Financial Agreements – Everything you always wanted to know, but were too afraid to ask

Paul Doolan[1]

1. INTRODUCTION

Prior to 27 December 2000, parties to a marriage could not waive their rights to property settlement or spouse maintenance, nor contract out of Part VIII of the *Family Law Act* by entering into a Financial Agreement. At common law, contracts entered into prior to marriage which made provision for future separation or which purported to oust the power of the Courts to adjudicate on issues of property settlement and spouse maintenance were unenforceable and void as being against public policy (*Hyman v Hyman* [1929] AC 601 per House of Lords; *Plut v Plut* [1987] FLC 91-834 per Strauss J).

In answer to community and legal concerns raised in the 25 years since the inception of the *Family Law Act*, the Federal Government introduced Part VIIIA of the *Family Law Act*, which took effect on 27 December 2000. The most striking feature of the legislation was that it enabled parties to an intending marriage (or who are married or even after divorce) to enter into a Financial Agreement, the effect of which, if binding, is to exclude the jurisdiction of the Court to make Orders for property settlement and/or spouse maintenance on marriage breakdown.

2 MARRIAGE AND DIVORCE IN AUSTRALIA[2]

The Australian Bureau of Statistics figures on marriage and divorce emphasise why Financial Agreements have in part come to the fore in recent years:

- In 2001, there were 55,300 divorces recorded in Australia. The good news is that this peak was followed by recent declines, down to a mere 52,400 divorces in 2005.

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[2] The statistics used in this paper are drawn from the article "*Lifetime Marriage and Divorce Trends*" published by the Australian Bureau of Statistics in their Australian Social Trends 2007 series.

- People are now marrying at a later age. For men in 2005, this was now 30 years, whilst for women it has increased to 28 years of age.

- Statistics show that the population is also divorcing at an older age. In 2005, the median age of divorce for men was 43.5 years whilst for women the median was 40.8 years.

- The expected duration of first marriages that end in divorce, has increased between censuses. Men who first married in 1985 – 87 period and who had later divorced, could expect their marriage to last an average of 11 years. That figure has now increased to 14 years. The average duration of women's first marriages ending in divorce has increased from 14 to 16 years.

- In a triumph of hope over experience, over half (56%) of men who divorce can expect to remarry, whilst in a triumph (slightly) for experience over hope only 46% of women who divorce then remarry.

2.1 Background to the January 2010 amendments – why the Court closely guards its Part VIII jurisdiction

The Full Court of the Family Court, when dealing with cases regarding challenges to Financial Agreements, has emphasised the situation that applied prior to the introduction of the financial agreement provisions in 2000, namely that the parties could not by agreement, outside the confines of legislation, contract themselves out of the right to institute proceedings for property settlement and spouse maintenance. Given those matters, the Full Court in *Black & Black* has made clear that *"strict compliance with the statutory requirements is necessary to oust the Court's jurisdiction to make adjustive orders under s79"* of the *Family Law Act*:

> *"40. The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy...*

> *42. The underlying philosophy that had guided the courts in enunciating that principle was seen to place too many restrictions on the right of parties to arrange their affairs as they saw fit. The compromise reached by the legislature was to permit the parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met."* [3]

The Full Court Judgment in *Kostres & Kostres*[4] commented on the amendments to s90G introduced by the *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth) (which received Royal Assent on 7 December 2009 and came into force on 4 January 2010), and broadcast a clear warning to parties and legal practitioners alike as to the need to not only comply with the statutory provisions, but to draft the substantive clauses of Financial Agreements with precision if they are to be effective:

> *"163. This case throws into sharp focus the particular care needed to be exercised by parties entering into a financial agreement under Part VIIIA (and the significant responsibilities on the legal practitioners drafting and advising on the agreement) if the agreement is to be binding and enforceable in the event their marriage, for any reason, breaks down.*
>
> *164. The principles applicable to the adjustment of property interests under s 79 have been carefully developed over many years. The section contemplates contributions, both financial and non financial, not only to acquisition of property but to its improvement and conservation (as well as contributions to the welfare of the family) and other matters (s 79(4)(d), (e), (f) and (g)). It is well established when determining an adjustment of property which is just and equitable the Court gives the expression "property" the widest interpretation, and adjustment can be made between parties regardless of the title of property. A court's power to adjust property under s 79 is exercised using well defined guidelines to ensure the resulting order is just and equitable, and any order made may be subject of the safeguard of appellate review. That is not the case with property dealt with under a financial agreement. Thus care in establishing the mutual intention of the parties, and drafting the terms of the financial agreement with precision assume the utmost importance.*

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[3] *Black & Black* (2008) 38 FamLR 503 at ¶40, 42 and 45

[4] *Kostres & Kostres* [2009] FamCAFC 222

165. As this case unfortunately demonstrates agreements designed to avoid costly litigation can have expensive consequences if the intention of the parties is not readily discernable from the drafting of the agreement. This is particularly so given the recent amendments to the Act by the Federal Justice System Amendment (Efficiency Measures) Act 2009 (Cth), which Act received Royal Assent on 7 December 2009. The amendments were designed to overcome the effect of the Full Court's decision in Black & Black (2008) FLC 93-357 where the Court applied a strict compliance test with relation to certain technical requirements for binding financial agreements made under the Act. One of effects of the amending Act is to provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding despite a failure to meet the procedural requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made). <u>This makes it even more essential that the substantive clauses of such agreements are drafted with precision to ensure effectiveness, especially as they may be dealing with future acquired property or other interests in property</u>." [emphasis added]

2.2 Statutory provisions excluding the Court's jurisdiction

Where there has been compliance with the statutory requirements imposed by Part VIIIA, the effect of a binding Financial Agreement is to oust the Part VIII jurisdiction of the Court by virtue of s71A of the *Family Law Act*:

S71A

(1) This Part 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.

(2) Subsection (1) does not apply in relation to proceedings of a kind referred to in paragraph (caa) or (cb) of the definition of ***matrimonial cause*** in subsection 4(1).

As noted by Murphy J in *Fevia & Carmel-Fevia* [2009] FamCA 816, the Court's power to make Orders pursuant to Part VIII is *"curtailed only in respect of financial matters to*

which a Financial Agreement applies and only if any such Financial Agreement is binding."[5] It is important to note the scope of the definitions of "financial matters" and "financial agreement" as provided for in s4 of the *Family Law Act*:

> *"**'financial agreement'** means an agreement that is a financial agreement under section 90B, 90C or 90D, but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies."*
>
> *"**'financial matters'** means:*
> *(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."*

3 FINANCIAL AGREEMENTS – TYPES AVAILABLE AND BASIC REQUIREMENTS

3.1 The categories of Financial Agreements

By way of broad overview, the available categories of Financial Agreements are as follows:

- 90B – Financial Agreements made before marriage;
- 90C – Financial Agreements during marriage;
- 90D – Financial Agreements after divorce order is made;
- 90J – Termination Agreement;
- 90UB – Financial Agreements before de facto relationship;
- 90UC – Financial Agreements during de facto relationship;
- 90UD – Financial Agreements after breakdown of a de facto relationship;

[5] *Fevia & Carmel-Fevia* [2009] FamCA 816 at ¶174

- 90UE – Agreements made in non-referring States that become Part VIIIAB Financial Agreements;
- 90UA – Part VIIIAB Termination Agreement.

NOTE: it is also important to record relevant provisions in Part VIIIB in relation to Superannuation Agreements, that may also apply:

- 90MH – Superannuation Agreement to be included in a Financial Agreement if about a marriage;
- 90MHA – Superannuation Agreement to be included in a Part VIIIAB Financial Agreement if about a de facto relationship.

3.2 The "basic" requirements for a binding Financial Agreement

The relevant statutory provisions (in Sections 90B, 90C, 90D, 90UB, 90UC and 90UD) specify with particularity the requirements imposed for the making of a Financial Agreement. These were summarised by Cronin J (in the context of a s90C Financial Agreement) to be threefold:

(a) there must be a written agreement with respect to any (but not necessarily all) of the property, financial resources and/or maintenance of the parties;

(b) the parties to the Financial Agreement cannot be parties to any other "binding agreement" with respect to the matters in (a) above;

(c) the Financial Agreement must be expressed to be made under s90C (or under s90B, s90D, s90UB, s90UC or s90UD as the case may be).

