 (2000)FLC 93-242] the parties reconciled and separated again. The courts were prepared to determine the parties' rights under Pt VIII despite earlier s 79 orders finalising their rights. If the parties in those cases had entered into Pt VIIIAB financial agreements with respect to their later cohabitation, their property and maintenance rights under Pt VIIIAB might have been ousted, but their property and/or maintenance rights under Pt VIII would probably have been left intact.

Prior agreement

Parties to a Pt VIIIAB financial agreement cannot have another Pt VIIIAB financial agreement dealing with the same matters [FN 9 s 90UB(1)(b), 90UC(1)(b) and 90UD(1)(b)] unless the first one has been terminated or set aside. Similarly, Pt VIIIA financial agreements cannot be entered into by parties who are already parties to a Pt VIIIA financial agreement dealing with the same matters [FN 10 s 90B(1)(aa), 90C(1)(aa) and 90D(1)(aa)]. However, there is no bar on parties entering into a Pt VIIIA financial agreement if they already have a Pt VIIIAB financial agreement, or to the parties executing both at the same time. Any Pt VIIIAB financial agreement ceases to be binding upon marriage. [FN 11 s 90UJ(3)]

What if the de facto relationship lasts less than 2 years?

Part VIIIAB financial agreements are "of no force and effect unless and until the de facto relationship breaks down." [FN 12 s 90UG] If a de facto relationship breaks down and the parties have cohabited for less than the required 2 years for a property or maintenance order under s 90SM or 90SF, the parties may be uncertain as to whether the agreement is binding.

A pre-requisite for maintenance and property orders under s 90SB(a), but not financial agreements is a de facto relationship for a period of 2 years or a total of 2 years. The parties can also satisfy one of the alternate grounds under s 90SB:

- There is a child of the de facto relationship
- The party to the de facto relationship who applies for an order or declaration, made substantial contributions within s 90SM(4) and a failure to make the order or declaration would result in serious injustice to the applicant
- The relationship is or was registered under a prescribed law of a State or Territory.

The definition of a "de facto relationship" in s 4AA does not require that the relationship lasted for a particular time. The "duration of the relationship" is only one of a number of

circumstances to consider when determining whether a de facto relationship exists. A period of 2 years is a possible qualifying factor for a maintenance or property order but it is not a pre-requisite to find a de facto relationship existed. In *Sutherland v Byrne-Smith* [FN 13 [2011] FMCA 632] the court found that it was unnecessary for the financial agreement to be set aside as the de facto relationship was of less than two years and the Act did not, therefore, apply. There were arguable grounds for the agreement to be set aside under the Act, but the Federal Magistrate chose instead to set it aside under the *Bankruptcy Act 1966*. He proceeded as if the agreement should be completely ignored as the de facto relationship did not last for 2 years. This appears to be an incorrect interpretation of the requirements for Pt VIIIAB financial agreements.

If the financial agreement in *Sutherland* was set aside under the Act, the Court could not have made property orders under s 90SM, unless it first found that it had jurisdiction to make orders. As the de facto relationship did not last for 2 years, an alternative ground under s 90SB would have to be found before the court could make orders.

Jurisdictional requirements - Geographic

The geographical requirements of Pt VIIIAB are particularly restrictive. In summary, when the agreement is made:

- neither party can be resident overseas
- being a resident of Australia is insufficient of itself. Each party must be resident in a participating jurisdiction. Making contributions in a participating State does not give jurisdiction for the parties to enter into a Pt VIIIAB financial agreement although these contributions are an alternative source of jurisdiction for s 90SM orders (the Pt VIIIAB alternative to s 79).

A Pt VIIIAB financial agreement requires one of the following geographic gateway requirements to be met:

1. The standard geographic pre-requisite is that both parties are ordinarily resident in a participating jurisdiction when they make the agreement (FN14 s 90UA).
2. The agreement meets the requirements for an agreement made in a later participating jurisdiction becoming a Pt VIIIAB financial agreement (FN 15 items 89 to 92 Amendment Act). This can apply to agreements made in South Australia after 1 March 2009 and before 1 July 2010.
3. The agreement meets the requirements for a pre-commencement time agreement becoming a Pt VIIIAB financial agreement (FN 16 items 87 and 88 Amendment Act). This can apply to agreements made in States and Territories other than Western

Australia or South Australia if the agreement prevents a court from making an order inconsistent with the agreement.