4 A POTTED HISTORY OF S90G

The professional indemnity concerns of lawyers who provide advice in relation to Financial Agreements, was raised with the former Liberal Federal Attorney General, the Hon Daryl Williams at the time Part VIIIA was introduced. He is reported to have said at the time:

> "*The fears of the legal community are largely unfounded as their argument pre-supposes a new and more onerous standard for the certified provision of the independent legal advice in relation to binding Financial Agreements.*

Every time legal advice is given, there is an imputed standard of care that the lawyer will take due diligence in offering professional, informed and reliable advice. This is the standard that has guided s47 of the Property (Relationships) Act (NSW) 1984 in relation to property settlements in de facto relationships, and it has not resulted in a heavier onus than in other contractual matters.

By reducing all advice and briefs to writing, the lawyer has little to fear in terms of professional indemnity, if he or she has acted in a properly professional manner."

4.1 The first version of s90G

The original version of s90G was introduced as a consequence of the *Family Law Amendment Act 2000* (No 143 of 2000). It applied from 27 December 2000 through until 13 January 2004. It is set out below:

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

(a) the agreement is signed by both parties; and

(b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

(i) the effect of the agreement on the rights of that party;

(ii) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement;

(iii) whether or not, at that time, it was prudent for that party to make the agreement;

(iv) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; and

(c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(d) the agreement has not been terminated and has not been set aside by a court; and

(e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

4.2 The second version of s90G

Amendments were first introduced to s90G by virtue of the *Family Law Amendment Act 2003* (No 138 of 2003) that took effect from 14 January 2004 and applied until 28 February 2009. Most significantly, it changed the wording of the legal advice that was required to be given by a legal practitioner and that which was required to form the certificate annexed to the Financial Agreement. The wording is set out below:

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

(a) the agreement is signed by both parties; and

(b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

(i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

(c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(d) the agreement has not been terminated and has not been set aside by a court; and

(e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

4.3 The third version of s90G

By way of historical note, it is observed that there was a further minor change made to the wording of s90G as a consequence of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (No 155 of 2008). This took effect from 1 March 2009 and operated until 3 January 2010. The only significant change was to restrict the requirement for independent legal advice to each "spouse party" to the Agreement rather

than each "party". There was a similar change made to s90G(1)(e). The wording that applied during the period from 1 March 2009 – 3 January 2010 is set out below:

> (1) 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) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
>
> (i) the effect of the agreement on the rights of that party;
>
> (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
>
> (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
>
> (d) the agreement has not been terminated and has not been set aside by a court; and
>
> (e) after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties.
>
> (2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

4.4 The current version of s90G effective 4 January 2010

Significant changes were made to s90G, which took effect from 4 January 2010 by virtue of the *Federal Justice System Amendment (Efficiency Measures) Act No 1 2009* (No. 122 of 2009). As noted by the Full Court in *Kostres & Kostres*, the amendments were designed to overcome the effect of the decision of the Full Court in *Black & Black* wherein the Court had applied a strict compliance test in relation to certain technical requirements for a binding Financial Agreement.[6]

> **S90G (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**

[6] *Kostres & Kostres*, supra at ¶165

(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.

Experience amongst family law practitioners suggests that the January 2010 statutory amendments have met with varying degrees of applause, alarm, surprise, uncertainty, bewilderment, and a general consensus that this will not be the last lot of amendments to s90G.

By way of summary, the main features of the new s90G(1) are as follows:

- the introductory wording maintains the requirement for strict compliance with the statutory scheme, by noting that a Financial Agreement will be "binding" if, and only if, it meets the statutory requirements. Of significant importance, is the removal of the phrase "to the effect of" in s90G(1)(b), which emphasises the need for the wording to comply, specifically, with that in the statute;

- the Agreement must be signed by all parties to the document;

- before signing the Agreement, each spouse party must be provided with independent legal advice from a legal practitioner about:

  (a) the effect of the Agreement on the rights of that party; and

(b) the advantages and disadvantages, at the time that the advice was provided, to that party of the making of the Agreement;

- either before or after signing the Agreement, each spouse party was provided with a signed statement by a legal practitioner stating that the advice above was provided to that party. There is no longer a mandatory requirement that the statement in question be annexed to the Agreement;

- there is no longer a requirement that within the body of the Financial Agreement itself, there be recorded the terms of independent legal advice received by each party from their legal practitioner. That being said, it would remain prudent to do so. It is important to note that given the mandatory terms of s90G, it will be necessary therefore to prove in the future that each spouse party received from their legal practitioner a signed statement. This gives rise to a potential problem in proving receipt by the client of that signed statement. To try and minimise that potential problem, annexing a copy of the signed statement of advice to the Agreement (as was previously done with certificates) is recommended. Also, having the client sign a receipt acknowledging that he or she has been given the signed statement is also recommended;

- each spouse party must be given a copy of the signed statement by the legal practitioner for the other party. It can be a copy (rather than an original) and can be given either to the spouse party or to the legal practitioner for that party.

- The amendments are retrospective in operation and apply to all Agreements made on or after 27 December 2000 (and also to 90UB, 90UC and 90UD Agreements which were operative from the March 2009 amendments).[7]

The Family Law Section of the Law Council of Australia[8] has (along with other commentators) raised a concern about certain aspects of the amendments.

Prior to 4 January 2010, the provision in s90G required the Agreement itself to contain a statement to the effect that each party was provided with independent legal advice about the required matters. That has been omitted from the new legislation and seemingly replaced with a positive obligation (that may need to be proved) that a spouse party was

[7] Item 8 and Item 17(1) of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009*

[8] Notice from the Family Law Section of the Law Council of Australia to members issued 5 January 2010

provided with independent legal advice about the specified matters. The Family Law Section has warned that *"this removes the ability to rely upon the fact that the Agreement contained the statement and creates potential difficulties about whether or not advice was deficient in some respect such as to render the Agreement non-binding"*.

Another commentator has noted that *"if the advice does not include all the specified matters or, arguably, is not absolutely accurate, the mandatory requirement may not have been met. It may not be possible for a Court to accept that despite a signed statement of legal advice, that the required advice has been given"*. [9]

However, there is a strongly arguable case to the contrary. The chair of the Family Law Section of the Law Institute of Victoria has expressed the view that the new s90G(1)(b) does not by its terms make it necessary, in order for the Financial Agreement to be shown to be binding, to prove the contents of the advice that was given, as a consequence of the availability of the presumption of regularity. That presumption holds that *"where an act is done which can only be done legally after the performance of some prior act (the giving of the advice for example) proof of the later act carries with it a presumption of the due performance of the prior act"*.[10] As a consequence, the receipt of the copy of the signed statement of legal advice for the other party carries with it such a presumption of regularity.

In 2009, when an earlier draft of the Bill to amend s90G had been circulated, the writer and Grahame Richardson SC penned a submission to the Attorney-General of the Commonwealth (copied to the Court and the Family Law Section of the Law Council of Australia) in relation to a number of the draft provisions. In that submission, the writer and Mr Richardson SC proposed that the (then) existing requirement that a statement of legal advice should appear in the body of the Agreement and in an annexed Certificate to the Agreement should be retained in any amending legislation. The changes now made to s90G are obviously to the opposite effect. Under cover of a letter dated 7 November 2009 from the Attorney-General in response to that submission, Mr McClelland stated that:

> *"The Government considered your comments that the present requirements in the Act for the statement as to advice to appear in the body of the Agreement and in an annexed Certificate to the Agreement should be retained. In this regard, the Government was concerned that every additional requirement for a binding*

[9] "Financial Agreements – is this the end?", 30 November 2009, Jacqueline Campbell, CCH

[10] Article by Stephen Winspear, Moores Legal, Chair of the Family Law Section of the Law Institute of Victoria, referencing Halsbury's Laws of Australia, Volume 13, ¶195-2160.

Agreement carried the risk that Agreements may not bind the parties if the requirement is not satisfied.

The additional requirement, moved during the Senate debate on the Bill as a Government amendment, that a copy of the signed statement about the giving of prior independent legal advice be provided to the other spouse party or their legal practitioner will mean each spouse party will have readily available evidence that the advice was given to the other spouse party. It will of course be open to legal practitioners to include, within the body of any particular Agreement, a statement that prior independent legal advice was given."

Whilst obviously not a statement made in the context of an Explanatory Memorandum or Second Reading Speech, it is interesting nonetheless to note the view of the Attorney-General is seemingly that it will not be necessary to positively or actually prove the content and nature of the advice given, and that it would be seemingly proved and indeed "*readily available*" by the provision of the copy of the signed statement.[11]

4.5 s90G(1A) – will the get out jail free card ever be handed out by the Courts?

It is important to appreciate that even if the strict requirements of the new s90G(1)(b), (c) and (ca) are not satisfied, an application can be made (known as an "enforcement application") by a party seeking to enforce the agreement for a Court declaration that the Agreement is binding if the Court is satisfied that it would be unjust and inequitable if the Agreement were not binding on the spouse parties to the Agreement (disregarding any changes in circumstances from the time the Agreement was made).

The relevant provisions of the new s90G(1A) are as follows:

> **(1A) A financial agreement is binding on the parties to the agreement if:**
>
> **(a) the agreement is signed by all parties; and**
>
> **(b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and**
>
> **(c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and**

[11] Letter dated 7 November 2009 from the Attorney-General, the Hon. Robert McClelland MP

> **(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and**
>
> **(e) the agreement has not been terminated and has not been set aside by a court.**
>
> (1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the *enforcement application*) by a spouse party seeking to enforce the agreement.
>
> (1C) To avoid doubt, section 90KA applies in relation to the enforcement application.
>
> (2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

The purpose of s90G(1A) appears squarely aimed at enabling the Court to declare binding a Financial Agreement, which would otherwise have failed the stringent requirements due to some minor technical deficiency. It appears directed, in a curative sense, at those matters in s90G(1)(b), (c) and (ca).

As to the type of circumstances in which the relief might be granted, it could potentially be available where there is some error in the wording of the signed statement of legal advice which was close to but not entirely compatible with the language in (1)(b), or a situation where there has been a breach of (1)(c) because the signed statement by the legal practitioner had not been given to the "spouse party" per se, but rather to a commercial lawyer or accountant for that party who had held the document as their agent.

4.6 The 2010 amendments – the transitional provisions

The changes introduced on 4 January 2010 are not neatly encapsulated by reading of the relevant provisions of Part VIIIA of the *Family Law Act*.

There are important transitional provisions contained within the body of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* that need to be borne in mind. By virtue of that Act, the amendments made 4 January 2010 apply as follows:

- The amendments are retrospective, and apply in relation to Financial Agreements and Termination Agreements made on or about 27 December 2000.[12]

[12] Schedule 5 – binding financial agreements, 8(1)

- The amendments that are made do not apply to those Agreements which, prior to 4 January 2010, have already been set aside by Order of the Court.[13]

- Similarly, if the Court has (after setting aside a Financial Agreement) made an order under s79 or 83 of the *Family Law Act* as to property or spouse maintenance, then the Financial Agreement previously made is not cured or resurrected by the amendments and does not bind the parties.[14]

- Where a Financial Agreement was made before 14 January 2004, then the new provisions of (1)(b) do not apply, and instead the pre-14 January 2004 independent legal advice wording applied (see section 4.1 of this paper for the wording).[15]

- Where a Financial Agreement is made prior to 4 January 2010, then the requirements in s90G(1)(c) and (ca) for provision of the copies of the signed statements of independent legal advice, do not apply.[16]

- Where a Financial Agreement was signed after 14 January 2004 but prior to 4 January 2010, and it incorrectly referenced the wrong statement of independent legal advice (being that which applied before 14 January 2004 rather than afterwards) then that error is cured and s90G(1)(b) is taken to have been satisfied nonetheless.[17]

5 THE PROBLEMS, COMMON AND OTHERWISE, WITH FINANCIAL AGREEMENTS

5.1 The need for a Financial Agreement to be "expressed to be made under"…

Careful note should be taken not only of s90G, but of the requirements imposed by each of ss90B, C and D. They require that the Financial Agreement be "expressed to be made under" the relevant section. As a consequence, there should be a specific statement in the Financial Agreement, whether in the recitals or the operative provisions, in the following form:

[13] Schedule 5 – binding financial agreements, 8(2)
[14] Schedule 5 – binding financial agreements, 8(3)
[15] Schedule 5 – binding financial agreements, 8(4)
[16] Schedule 5 – binding financial agreements, 8(6)
[17] Schedule 5 – binding financial agreements, 8A(2)

"This is a Financial Agreement made pursuant to [example s90B]."

In *Ruane & Bachman-Ruane & Anor*, Cronin J confirmed that to be a Financial Agreement under [s90C in that case] one of the 3 basic requirements was that *"the Agreement must be expressed to be made under s90C".*[18]

5.2 What is part of a Financial Agreement – the Recital versus Covenant conundrum

A matter of some debate has been settled, at least at first instance, by the decision of Cronin J in *Ruane & Bachman-Ruane*. His Honour was there required to consider whether, in circumstances where the statutory requirements of Part VIIIA must be strictly followed, if it mattered that some requirements were set out, mentioned or detailed in, Recital clauses rather than what are traditionally known as "operative clauses". Cronin J answered that in the negative. After referring to the decision of the High Court in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 56 ALJR 459, Cronin J held that the distinction between the Recital and operative clauses is, in the circumstances of a Financial Agreement, a distinction without a difference:

> *"64. In a financial agreement for the purposes of the Family Law Act, specifically drawn for the purposes of achieving the ouster of jurisdiction offered by s71A, the distinction between the recital and operative clauses is a distinction without a difference. What must be clear and unambiguous is that the parties objectively intended to oust the jurisdiction and put in place the methodology to resolve their financial affairs should the breakdown of the marriage occur. In Black and Black (supra) the Full Court referred to strict compliance with statutory requirements. The fulfillment of those requirements may be gleaned from the recitals if the whole of the document addresses those matters and is properly executed (see also ASIC and Rich and Anor (supra)).*
>
> *65. Thus, if it is clear that the parties intended the document to be a financial agreement then the necessary statutory references required to make it binding can be set out in recital clauses. As a matter of precaution, the operative clauses should make clear that reliance is placed upon the recitals. However, even if incorporation by reference is not made, a court can still read into the financial*

[18] *Ruane & Bachman-Ruane & Anor* [2009] FamCA 1101 at ¶33

agreement, the reliance upon the recitals. The only time that could not occur would be if there was an obvious inconsistency between a recital clause and an operative clause. Such an inconsistency however would have to go towards a failure to incorporate one of the statutory requirements. What the parties also need to do is show that based upon satisfying all of the requirements of the Act, the operative part of the agreement deals with the division of property (and if necessary, spousal maintenance) and that there is an intention to oust the jurisdiction."[19]

5.3 What is the effect of s90DA?

Changes introduced by Schedule 5 to the *Bankruptcy and Family Law Legislation Amendment Act 2005* came into effect on 15 April 2004. As a consequence, an amended s90DA was inserted into the *Family Law Act* as follows, and which applied until 21 November 2008.

90DA [OUTDATED]

(1) A financial agreement between 2 people, to the extent to which it deals 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 them at the time when the agreement is made, or at a later time and before the termination of the marriage by divorce, is to be dealt with; or

(b) the maintenance of either of them after the termination of the marriage by divorce;

is of no force or effect until a separation declaration is made.

(2) A separation declaration is a written declaration that complies with subsections (3) and (4).

(3) The declaration must be signed by at least one of the parties to the financial agreement.

(4) The declaration must state that:

(a) the parties have separated and are living separately and apart at the declaration time; and

(b) in the opinion of the parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

(5) In this section:

[19] *Ruane & Bachman-Ruane & Anor* [2009] FamCA 1101 at ¶64 and 65

declaration time means the time when the declaration was signed by a party to the financial agreement (or last signed by a party to the agreement, if both parties to the agreement have signed).

Separated has the same meaning as in section 48 (as affected by section 49).

By changes introduced by *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, s90DA was amended, such amendments coming into effect from the date of Royal Assent on 21 November 2008. The current version of s90DA is as follows:

(1)A financial agreement that is binding on the parties to the agreement, to the extent to which it deals with 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:

(a) at the time when the agreement is made; or

(b) at a later time and before the termination of the marriage by divorce;

are to be dealt with, is of no force or effect until a separation declaration is made.

Note: Before the separation declaration is made, the financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by section 90DB).

(1A) Subsection (1) ceases to apply if:

(a) the spouse parties divorce; or

(b) either or both of them die.

Note: This means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the divorce or death(s).

(2) A separation declaration is a written declaration that complies with subsections (3) and (4), and may be included in the financial agreement to which it relates.

(3) The declaration must be signed by at least one of the spouse parties to the financial agreement.

(4) The declaration must state that:

(a) the spouse parties have separated and are living separately and apart at the declaration time; and

(b) in the opinion of the spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

(5) In this section:

declaration time means the time when the declaration was signed by a spouse party to the financial agreement.

separated has the same meaning as in section 48 (as affected by section 49).

Later in this paper, the writer makes an observation regarding a possible ambiguity that may arise as to when spouse maintenance provisions in a Financial Agreement have effect for the purposes of s90F of the legislation, as a consequence of that amendment to s90DA. At this point, you should note that the previous version of s90DA made specific reference to the "maintenance" aspects of a Financial Agreement as not being of force or effect until a separation declaration is made. Under the existing version of s90DA that came into effect of 21 November 2008, no such reference exists and the writer has not been able to locate any similar provision moved elsewhere in the legislation.