4. An agreement made in a non-referring State which meets the requirements of s 90UE(1). These requirements are particularly technical and complex. They apply to non-referring States, being South Australia until 1 July 2010, and to Western Australia. The following scenario is an example of its application.

   Jenny and Paul enter into an agreement under Western Australian law in 2008 about the distribution of their property if they separated and the agreement ousted the jurisdiction of the Western Australian courts. Jenny and Paul lived together for 4 years and separated in 2012. This meant they met the gateway requirement of 2 years of cohabitation under s 90SB. For the first year of cohabitation they lived in Western Australia but then lived in Victoria. This meant that they satisfied the gateway requirement of s 90SD(1)(b)(i) that they were ordinarily resident for at least one-third of their relationship in a participating jurisdiction. Of course, they could have been ordinarily resident in Victoria for 5 minutes if they satisfied the alternative condition in s 90SD(1A) of being ordinarily resident in Victoria when the relationship broke down, or not resident in Victoria at all, if the applicant made substantial contributions under s 90SM(4) in Victoria while resident in Western Australia. Immediately before they moved to Victoria, the Western Australian agreement was in force and the couple were not married to each other.

There has been very little litigation about State and Territory agreements which potentially fall under the Act. In *Drew & Vickery* [FN 17 [2010] FMCAfam 1307] the wife argued that her application for property orders was under the Act as there were two discrete de facto relationships, the second ending after the agreement was executed and after 1 March 2009. The husband argued that the second period of cohabitation was too short to establish jurisdiction, being only about 4-6 months. Neville FM found that the parties separated after 1 March 2009. Similarly, the Full Court in *Dahl & Hamblin* [FN 18 (2011) FLC 93-480] found the Court had jurisdiction to make property orders because the parties were in a de facto relationship for at least 2 years even though part of that period was before 1 March 2009.

The agreement in *Cording & Oster* [FN 19 [2010] FamCA 511] was entered into on 7 October 2008, prior to the commencement of the Victorian legislative changes on 1 December 2008 [FN 20 *Relationships Act (Vic) 2008*] and the Federal changes on 1 March 2009, but it anticipated both. Ms Cording sought an order that the agreement was not binding and not a financial agreement under the Act. The parties separated in late 2009 after a 10 year period of cohabitation. Cronin J commented:

> The thoroughly researched submissions of each party highlight the technicality with which this legislation is shrouded. That would certainly not assist ordinary Australians wishing to give certainty to their lives nor I suspect, was it so intended by parliament. [FN 21 at para 19]

He found that the agreement was valid and binding under Pt VIIIAB. It was an agreement made under a preserved law of an earlier participating law. Therefore, under item 88 of the Amendment Act it was a financial agreement under Pt VIIIAB.

Ousting of Jurisdiction

Financial agreements oust the jurisdiction of the court to make orders with respect to matters dealt with in them. The jurisdiction is not ousted in the same way under Pt VIIIAB as under Pt VIIIAB. Division 2 of Pt VIIIAB, which deals with maintenance, and property of de facto couples does not apply to the following matters listed in s 90SA(1) if they are dealt with in the agreement:

(a) the maintenance of one of the spouse parties;
(b) the property of the spouse parties or of either of them;
(c) the financial resources of the spouse parties or of either of them.

Part VIII, which deals with property and spousal maintenance of married couples, does not apply to:

(a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or
(b) financial resources to which a financial agreement that is binding on the parties to the agreement applies. [FN 22 s 71A(1)]

The phrase "financial matters" is defined in s 4(1) as:

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

The matters which can be dealt with in a financial agreement are different under Pts VIIIA and VIIIAB. The effects of the different wording and construction of the ousting provisions are not immediately apparent and the reasons for the differences are obscure. Significantly, if one party becomes bankrupt the impact of a financial agreement is not the same. This is discussed later in this article.

Content

Section 90UB applies to agreements between people "contemplating entering into a de facto relationship". The matters which can be dealt with in s 90UB agreements under Pt VIIIAB are the same as for s 90UC and 90UD agreements. Section 90UB(2) covers:

- property and financial resources owned at the time of the agreement by either or both of the parties or acquired during the de facto relationship
- maintenance.