5.4 Maintenance clauses and s90E

Spouse parties to a Financial Agreement can make provision for the maintenance of either or both of them during, after or both during and after the marriage. One of the benefits of Financial Agreements, is that they can provide the finality as to claims for spouse maintenance that were previously only available where the Court had made an order approving a s87 Maintenance Agreement.

5.4.1 *The effect of death*

Where a maintenance order is made by the Court pursuant to s74 of the *Family Law Act*, that Order automatically ceases to have effect upon the death of the party[20] and, unless in special circumstances, the Court otherwise orders, if the payee remarries.[21]

However, no such automatic termination occurs in the event of maintenance provisions contained within a Financial Agreement. To the contrary, s90H provides that a Financial Agreement that is binding *"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"*.

As a consequence, it is prudent to include within a Financial Agreement where provision for maintenance is made, a clause to the following effect:

> *"Payment of spouse maintenance pursuant to the preceding clause, shall terminate upon the first in time of the following events to occur:*
> *(1) death of either spouse party to the Financial Agreement;*
> *(2) re-marriage of the payee for spouse maintenance;*

[20] S82(1) – (3) *Family Law Act*

[21] S82(6) *Family Law Act*

> *(3) the payee residing in a de facto relationship within the meaning of the Family Law Act for a period, whether continuous or in aggregate, of more than 3 months;*
> *(4) [insert sunset date];*
> *(5) the payer becoming bankrupt or subject to a personal insolvency agreement."*

5.4.2 *Can there be a mutual release of maintenance rights without some monetary payment?*

It has become commonplace in Financial Agreements, where there is no substantive payment of maintenance being made but there is agreement between the parties that there will be no future claims for maintenance, to include a clause providing either for:

- a mutual release of rights to make a claim for spouse maintenance; or
- a payment by each party to the other of $10 by way of spouse maintenance, which the Agreement then specifies is for the purposes of s90E maintenance of that value for each party. By way of example:

> *"(1) That within 14 days of the date of this Financial Agreement:*
> *(a) the husband shall pay to the wife as and by way of spouse maintenance, the sum of $10;*
> *(b) the wife shall pay to the husband as and by way of spouse maintenance, the sum of $10.*
> *(2) The parties acknowledge that clause 1(a) of this Financial Agreement is a provision that relates to the maintenance of a party, namely the wife, and for the purposes of s90E of the Act is hereby specified that the value of the provision is $10.*
> *(3) The parties acknowledge that Clause 1(b) of this Financial Agreement is a provision that relates to the maintenance of a party, namely the husband, and for the purposes of s90E of the Act it is hereby specified that the value of the provision is $10."*

Pause for thought as to the effectiveness of such provisions is given by a recent decision of Justice Cronin. The Financial Agreement in *Ruane & Bachman- Ruane* contained what might be described as a "nil" provision for spousal maintenance. Ultimately the Court was not required to pass judgment on that particular provision as the Financial

Agreement was set aside on other grounds and the proceedings before the Court were for property settlement only (not spouse maintenance). That being said, Cronin J concluded his Judgment in the following (ominous) terms:

> *"95. In passing, although not relevant to the decision I have to make, counsel for the husband also raised the imperfections in the agreement as drawn concerning spousal maintenance saying that the document did not comply with the provisions of s90E. Counsel for the wife submitted, in my view correctly, there was no necessity for this issue to be ventilated because there was no spousal maintenance application before the Court. I agree. The question of whether or not a provision in an agreement that provides for "nil" spousal maintenance is for another day."*[22]

5.5 s90F – is this a matter beyond the control of those drafting the Agreement?

The Court's jurisdiction to make an order in relation to the maintenance of a spouse party, is not excluded or limited if the Court is satisfied (pursuant to s90F(1A)) that, at the time 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 him or herself without an income tested pension, allowance or benefit.

It is important to note that in the case of Financial Agreements made pursuant to s90B or s90C (to the extent to which they deal with how, in the event of breakdown of the marriage, the property or financial resources of the spouse parties is to be dealt with) is of no force or effect until a separation declaration is made.

A note to s90DA(1) provides that a Financial Agreement is of force and effect in relation to the other matters it deals with (except those covered by s90DB) prior to the time a separation declaration is made.

What then is the relevant time for the purposes of s90F(1A)?

There appears to be some ambiguity on the face of the legislation as a consequence of the current version of s90DA.

S90DA provides that in the context of s90B and s90C Financial Agreements, the relevant date is when a separation declaration is made – but this appears only to apply to questions

[22] *Ruane & Bachman-Ruane & Anor* [2009] FamCa 1101 at ¶95

of treatment of property and financial resources – not the maintenance of the spouse parties.

It is noted that the ability to make a Financial Agreement dealing with spouse "maintenance" is bestowed by s90B(2)(b) and s90C(2)(b), neither of which deals with the question of "property or financial resources" which are instead deal with in sub-paragraphs 90B(2)(a) and 90C(2)(a) respectively.

A possible interpretation of s90F and s90DA is then that:

(a) the relevant time as to when the spousal maintenance provisions in a Financial Agreement take effect is when the Agreement is signed by both parties and it is this date that is relevant for s90F purposes;

(b) the relevant time at which the property and financial resource provisions take effect is when the separation declaration is made on breakdown of the marriage

5.6 Requirement for strict adherence – why "if and only if" means what it says

Prior to the 4 January 2010 amendments, the import of the words "if, and only if" was perhaps slightly mollified by use of the subsequent expression "to the effect of". Note should be made of the fact that the current version of s90G(1) simply proceeds on the basis of "if, and only if" and no longer bears any watering down by use of "to the effect of". This may well therefore have the result that a strict use of the words of the various sections in Part VIIIA is necessary to meet the requirements of the legislation.[23]

It is noted that having regard to the pre-January 2010 state of the legislation, Cronin J was of the view that it was not necessary to use the words of the various sections precisely to meet the requirements of Part VIIIA, however the reader of the Financial Agreement must be safe in the knowledge that each provision has been satisfied. This ruling by Cronin J was, however, in the context of the old version of s90G(1)(b) which used the expression "to the effect of" (and which no longer appears in the new s90G(1)(b)).

The effect of not meeting the strict wording of the legislation has been made clear in earlier decisions.[24]

In the decision of Coates FM in *Gardiner & Baker*[25] the learned Federal Magistrate found that a Recital that referred to legal advice having been given as to the "advantage,

[23] *Ruane & Bachman-Ruane & Anor* [2009] FamCa 1101 at ¶67

[24] *Black & Black* [2008] FamCAFC 7 at ¶45

financially or otherwise" of making the Agreement, was deficient and therefore non-binding as it did not comply with the then requirement of s90G(1)(b) which required reference to "advantages and disadvantages" and not merely just to "advantages". As a consequence, the Financial Agreement did not meet the provisions of s90G.

5.7 Who or what is a "legal practitioner"?

S90G(1) requires provision of "independent legal advice" from a "legal practitioner".

Whilst that might seem straightforward on the face of it, it has been the subject of litigation on at least 2 occasions when a non-Australian qualified legal practitioner signed the Certificate attachment to a Financial Agreement.

In *Ruane & Bachman-Ruane*, Cronin J held that a Financial Agreement was not valid because the Certificate (signed by an English lawyer who was not an Australian legal practitioner) did not comply with the requirements of s90G:

> *"74. Section 4 of the Act provides that unless the contrary intention appears in the Act, "lawyer" but not "legal practitioner" is defined to mean a person enrolled as a legal practitioner of:*
> *(a) a federal court; or*
> *(b) the supreme court of a state or territory.*
>
> *75. To argue the plain meaning of "legal practitioner" in the context of this Act and in particular Part VIIIA in its wide and generic sense does not sit comfortably with the seriousness of the object of the provision which is to oust jurisdiction.*
>
> *76. In addition, the plain reading of s90G is for parties to obtain legal advice. It does not follow that the advice has to be accepted or followed nor for that matter, for the advice to be correct. The purpose of the provision is to ensure that party understands not only the rearrangements of property and financial resources but also that rights are being affected. Those rights include exclusion of access to the courts subject to certain exceptions. It is this last point that requires consideration about whether the person given the advice not only is competent in the sense of having access to the relevant knowledge but also accountable as an officer of the court so that the court could be reassured that the advice was*

[25] [2009] FMCAfam 1029

directed to the exclusion of access as well as the explanation about the practical side of the settlement itself.