The agreement may also, under s 90UB(3), contain matters "incidental or ancillary" to those listed in s 90UB(2).

By contrast, s 90B(2) which applies to parties to a Pt VIIIA financial agreement who are "contemplating entering into a marriage" can deal with:

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

A s 90B financial agreement may also contain, as set out in s 90B(3):

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

The above provisions are difficult to compare. Although apparently similar they have different effects. Importantly:

1. Part VIIIAB agreements, unlike Pt VIIIA agreements, cannot deal with property or financial resources acquired after separation.
2. Part VIIAB agreements, unlike Pt VIIIA agreements, cannot deal with "other matters". This may mean that Pt VIIIA financial agreements can deal with child maintenance but Pt VIIIAB financial agreements cannot. A note to s 90UH says that: "While Pt VIIIAB financial agreements are not made with respect to child maintenance, provisions about child maintenance could be included in the same document for child support (or other non-Pt VIIIAB) purposes." This suggests that a child support agreement can be in the same document as a Pt VIIIAB financial agreement. It is, however, prudent to use a separate document or a court order for child maintenance or child support rather than include these provisions in a financial agreement as the arrangements which are proper for child maintenance and child support may change and potentially de-stabilise the whole agreement.

Sections 90UC(2) and 90UD(2) are worded similarly to s 90UB(2). Part VIIIAB financial agreements cannot deal with property acquired after the end of the relationship. Section 90D excludes property acquired after divorce, but unlike a Pt VIIIAB financial agreement, a s 90D financial agreement can deal with property acquired post-separation. It is possible that a Pt VIIIAB financial agreement can deal with post-separation property, as "matters incidental or ancillary" (under s 90UB(3), 90UC(3) and 90UD(3)) to those mentioned in s 90UB(2), 90UC(2) and 90UD(2). There has been no judicial consideration as to whether the phrase "matters incidental or ancillary" catches post-separation property in a de facto relationship or whether the similarly worded s 90B(3), 90C(3) and 90D(3) with respect to Pt VIIIA financial agreements, can be interpreted to cover post-divorce property. There is probably a strong argument that they cannot do so because post-separation property appears to have been deliberately excluded from s 90UB, 90UC and 90UD. Post divorce property is excluded from s 90B, 90C and 90D. Maintenance after divorce is included in s 90B and 90C but the position under s 90D is less clear.

A s 90UB financial agreement can deal with, under s 90UB(3) "matters incidental or ancillary" to those mentioned in s 90SB(2) but not "other matters". The meaning of "other matters" is uncertain, but it appears broader than "matters incidental or ancillary", giving greater scope to cover post-divorce property in a Pt VIIIA financial agreement than in a Pt VIIIAB financial agreement. However, the express exclusion of post-divorce property from s 90B(2), 90C(2) and 90D(2) suggests that it cannot be brought back in under another section.

The alternative to Pt VIIIAB and VIIIA financial agreements if there is post-separation or post-divorce property is, of course, court orders. As a result of cases such as *Senior & Anderson* [FN 24 (2011) FLC 93-470] and *Parker & Parker* [FN 23 (2012) FLC 93-499], consent orders are preferable to financial agreements in any event. Where there is post-separation or post divorce property a court order will better achieve finality because it can deal with post-separation and post-divorce property and enable transfers of post-separation or post-divorce property to attract capital gains tax roll-over relief. If a financial agreement was entered into before the de facto relationship or during it, and there is post-separation property, a party may seek to set aside the agreement so that contributions to the property are taken into account. Whether or not that application will be successful will depend upon all the circumstances.

Bankruptcy

The bankruptcy of a party to a Pt VIIIAB financial agreement does not have the same impact as the bankruptcy of a party to a Pt VIIIA financial agreement. Whether or not a party is

bankrupt is relevant to a Pt VIIIAB financial agreement, but not to a Pt VIIIA financial agreement. However, it is an act of bankruptcy if a person becomes insolvent as a result of a transfer or transfers made under any financial agreement. [FN24 s 40(1)(o) and 40(7) *Bankruptcy Act* 1966] The distinction between Pts VIIIA and VIIIAB is particularly important if parties are considering whether to enter into an agreement under s 90UC (during a de facto relationship) or under s 90B (when contemplating a marriage) particularly if one party has significant debts or is in a risky business. Legal practitioners need to advise on the distinction and draft the appropriate agreement.