77. In Murphy v Murphy [2009] FMCAfam 270 Coates FM said legal advice was advice about the law of a particular jurisdiction. His Honour determined that legal practitioner meant a person entitled to practice in the jurisdiction. That would therefore exclude an Australian academic lawyer or an international lawyer who might have had significant experience in dealing with Australian law. This was the argument put by counsel for the third party lawyers. The husband says, adopting the reasoning in Murphy (supra), no other purpose appears on the face of the legislation or by inference, in the agreement. The wife rejects the argument. I think Coates FM was right but there are other matters that assist me...

80. To engage in legal practice which is defined in New South Wales as the practice of law, under the Legal Profession Act 2004 (NSW) a person requires to be a registered practitioner. That legislation sets out that its purpose is to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so as well as to protect clients. Similar legislative provisions apply in Victoria. In Queensland, the Legal Profession Act 2007 (Qld) sets out (s21) that the main purpose of the Act is achieved by providing that legal practice is engaged in only by persons who are properly qualified and hold a current practising certificate.

81. The giving of legal advice lies at the very heart of the practice of the law (see Cornall v Nagle [1995] 2 VR 188).

82. Thus, to achieve the fundamental purpose of Part VIIIA, consistent with the common purpose of various state legislation, the ordinary meaning of "legal practitioner" must be a person who fits the description set out in s4 of the Family Law Act.

83. I find that the financial agreement is not valid because the certificate did not comply with s90G."[26]

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26 *Ruane & Bachman-Ruane & Anor* [2009] FamCa 1101 at ¶77 – 77, 80 – 83 and see further Coates FM in *Murphy v Murphy* [2009] FMCAfam 270 at ¶74

5.8 The dubious wisdom of counterpart documents

One of the (many) unusual aspects of the interpretation of Part VIIIA, is the holding in the case law that compliance with s90G will not be met in circumstances where there has been an exchange of counterpart documents.

Section 90KA provides that in determining whether a Financial Agreement is valid, enforceable or effective, the Court is to do so *"according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".* It is noted that it is common in the commercial world for contracts to be made by exchange of counterpart documents, notwithstanding that the signatures of each of the relevant parties might appear on different versions of the document.

Whatever the validity of such agreements might be as a matter of contract, the signing and exchange of counterpart Financial Agreements has been rejected by the Family Court as constituting sufficient compliance with the strict requirements of s90G:

> *"215. Thus, in my view, for example, compliance with the section cannot involve signed counterparts of the agreement because neither party will have an agreement that contains all of the required matters. (I agree, then, with respect, with the comments of Carter J to that effect in Millington and Millington [2007] FamCA 687 at par 33)."*[27]

Under the provisions of s90G that applied prior to the January 2010 amendments, there was a requirement that an original of the Agreement be given to one party and a copy to the other spouse party. It is noteworthy that the Court has held that "copy" in that context means a photocopy of the original showing the signatures of all of the parties, and cannot be satisfied merely by a word processor version of the document (without signatures) being provided:

> *"101. In my view it is plain, contextually, having regard to both s90G(1)(a) and the prefacing words in s90G(1)(e) that "the original" means the original agreement as signed by all parties, and that it is not necessary to add or read in such additional words to achieve that plain meaning because no other meaning is available. "Copy", according to the Australian Concise Oxford Dictionary, has*

[27] *Fevia & Carmel-Fevia* [2009] FamCA 816 at ¶215 per Murphy J

> *the primary meaning "thing made to look like another", and according to the Macquarie Dictionary, "reproduction, or imitation of an original". Thus, a document not showing the signatures of all parties cannot be "a copy" of the original agreement but merely "a copy" of the form of a proposed agreement before signature by all of the parties, by which signing the agreement comes into existence."*[28]

Note should also be made of the meaning of the phrase "after signing the agreement" as it appeared and appears both in the pre-4 January 2010 and post-4 January 2010 version of s90G. The prior version of s90G, provided in s90G(1)(e) that *"after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties".*

Whilst that requirement is removed in the post-4 January 2010 version of s90G, there is still a requirement in s90G(1)(c) that *"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...".*

Provision of a document "after" signing of an agreement, imports the requirement of some immediacy in the giving. In *Suffolk & Suffolk (No 2)*, O'Reilly J held that provision of a copy of an agreement to a spouse some 5 or so years after the agreement was made (being after the marriage had broken down, some 2 years after separation and even after proceedings had been instituted) did not satisfy the requirements of s90G(1)(e) of the prior version of s90G:

> *"108. Thus, I accept Mr Hall's written submissions 21 July 2009, par 45, which I will set out rather than paraphrase:*
>
> *45. The use of the term "after it is signed" imports that there is some immediacy in the giving. The particular wording contemplates that the "giving" occurs at or about the time the agreement is signed, otherwise the inclusion of the words "after it is signed" in s90G(1)(e) make no sense. Further when read together with the other requirements set out in section 90G, it makes sense to interpret the section as requiring the giving to occur with some temporal connection to the making of the agreement, as the other matters in s90G(1)(a) to (c) relate to its form, and to what the agreement must contain, and the acknowledgement of receiving advice, and a certificate certifying that the advice was given. All of*

[28] *Suffolk & Suffolk (No 2)* [2009] FamCA 917 at ¶101 per O'Reilly J

> *these matters must be done at the time the agreement was made. It thus makes sense that likewise, so must the giving of the original and a coy to the parties be done at the same time."*[29]

The matter was also considered by Justice Murphy in *Fevia & Carmel-Fevia*. In that case, the Court held that s90G effectively imported into it a requirement or qualifying phrase that the step be taken "within a reasonable time". His Honour accepted the question of a reasonable time was not synonymous with "contemporaneously with" or "shortly after", but nonetheless found:

> *"231. I consider the implication of the expression "within a reasonable time" is necessary in determining whether the s90G requirement for the provision of an original and copy is complied with and that the implication of such an expression is consistent with the overall purpose of the section and Part VIIIA earlier outlined.*
>
> *232. What is reasonable will, of course, depend upon the particular circumstances of the contracting parties (including, it might be said, whether the agreement is made pursuant to s90B, s90C or s90D)."*[30]

5.9 The statement of independent legal advice

Whilst the requirement for the inclusion, within the body of a Financial Agreement, of a statement of independent legal advice has been removed, it is recommended that such a clause continue to be inserted by practitioners. A sample clause would be as follows:

> *"The husband and wife hereby acknowledge that before they each signed this Financial Agreement, they each received separate and independent legal advice from a legal practitioner, as certified in the annexures to this Agreement, as to the following:*
> *(a) the effect of this Agreement on the rights of that party; and*
> *(b) the advantages and disadvantages, at the time the advice was provided, to the party of making the Agreement."*

[29] *Suffolk & Suffolk (No 2)* [2009] FamCA 917 at ¶108 per O'Reilly J

[30] *Fevia & Carmel-Fevia* [2009] FamCA 816 at ¶231 – 232

Whilst the requirement for a Certificate of independent legal advice to be annexed to the Agreement has been removed, it is recommended that practitioners continue to annex the Statement signed by the lawyer in question, and a sample document would be as follows:

> *"I {solicitor name} of {firm name}, {firm address}, Solicitor, hereby certify and state that in relation to an agreement in writing proposed to be entered into between {party A} and {party B}:*
>
> *(1) I am a legal practitioner qualified to practice in Australia;*
>
> *(2) I advised {party A} independently of the other party and before the time at which {he/she} signed this Agreement, as to the following matters:*
>
> *(a) The effect of the Agreement on the rights of my client;*
>
> *(b) The advantages and disadvantages, at the time that the advice was provided, to my client of making the Agreement.*
>
> *Dated:*
>
> *Signed:"*

5.10 The benefits of receipts

To prove, within the meaning of s48 of the *Evidence Act*, compliance with the mandatory requirements of s90G of the Act, may be extraordinarily difficult in 5, 10, 20 or 40 years' time, when parties seek to enforce or challenge a Financial Agreement signed many years before. The practitioners involved may have died, files may have been lost or destroyed, memories may have faded, records may have been misplaced.

It is recommended that practitioners require a Receipt to be signed by each party to the Financial Agreement that confirms in writing:

- their receipt of an original or copy of the signed Agreement (even though this requirement is no longer required by the Act);
- that before signing the Agreement, they received independent legal advice, and what that advice was;
- that either before or after they signed the Agreement, they received a signed statement by their lawyer setting out those matters;
- that after signing the Agreement, they received a copy of the signed statement of independent legal advice from the lawyer for the other party.

A proposed sample Receipt is set out below:

"I, {Party A} acknowledge that the Financial Agreement ("Agreement") between myself and {Party B} and dated the ## day of ##, was signed by me and {Party B} and that:

(1) {the original/a copy} of the signed Agreement was given to me;

(2) Before signing the document, I received independent legal advice from my solicitor {solicitor name}, about:

(a) The effect of the Agreement on my rights;

(b) The advantages, and disadvantages, at the time that the advice was provided, to me of making the Agreement.

(3) I have received a signed statement from my solicitor, {solicitor name}, stating that I have received independent legal advice about;

(a) The effect of the Agreement on my rights;

(b) The advantages and disadvantages, at the time that the advice was provided, to me of making the Agreement.

(4) I have received a copy of a signed statement by the legal practitioner for {Party B} stating that before signing the Agreement {he/she} was provided with independent legal advice from {his/her} legal practitioner about:

(a) The effect of the Agreement on the rights of that party;

(b) The advantages and disadvantages, at the time the advice was provided, to that party of making the Agreement.

Dated:

Signed:"

5.11 Written letters of advice by legal practitioners

Given the potential for a challenge in future on the basis of s90G(1)(b) as to the nature and content of the advice actually given, it is essential that practitioners continue to provide written letters of advice to their clients about the required matters.

Practitioners should also give consideration to providing a disclaimer within their advice to the client, warning them of the uncertainties associated with Financial Agreements because of the language of the statute and the manner in which it is the subject of ongoing interpretation by the Courts. By way of example,

"A Financial Agreement represents the most that the law presently offers to persons seeking to secure their financial future both from claims arising out of

their marital relationship and in respect of their entitlements and their obligations upon any separation. It is important to note that:

- *the future circumstances of each spouse party can never be foreseen and thus the effect of those circumstances at some indeterminate future time when a dispute may arise in relation to the Agreement, may have a significant but currently unknown material effect;*

- *the future financial position of each spouse party, can never be known with any certainty. The pool of assets and liabilities and financial resources may change in a multitude of ways between now and the time of separation. Assets which are available now and which it is expected will found the basis for any future claim, may no longer exist at the time that separation occurs. Assets may change form, be sold, encumbered, diminish or increase in value;*

- *the approach of the Courts to the relevant provisions of the Family Law Act which govern these Financial Agreements and how they might be varied or set aside, remains in a state of evolution. There are areas where clarification will only be known by ultimate rulings from the Full Court of the Family Court or the High Court of Australia;*

- *there is the continuing possibility of further amendments to the legislation governing Financial Agreements. Again, the form and effect of any such future change, is not presently known and impossible to predict.*

Each of the above matters may have an effect, for better or for worse, upon a party who enters into a Financial Agreement."

5.12 Financial Agreements and why they may not be friends with Wills, shareholders agreements, unitholders agreements, contracts and rights of pre-emption

Financial Agreements are not "stand alone" documents. They are a living document that will continue to affect parties throughout the period of their relationship or marriage.

Care should be taken to advise clients, particularly those who have complex business affairs and who may hold corporate or partnership interests in conjunction with various

third parties, to have the terms of the Financial Agreement checked by the commercial lawyer for the party to ensure that it does not come into conflict with or cause potential problems for, rights and obligations that might otherwise exist under the terms of other commercial arrangements that a spouse party has.

5.13 s90K – trying to pre-empt challenges

The circumstances in which the Court may set aside a Financial Agreement are contained in s90K. These are separate from the Court's powers to make an order declaring that a Financial Agreement is not binding as a consequence of failure to meet the requirements imposed by s90B, C, D or 90G. By means of trying to stave off a subsequent challenge to a Financial Agreement, most particularly under s90K(1)(d), it may be appropriate to include within the Financial Agreement a recital to the following effect:

> *"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 inclusive of any or all of the following:*
> *(1) separation;*
> *(2) the birth of a child or children or adoption of a child or children;*
> *(3) serious illness or injury;*
> *(4) death;*
> *(5) the loss of any or all of the property and financial resources listed in the schedules attached to this Financial Agreement;*
> *(6) significant increase or decrease in value of property and financial resources referred to in the schedules attached to this Financial Agreement;*
> *(7) the receipt of by either or both of them of windfall benefits, including but not limited to lottery wins and inheritances."*

There is not, within the legislation, a mandatory requirement that parties to a Financial Agreement annex a detailed schedule of their asset and liability position at the time the Agreement is made. However, given the potential for challenge to Financial Agreements on contractual terms and/or on the basis of a failure to make disclosure of a material matter and unconscionability, it is prudent to record in the Agreement wherever possible (by way of annexure or within the body itself) a detailed list of what constitutes the property and financial resources of each party at the time the Agreement was made. Further, if there is a reasonable likelihood of a change in those financial circumstances then it should also be disclosed. On occasion, the complexity of a party's financial circumstances are at such level and magnitude as to make difficult or perhaps even impossible the task of preparing an itemised list of the relevant property and financial

resources, or parties may be willing to enter into a Financial Agreement, notwithstanding that absolute financial disclosure has not been given and/or valuations conducted. In such circumstances, insertion in a Financial Agreement of a clause of the following nature would be recommended:

> *"The parties each acknowledge that they have made due inquiry as to the nature and value of the assets and liabilities as described in Schedule 1 and 2 to this Agreement. Both parties agreed that Schedule 1 and 2 have been prepared on the basis of setting out details of the major assets of each of the parties and their respective superannuation entitlements. Recorded in* ***Schedule 1*** *are Joe Bloggs' estimates of value and recorded in* ***Schedule 2*** *are Jane Doe's estimates of value and whilst each of them has had the opportunity to take advice as to the value of the assets and liabilities of the other, neither of them has elected to do so. Each party has agreed to enter into this Agreement even though formal valuations have not been undertaken of the real estate and other property described in* ***Schedule 1*** *and* ***Schedule 2****. Both parties acknowledge that they have been given every opportunity they consider necessary to have valuations undertaken or to seek disclosure of financial documents and no requests for information or documents are outstanding at the date of the making of this Agreement."*

5.14 Time of challenge to a Financial Agreement – the laches defence

Where a party seeks to have a Financial Agreement declared non-binding and/or seek to have it set aside, there is no provision within the legislation that directs a timeframe as to when such an application should be made.

Whether there is some implied requirement of a "*reasonable time*" for the making of such an application has been the consideration of the Federal Magistrates Court at first instance. In C*ole & Cole*[31] Wilson FM was dealing with an application seeking to set aside a Financial Agreement pursuant to s90K(1)(b) on the basis of an asserted mental incapacity at the time the Agreement was entered into. The law provides that a person who lacks the mental capacity to understand the consequences of entering into a contract may avoid it, and the contract is voidable at the instance of the disadvantaged party.[32]

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31 *Cole & Cole* [2008] FMCAfam 664

32 *Gibbons v Wright* (1954) 91 CLR 423, and the Laws of Australia (Halsbury) at [7.3.58] and [7.3.59] referenced at *Cole & Cole*, supra at ¶3 - 6

The learned Federal Magistrate dismissed the application to set aside the binding Financial Agreement on the basis that the Applicant had not discharged the onus of establishing that the Applicant was unable, due to mental impairment, to understand the contract at the time of formation; and that the other party to the Financial Agreement knew or ought to have known of the impairment.

Whilst the argument failed at the threshold, the Federal Magistrate in an obiter comment, stated that the Court would also have dismissed the application (even if mental incapacity had been proved) on the basis of delay by the Applicant in bringing the claim. The Applicant had asserted that at the time of the making of the Financial Agreement they lacked capacity, which they regained the following year. However, the application to set aside the Financial Agreement was not filed for 12 months after the time they were said to have regained capacity. The Federal Magistrate held that:

> *"The Applicant should have, within a reasonable time, elected whether to avoid a contract that he said was made whilst he was mentally impaired. I do not think that a delay of 12 months was acting in a reasonable time. The Respondent was entitled to assume that the binding Financial Agreement was in force and conduct her affairs accordingly. Even if the Applicant had discharged the onus of establishing that the binding Financial Agreement was voidable, I conclude that by his delay, he is precluded from seeking any relief to set aside that Agreement."*[33]

5.15 Jurisdiction for the making of de facto Financial Agreements

There are specific geographic requirements that apply to the making of de facto Financial Agreements pursuant to s90UB, UC and UD. They are markedly different to those that apply where a Court is asked to make a Declaration or Order in relation to de facto relationships.

Pursuant to s90SK of the *Family Law Act*, the Court can make a declaration or order in relation to a declaration where the Court is satisfied that:

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

[33] *Cole & Cole*, supra at ¶30 - 31

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

b. that either:

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

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

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

or that the alternative condition in subsection (1A) is met.