The distinction arises because matters covered by Pt VIIIA and Pt VIIIAB financial agreements do not oust jurisdiction in the same way. The relevant sections, s 90SA(1) and 71A(1), are set out earlier in this article. Under Pt VIIIAB, s 90SA(1) does not apply to proceedings between a party to a de facto relationship and the trustee of a bankrupt party to a de facto relationship with respect to:

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

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

The effect of the distinction is:

1. A Pt VIIIAB financial agreement is of no effect to proceedings between:
   - a non-bankrupt spouse and a bankruptcy trustee regarding the maintenance of the non-bankrupt spouse
   - a non-bankrupt spouse and a bankruptcy trustee regarding vested bankruptcy property.
2. Whilst a non-bankrupt spouse can still bring proceedings for spousal maintenance or claim against property vested in a bankruptcy trustee, despite the existence of a Pt VIIIAB financial agreement covering these matters, a non-bankrupt spouse with a Pt VIIIA financial agreement cannot do so, without first setting the agreement aside.

Sutherland v Byrne-Smith [FN 25 [2011] FMCA 632] is an example of where s 71 could have been used by the court to find the Pt VIIIAB financial agreement was of no effect, but reference was not made to it.

Superannuation

Superannuation can be included in Pt VIIIA and Pt VIIIAB financial agreements (s 90MH(1) and s 90 MHA(1)). For Pt VIIIAB agreements, as for Pt VIIIA agreements, there appears to be limitations on whether superannuation can be effectively dealt with in an agreement

entered into before separation. A provision in an agreement which provides for the parties to split future superannuation may not be able to be implemented without a court order under s 90MT.

Section 90MHA(1) states that a superannuation interest does not have to exist when a financial agreement is made but s 90MJ(1)(a) requires the interest to be identified in the agreement. This is particularly problematic for agreements entered into many years before a separation. How can an unknown future interest be identified?

A split can occur if the agreement specifies a method for calculating the base amount [FN 26 s 90MI(1)(b)]. For example, if the future interests of the parties are unknown, a formula could be included in the agreement.

However, how can procedural fairness be given to the trustee in relation to a split which may not occur for 10 or 20 years? Third parties are entitled to procedural fairness. The *Family Law Rules 2004* set out the requirements for procedural fairness for orders but the Act is silent in relation to financial agreements. Although an unsplittable payment is a ground for an agreement to be set aside under s 90UM(1)(j), trustee refusal to implement does not create an unsplittable payment [FN 27 Reg 11 *Family Law (Superannuation) Regulations 2001*]. As a superannuation split cannot be as clearly set out in a financial agreement before a relationship or marriage or during a relationship or marriage as it can be in an agreement or court order entered into post-separation, a trustee may be justified in refusing to implement it. This may be a ground to apply to set the agreement aside for impracticability within s 90UM(1)(f), but there is no certainty that the court will set it aside.

If superannuation is not properly dealt with in the agreement, s 90SA(1) appears to prohibit a property order being made, even if not all property is deal with by the agreement. Under s 90MS orders in relation to superannuation interests can be made in property proceedings under s 90SM. A court cannot otherwise make a property order in relation to a superannuation interest [FN 28 s 90MS(2)].

If superannuation is a significant part, or is expected to be a significant part of the pool, the usefulness and effectiveness of a financial agreement needs to be considered carefully.

Spousal maintenance

A spousal maintenance provision in a Pt VIIIAB financial agreement is void unless it complies with s 90UH. Section 90UH(1), worded similarly to s 90E which applies to Pt VIIIA financial agreements, states:

> A provision of a financial agreement that relates to the maintenance of a spouse party to the agreement... is void unless the provision specifies:
>
> (a) the party... for whose maintenance provision is made; and
>
> (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party...

Section 90UH(1) does not apply to agreements covered by s 90UE, being agreements made in a non-referring state that become Pt VIIIAB financial agreements.

In *Corney & Hose* [FN 29 [2010] FMCAfam 1462] the wife sought the severance of a recital in a Pt VIIIAB financial agreement which stated that neither party at any time make any claims upon the other for payment of spousal maintenance. She also sought an order for maintenance of $500 per week. The husband argued that the wife was estopped from invoking non-compliance with s 90UH. The parties were separated. Altobelli FM said:

> I am satisfied that s 90UH, like s 90B, 87A, and 77A has the purpose of protecting the revenue. This is an important consideration when bearing in mind the "social purpose" of the legislation ... If the purpose of s 90UH is to protect the revenue, I am unable to accept the contention that parties can choose to, in effect, opt out of a statutory provision which was designed not to protect their private interests but the much broader public interests. In these circumstances, the estoppel argument articulated on behalf of the de facto husband cannot succeed. [FN 30 para 6]

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

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

The distinction between Pts VIIIA and VIIIAB regarding intact relationships arises from the legislation referring powers from the States and Territories. For example, New South Wales only referred powers with respect to the following matters:

(a) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes,

(b) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex [FN 31 (s 4 *Commonwealth Powers (De Facto Relationships) Act (NSW) 2003*)]

This limitation on the referral of powers is reflected in s 90UB(1) and 90UC(1) which state that a Pt VIIIAB financial agreement can deal only with the matters mentioned in s 90UB(2) and 90UC(2) "in the event of the breakdown of the de facto relationship".

Death

The wording of s 90UB(2) and 90UC(2), particularly when read with the State and Territory legislation referring powers to the Commonwealth, makes it clear that a Pt VIIIAB financial agreement is not an estate planning device. In the past, some legal practitioners have tried to rely on s 90H to use Pt VIIIA financial agreements in this way. Section 90H states:

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

Section 90UK is worded similarly for Pt VIIIAB financial agreements but also has a note:

> If the parties are still in the de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the financial agreement (see the definition of *breakdown* in s 4(1)).

At first glance, the inclusion of the note to s 90UK appears to support the view that s 90H can be relied on to enable Pt VIIIA financial agreements to be used as an estate planning tool as s 90H does not have the same note. However, the word "breakdown" is used in s 90B(2), 90C(2), 90UB(2) and 90UC(2) and is defined in s 4(1) as:

(a) In relation to a marriage, does not include a breakdown of the marriage by reason of death;
(b) In relation to a de facto relationship, does not include a breakdown of the relationship by reason of death.

Although constructed differently, both s 90UK and s 90H are designed to ensure that if parties separate prior to death and have a financial agreement entered into before or after separation but before the death of one or both of the parties, that the terms of the agreement are still in force and can be implemented and enforced.

Setting aside

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

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
(b) a party to the agreement entered into the agreement:
    (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
    (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
(c) a party (the *agreement party*) to the agreement entered into the agreement:
    (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the *other de facto relationship*) with a spouse party; or
    (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible

or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the other de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(d) a party (the *agreement party*) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 79, or a declaration under s 78, in relation to the marriage (or void marriage); or

(iii) with reckless disregard of those interests of that other person; or

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

(f) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(g) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (4)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

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

(i) a payment flag is operating under Pt 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 Pt; or

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

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

A comparison of the grounds in s 90UM(1) and s 90K(1) for setting aside financial agreements is in the table below:

S 90UM(1) - Pt VIIIAB		**S 90K(1) - Pt VIIIA**
(a)	Fraud	(a)
(b)	Interests of creditors	(aa)
(c)	Defrauding party to de facto relationship	(ab)
(d)	Defrauding party to marriage	No equivalent section
(e)	Void, voidable or unenforceable	(b)
(f)	Impracticability	(c)
(g)	Change in circumstances relating to child	(d)
(h)	Unconscionability	(e)
(i)	Payment flag	(f)
(j)	Unsplittable superannuation interest	(g)
(k) This ground is discussed further below.	Section 90UE agreements	No equivalent section

Sections 90UM(1)(g) and s 90K(1)(d) appear similar in that they enable a financial agreement to be set aside because of a material change in circumstances relating to the care, welfare and development of a child of the marriage or the de facto relationship and the child or a party to the agreement with caring responsibility for the child will suffer hardship. The distinction between the two sections lies in the definition of the "child" to which each section applies. A child of a de facto relationship is defined, but not extensively, by s 90RB as being "a child of both of the parties to the de facto relationship." Also relevant are s 60HA(1) and (2) which define a child as including the child of a person who has, or had, a de facto partner if:

- the child is a child of the person and the person's de facto partner
- the child is adopted by both or by one with the consent of the other
- a child who is, under s 60H(1) or s 60HB, the child of the person and the person's de facto partner - these sections dealing with children born as a result of artificial conception procedures or surrogacy

The definition of "child of a marriage" is more extensive and includes:

- a child who is, under s 60F(1) or (2), a child of a marriage (s 4(1))
- a child of the husband and of the wife in the marriage (s 60F(4A))
- a child of the husband and wife born before the marriage (s 60F(1)(b))
- a child adopted since the marriage by the husband and wife or by one of them with the consent of the other (s 60F(1)(a))
- a child who is, under s 60H(1) or s 60HB, the child of the husband and wife - these sections dealing with children born as a result of artificial conception procedures or surrogacy (s 60F(1)(c))
- a child of a marriage terminated by divorce or annulled in Australia or elsewhere (s 60F(2)(a))
- a child of a marriage terminated by the death of one party to the marriage (s 60F(2)(b))

An obvious distinction between the above definitions is the lack of clarity as to whether or not a child of a de facto relationship includes a child born before the de facto relationship commenced or after it ended. The definition of "child of a de facto relationship" is clearer in, for example, the Victorian de facto legislation. Section 39 of the *Relationships Act* 2008 [FN 32 Similarly to the former Pt IX *Property Law Act* 1958] defines a "child of a domestic relationship" specifically as:

> (a) a child born as a result of sexual relations between the partners; or
>
> (b) a child of one of the partners of whom the other partner is presumed to be the father under Part 2 of the *Status of Children Act 1974*; or
>
> (c) a child adopted by the partners.

A ground which applies to Pt VIIIAB financial agreements but not to Pt VIIIA financial agreements is s 90UM(1)(k). This ground applies to s 90UE agreements which are within s 90UM(5):

> (a) at least one of the spouse parties to the agreement was not provided, before signing the agreement, with independent legal advice from a legal practitioner

about the effect of the agreement on the rights of that party and about the advantages and disadvantages to that party of making the agreement; or

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

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

Curiously, s 90UM(1)(k) means that a s 90UE agreement can be challenged on a different ground to Pt VIIIA financial agreements or to other Pt VIIIAB financial agreements. It appears to be similar to the "saving" provision of s 90G(1A) and 90UJ(1A) but the wording is reversed. Sections 90G(1A) and 90UJ(1A) are aimed at finding an agreement to be binding despite one or more of s 90UJ(1)(b), (c) or (ca) (or s 90G(1)(b), (c) or (ca)) not being satisfied. Section 90UM(5) encapsulates much of the same wording from s 90UJ(1).

A table setting out the distinctions between s 90UJ and s 90UM follows:

Section 90UJ(1A)	**Section 90UM(1)(k) & (5)**
A Pt VIIIAB financial agreement which does not meet the requirements of s 90UJ(1)(b), (c) or (ca) can be found to be binding.	As 90UE agreement can be set aside if does not meet one or more technical requirements.
The agreement must be signed by all parties (s 90UJ(1A)).	By reference back to s 90UE(1)(a), the couple (but not all parties) must have signed the agreement.
One or more of s 90UJ(1)(b), (c) or (ca) are not met. These are positive obligations requiring: - the provision of independent legal advice about particular matters to each spouse - a Statement signed by a legal practitioner stating that the advice was provided is given to the client either before or after signing the agreement - a copy of the Statement was given to the other spouse party or to their legal practitioner	One or more of s 90UM(5)(a) and (b) applies. These are negative requirements which invoke the section if: - at least one of the spouse parties was not provided with independent legal advice about certain matters before signing the agreement - the advice was provided to at least one of the spouse parties but that party was not provided with a signed Statement from the legal practitioner There is no reference to any failure to exchange Statements.
A court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement.	A court is satisfied that it would be unjust and inequitable if the court does not set the agreement aside.