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

2. *For the purposes of paragraph (1)(b), a State need not have been a participating jurisdiction during the de facto relationship.*
3. *If each State is a referring State, the Governor-General may, by Proclamation, fix a day as the day on which paragraph (1)(b), and the alternative condition in subsection (1A), cease to apply in relation to new applications.*

However, in the case of participating jurisdictions (such as NSW) where parties wish to enter into a de facto relationship Financial Agreement, the provisions of s90UA require as follows:

"Two or more people can make a Part VIIIAB financial agreements under s90UB, 90UC or 90UD only if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement."

It is important to note that the de facto spouse parties to a s90UB, 90UC or 90UD Financial Agreement, must both be ordinarily resident in a participating jurisdiction when they make the Agreement. Practitioners should check the ordinary residence of each party at the time they make the de facto Financial Agreement, as whilst both parties might for example have been ordinarily resident in NSW during the de facto relationship and at

the time of separation, one of them may post-separation but prior to signing the Agreement moved to a non-participating jurisdiction.

5.16 Child maintenance provisions in Financial Agreements

A Financial Agreement can make provision for the property and maintenance of either of the spouse parties, together with matters incidental or ancillary. Presumably, one such ancillary or incidental matter would be child support or child maintenance.

There is a requirement by virtue of s90E that a provision of a Financial Agreement that relates to "maintenance of... a child... is void unless it specifies the child for whose maintenance provision is made and the amount provided for the maintenance of that child".

Whilst there might be some statutory provision that the writer has no doubt overlooked, it is difficult to follow the relevance of s90E insofar as it relates to children. There appears to be no provision in the *Child Support (Assessment) Act* that provides that a provision in a Financial Agreement made pursuant to Part VIIIA, can exclude the jurisdiction of the Child Support Agency to issue an assessment or the Court to make some departure order. Further, s71A of the *Family Law Act* only prevents a Court from exercising jurisdiction under Part VIII of the *Family Law Act* which deals with property and/or spouse maintenance. Section 71A could not prevent an application being made for maintenance for a child over the age of 18 years (even though a Financial Agreement provided to the contrary) as those provisions are contained in Part VII (s66L of the Act) and there is no provision similar to s71A found in Part VII of like effect.

5.17 Transfers of property under a Financial Agreement and the effect of ss120 and 121 of the Bankruptcy Act

The mere fact that a Financial Agreement is binding and ousts the jurisdiction of the Family Court in respect of those matters covered by the Agreement, does not exempt transfers of property that take place under the Financial Agreement from challenge under the provisions of the *Bankruptcy Act*.

The Federal Court of Australia has made clear that the mere fact that movement of consideration may be acknowledged in a Financial Agreement, does not give validity to a transaction that it would not otherwise have. In a decision of the Federal Court in *Combis, Trustee of the property of Peter Jensen (bankrupt) v Jensen (No 2)* [2009] FCA 1383, the Federal Court held that they were not in any way prevented under the *Bankruptcy Act* from reviewing transactions under a Financial Agreement, merely by the

fact that the Agreement was valid as between the parties for the purposes of the *Family Law Act*:

> *"(b) It is not in dispute that a binding financial agreement which is valid under the relevant provisions of Pt VIIIA of the Family Law Act has the effect of ousting the jurisdiction of the court in respect of certain matters covered by the agreement, including financial matters or financial resources to which a binding financial agreement applies: Black & Black [2008] FamCAFC 7 at [29]. However the simple fact of acknowledgment by one spouse in a financial agreement of the provision of consideration for the transfer of property does not mean that the alleged consideration is adequate for the purposes of s 120 and s 121 of the Bankruptcy Act if a transaction is subsequently challenged by a trustee in bankruptcy. As I noted earlier in this judgment, "consideration" in the context of the bankruptcy legislation has its ordinary legal and commercial meaning (Lopatinsky [2003] FCAFC 109; (2003) 129 FCR 234 at 249). The fact that the movement of consideration is acknowledged in a financial agreement does not give the consideration validity it would not otherwise have.*
>
> *(c) Further, and in any event, as I have already found in Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen [2009] FCA 778, the transfer of property pursuant to a financial agreement does not equate to a transfer of property pursuant to Court order, as was the case in Mateo [2003] FCAFC 26; (2003) 127 FCR 217. The current legislative framework applicable to financial agreements contemplates that a trustee in bankruptcy may make application pursuant to both s 120 and s 121 of the Bankruptcy Act to set aside a transfer pursuant to a financial agreement executed by the parties. Similarly, it is open to the Court to review the nature of the consideration stated in a financial agreement. The Court is not in any way prevented from doing so by the fact that the financial agreement is enforceable as between the parties under the Family Law Act."*[34] [emphasis added]

5.18 Waiver of legal professional privilege

It is likely that in determining applications to set aside a Financial Agreement under s90K, questions will arise as to whether there has been disclosure waiver or issue waiver of legal professional privilege.

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34 *Combis, Trustee of the Property of Peter Jensen (Bankrupt) v Jensen (No 2)* [2009] FCA 1383 at ¶47(b) and (c)

In the matter of *Bell & Bell* [2009], FM Burnett dealt with an application by the wife to set aside a Financial Agreement where, in affidavit material, she alleged that she has been denied relevant information by the husband, made allegations concerning her own alleged precarious mental state, made allegations of pressure being brought to bear to sign the Agreement, and allegations against the husband of non-disclosure of material assets.

The Court held that issue waiver had occurred, insofar as the wife by her conduct in prosecuting the claim had waived privilege in relation to the s90G advice she received from her lawyers prior to her entry into the Financial Agreement.

> 61. *In this instance, it seems that conduct and omission are relied upon by the wife in her claim. Accepting that to be the case then it seems to me that it is difficult to comprehend that there would not have been reliance, despite the fact that it is said that the requirements of s.90G(1)(b)(i) and (ii) of the Family Law Act do not of themselves strictly import a requirement for reliance.*
>
> 62. *Where a lawyer provides advice pursuant to s.90G(1)(b)(i) or (ii) it seems inconceivable to me that it would not be relied upon, particularly when one has regard to the duty of a lawyer, to provide such advice. Indeed, if advice were provided but rejected a lawyer acting responsibly would require a waiver particularly where it was apparent to him that any advice provided is contra-indicated by conduct intended by a client. That is to say, if having received advice which was adverse to the agreement, a client persisted in proceeding to enter into such an arrangement a reasonable lawyer acting out of concern for his own welfare would, of course, ensure that such an acknowledgement and waiver was sought from his client, if for no other reasons but to protect himself. It follows in my view that in the absence of any disclaimer that there must, or would, have been some element of reliance upon the advice of a lawyer prior to the entry into the agreement.*
>
> 65. *It follows then that for the reasons that I have just addressed I am satisfied that this is a case of issue waiver where the wife by her conduct in prosecuting this claim has waived privilege in relation to the s.90G advice. However, for reasons that I have earlier addressed in relation to the scope*

of the waiver I am not entirely satisfied with the breadth of disclosure presently sought."[35]

5.19 Applications by third parties to set aside transfers under a binding Financial Agreement

A series of amendments, designed to protect interests of third party creditors, were introduced to s4, s4A and s90K of the *Family Law Act* following the decision of Justice O'Ryan in *Australian Securities and Investments Commission v Rich* (2003) FLC 93-171.

The facts of the case are well known. The parties married in 1987 and were still cohabiting with their 3 children at the time of the proceedings. The husband was a founding director of One.Tel Ltd and was joint managing director until 17 May 2001. On 29 May 2001, the Board resolved to place the company into administration. Two days later, being 31 May 2001, the husband and wife entered into a Financial Agreement under s90C of the *Family Law Act*. That same day, ASIC commenced investigations of Mr Rich in respect of alleged breaches of corporations law. One.Tel Ltd was placed into liquidation on 24 July 2001.

The s90C Financial Agreement entered into between Mr and Mrs Rich was allegedly unusual in its terms. The parties remained residing together and had not separated. It noted that the husband had net assets of approximately $9,455,000, and the wife net assets of about $13,000,000.

The Financial Agreement recited, by way of understatement, that "*Jodee's financial affairs have taken a significant turn for the worse and his financial future is under a cloud. Maxine is concerned that her professional career, as a lawyer, and public company director may be significantly compromised as a result of the adverse change in Jodee's circumstances*".

Notwithstanding that the wife already held $13,000,000 of the parties' assets versus the husband's $9,455,000 of assets, the effect of the Agreement was to alter their respective net asset position such that, after the Financial Agreement came into effect:

- the wife's total assets increased from $13,000,000 to $16,500,000;
- the husband's net assets had decreased from $9,455,000 to approximately $3,900,000.