In determining whether it would be unjust and inequitable, any changes in circumstances from the time the agreement was made are to be disregarded.	In determining whether it is unjust and inequitable the court must have regard to the eligible agreed matters within the meaning of s 90UE. The eligible agreed matters are set out in s 90UE(3) as: (a)how all or any of the: (i) property; or (ii) financial resources; of either member, or both members, of the couple at the time when the agreement is made, or at a later time and during a de facto relationship between them, is to be distributed; (b) the maintenance of either member of the couple; in the event of the breakdown of a de facto relationship between them, or in relation to a de facto relationship between them that has broken down, as the case requires.

Consequences of setting aside

If a Pt VIIIAB financial agreement is set aside or found not to be binding, the court can make a property or maintenance order under s 90UM(6). A court may, on an application by a person who was a party to the Pt VIIIAB financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons. This is similarly worded to s 90K(3) with respect to Pt VIIIA financial agreements. These provisions appear to be designed to ensure that the parties are not hindered in obtaining relief after an agreement is set aside because of the time which has elapsed since separation.

However, with respect to Pt VIIIA financial agreements, s 44(3B)(c)(ii) specifically allows a further 12 months for maintenance or property proceedings to be instituted after an agreement is set aside or found to be invalid. There is no similar provision with respect to Pt VIIIAB financial agreements. Proceedings may be commenced after that time under s 44(3) if both parties consent or the court grants leave. Leave may be granted if the court is satisfied under s 44(4):

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

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

The wording of the provisions applying to Pt VIIIA and Pt VIIIAB financial agreements is, perhaps unsurprisingly, different for no obvious reason.

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

(a) that the application still needs to meet the standard s 44(5) requirement of the application being made within 2 years after separation;
(b) that the application cannot be made outside of the 2 years unless leave is granted under s 44(6);
(c) there is no time limit (an unlikely interpretation); or
(d) the application ought to be made promptly.

The court may grant leave to a party to apply after the end of the application period. The wording of s 44(6) is similar to s 44(4). De facto couples cannot though, consent to, proceedings being issued out of time, although married couples can consent under s 44(3).

A further complication is that s 90UM(6) cannot give the court jurisdiction which it otherwise does not have. The court must find that the threshold tests are met before it makes an order under s 90SM (for property) or s 90SF (for maintenance). These are different than for Pt VIIIAB financial agreements and include:

(a) Geographical requirements under s 90SK (for property) or s 90SD (for maintenance). Under s 90SK(1) a court may make a declaration under s 90SL, or an order under s 90SM, in relation to a de facto relationship only if the court is satisfied:
    (a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the *application time*); and
    (b) that either:
        (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or

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

in one or more States or Territories that are participating jurisdictions at the application time; or

(iii) the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.

(b) The de facto relationship broke down after 1 March 2009 or the couple has opted in under item 86A Amendment Act.

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

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

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

(c) that:

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

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

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

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

The consequences of a Pt VIIIAB financial agreement being set aside are potentially more disastrous for one of the parties than if a Pt VIIIA financial agreement is set aside. If a Pt VIIIAB financial agreement is set aside, although the wording of s 90UM(6) is similar to s 90K(3), the court cannot make orders unless it finds it has jurisdiction to do so. If the relationship was for less than 2 years, the prospect of avoiding the consequences of the agreement by successfully setting it aside and disputing jurisdiction to make property or maintenance orders may be very tempting to some parties. A party might frustrate a finding of jurisdiction, refuse to opt into the Act or oppose the court granting leave to apply for an order after the end of the standard application period.

Conclusion

The legislation dealing with financial agreements, under Pts VIIIA or VIIIAB, is complex and this complexity is exacerbated by the inconsistent wording, construction and effects of the two Parts.

The checklist of pre-requisites before parties can enter into a Pt VIIIAB financial agreement is greater than for Pt VIIIA financial agreements. These pre-requisites include jurisdictional, geographic and relationship hurdles. The litigation uncertainties and significant legislative changes with respect to financial agreements suggests that the complexities for legal practitioners with respect to Pt VIIIAB financial agreements are considerable, and probably greater than for Pt VIIIA financial agreements.

In summary, legal practitioners cannot assume that the advice they give to satisfy s 90G(1) in relation to a Pt VIIIA financial agreement can be replicated when giving advice under s 90UJ(1) in relation to a Pt VIIIAB financial agreement.