[35] *Bell & Bell* [2009] FMCAfam 595 at ¶61 – 62, 65

The effect of the Agreement was to leave Mr Rich with about 17.3% of the net assets of the parties.

The Trial Judge, Justice O'Ryan, referred to the Certificates provided by lawyers pursuant to s90G of the *Family Law Act*, and said he had "*some difficulty understanding the legal advice recited in the Agreement that the wife would be entitled to a significant award*" and that "*I find the legal advice recited in the Agreement incredulous*".

ASIC commenced proceedings in the Equity Division of the Supreme Court of New South Wales seeking Orders against the husband under the *Corporations Act*. The compensation claim filed and served in those Supreme Court proceedings asserted that the One.Tel Group incurred net liabilities and suffered a reduction in net worth of approximately the following amounts:

- $93,000,000 between 28 February 2001 and 29 May 2001;
- $62,000,000 between 31 March 2001 and 29 May 2001.

ASIC applied for Orders in the Family Court under s90K(1)(b) and s90KA of the *Family Law Act* to set aside the Financial Agreement. ASIC contended that in transferring property under the Financial Agreement, the husband had the intention of defrauding ASIC.

The husband and wife submitted, as a preliminary point, that the Family Court had no jurisdiction to entertain ASIC's claim. Mr and Mrs Rich argued that ASIC had no standing, as it was not a party to the marriage, and there were no pending or completed proceedings under the *Family Law Act* on foot at the time the Financial Agreement was entered into under s90C. ASIC contended that the Family Court had jurisdiction to entertain its claim as a third party materially affected by the Financial Agreement, under s31(1)(d) of the *Family Law Act*.

Justice O'Ryan dismissed ASIC's claim for want of jurisdiction. Justice O'Ryan found that the Family Court had an exclusive jurisdiction in relation to any proceedings to set aside the Agreement, and such proceedings constituted a "matrimonial cause". Paragraph (eaa) of the definition in s4 of "matrimonial cause", provides that the proceedings are to be *". . . between the parties to a marriage*". As ASIC was not a party to the marriage, its application did not fall within the relevant description of "matrimonial cause". Further, there were no proceedings on foot when the parties (being the husband and wife) entered into the Financial Agreement. As a consequence, paragraph (f) of the definition of "matrimonial cause" did not give jurisdiction to deal with ASIC's application. His

Honour concluded that if there had been a pending or existing proceeding between husband and wife in relation to the Agreement, then subject to various discretionary considerations, a third party in the position of ASIC could well have applied and been granted leave to intervene. Section 90K, as then formulated, did not authorise the institution of proceedings by ASIC for relief under the *Family Law Act*. At paragraphs 115-118 of the decision, Justice O'Ryan concluded as follows:

> "11.5 *However, it is of concern to me that the consequence of my finding is that the Family Court has no jurisdiction to deal with an application by an unsecured or contingent creditor to set aside a Financial Agreement in circumstances where the interests of such a third party are or may be adversely affected by the terms of the Agreement. This position is contrary to that taken by the Court over a number of years in circumstances where an Order was made under s79 or an Agreement approved under s87.*
>
> *11.6 In my view, in this case, there is prima facie evidence that the husband and the wife entered into the Agreement in order to reduce the extent and value of the husband's assets. It is difficult to accept that it was done because there was a concern about the financial future of the wife and the children in the event of marriage breakdown given that the wife already had property of a net value in excess of $13,000,000. Further, the terms of the recitals are relevant and the wife has a professional career as a lawyer and public company director. Prima facie the evidence supports the contention by Senior Counsel for ASIC that the Agreement was entered into because of a concern about claims on the husband's property by third parties as a result of the collapse of One.Tel Limited. It was therefore entered into to defeat the interests of the third parties.*
>
> 11.7 *What is also of concern is that various commentators have stated that if there are third party creditors or a business in serious trouble or there is the prospect of bankruptcy then the parties should settle by a Financial Agreement*[36]*. This appears to be the advice that is being given to legal practitioners, and no doubt to their clients, and in my view, in certain circumstances, it may raise ethical issues*[37]*.*

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36 "Financial Agreements: A Practical Overview" (2001) 15 *Australian Family Lawyer* 16

37 Altobelli T, "*A Post Legislative Review of Financial Agreements*" in Lexis Nexis Butterworths, *11th Annual Family Law Masterclass*, (2003) (Sydney, Lexis Nexis Butterworths, 2003)

> 11.8 *In my view, consideration should be given to conferring jurisdiction on this Court to deal with an application by the third party whose interests may be adversely affected by the terms of a binding Financial Agreement to set aside the Agreement. There are public policy reasons for why this should be so. Thus Part VIIIA should be reviewed, at least in terms of its effect on the legitimate interests of third parties, because the Family Law Act may be made* ". . . an instrument of harm to a third party"[38].

The decision of *ASIC v Rich* had immediate flow-on effects. The Court granted leave for publication of its decision and identification of the parties to the case. The Federal Government also moved swiftly to enact the *Family Law Amendment Act 2003*. The effect of those amendments were to insert provisions granting to the Family Court jurisdiction to entertain claims by third parties to set aside Financial Agreements. This was achieved by several important amendments:

- The definition of "matrimonial cause" in s4 was amended by insertion of paragraph (eab) to include "*third party proceedings to set aside a Financial Agreement*".

- A new s4A was inserted dealing with third party proceedings to set aside Financial Agreements. Those third party proceedings were defined to mean proceedings between:

  (a) either or both of the parties to a Financial Agreement; and

  (b) a creditor or a Government body acting in the interests of a creditor.

- A very broad definition was inserted by s4A to "creditor". A creditor, for the purposes of the legislation, means:

  (a) a creditor of either of the parties to the Financial Agreement; or

  (b) a person who, at the commencement of the proceedings, could reasonably have been foreseen by the Court as being reasonably likely to become a creditor of either of the parties to the Financial Agreement.

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[38] Parkinson P, "*Setting aside Financial Agreements*" (2001) 15 AJFL 26

- Section 90K was amended by insertion of s90K(1)(aa). That empowered a Court to make an Order setting aside a Financial Agreement if, and only if, the Court is satisfied that:

  (aa) either 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 parties; or
  ii. with reckless disregard of the interests of a creditor or creditors of a party.

The legislation further provides in s90K(1A), that a creditor, for the purposes of paragraph (1)(aa), includes, in relation to a party to the Agreement, a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

The amendments are extremely broad in their scope and have the potential to include a wide class of persons and entities within the term "creditor". The ultimate scope of the term "creditor" as defined, must await judicial decision.

5.20 Enforcing a Financial Agreement through the Court

A Financial Agreement cannot simply be enforced through the Court without a preliminary step first being taken.

Chapter 20 of the *Family Law Rules* relates to enforcement.

Pursuant to Rule 20.02, a person seeking to enforce a Financial Agreement must first obtain an Order of the Court under s90KA(c) of the *Family Law Act*. Without such an Order first being obtained, the Court has no jurisdiction to enforce the Agreement.

6 CONCLUSION

The provisions governing Financial Agreements have had a chequered history, both as to stability of language in the statute and scope for interpretation by the Courts. The introduction of Financial Agreements was intended to enable parties to contract out of the property and maintenance provisions of the *Family Law Act*, thus allowing them to put their own affairs in order and assumedly also reducing the workload of the Courts.

Neither has proven to be the case.

Tim North SC, when presenting a paper during 2009 on drawing Financial Agreements, opened by stating that "*asking a barrister to speak about drawing a Financial Agreement is somewhat like asking a termite to speak about the qualities of soft wood*".

The legislative changes introduce some much needed reforms, but also leave the door open for further areas of dispute to develop. The problems in coming up to proof in terms of compliance with the provisions of s90G of the legislation may bedevil clients and the Courts for many years to come. History will ultimately be the judge as to whether the statement by the Commonwealth Attorney-General, Mr Robert McClelland when making the Second Reading Speech to the House of Representatives on 3 December 2008, is ultimately proved to be correct:

> *"The Bill amends the Family Law Act to ensure that people who have made an informed decision to enter into one of these Agreements cannot later avoid or get out of the Agreement on a mere technicality, resulting in Court battles that the Agreement was designed to prevent. These amendments will restore confidence and certainty in the binding nature and enforceability of Financial and Termination Agreements under the Family Law Act.*
>
> *I commend this Bill."*[39]

[39] Second Reading Speech, Wednesday 3 December 2008, House of Representatives, *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*, the Hon. Robert McClelland MP, Attorney-General of the Commonwealth