

FINANCIAL AGREEMENTS

more growing pains

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Overview

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Recent decisions and issues including:

- independent legal advice
- disclosure obligations
- section 75(2)(p)

Stages of enquiry

1. is there an agreement?
2. is there a Financial Agreement?
3. is there a binding Financial Agreement (or can it be saved)?
4. has the Financial Agreement been terminated or set aside?
5. to what does the Financial Agreement apply?

Is there an agreement?

'effective and enforceable at law' (Fevia and Carmel-Favia [2009] FamCA 816, para.121)

Saintclaire [2013] FamCA 491 (Ryan J)

Garvey & Jess [2016] FamCA 445 (Carew J)

'The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts ...' (section 90KA)

New objects and outline

Amendment Bill proposes introduction of sections 90AL (setting out objects) and 90AM (setting out the principles) underlying Part VIIIA – section 90AM(2):

(a) prospective, current or former parties to a marriage should be able to take responsibility for resolving matter in relation to property, financial resources and maintenance, without involving a Court; and,

(b) such parties who make an agreement about those matters should have certainty that the agreement will bind those parties unless:

- (i) they make another agreement to terminate an earlier agreement; or,*
- (ii) a Court sets the agreement aside.*

Maldera & Orbel [2014] FamCAFC 135 v. B & B: Family Law Reform Act (1997) FLC 92-755

Garvey & Jess [2016] FamCA 445

Section 90KA of the Act gives a party wanting to enforce an agreement three possible alternatives for enforcing that agreement. One of these is to seek an order that the agreement be enforced as if it were an order of the Court and if it is to be enforced relying upon the provisions for its enforcement contained in Chapter 20 of the Rules, there must first be an order pursuant to s 90KA(c). That is not the relief sought by the wife and, in my view, r 20.02 does not require the wife to have sought and obtained an order pursuant to s 90KA(c) as a precondition to the relief she seeks pursuant to s90KA(a) and (b). (Abati & Cole, para.35)

Abati & Cole [2015] FamCA 185 (McMillan J)

Polik [2015] FamCA 299 (Cronin J)

'4.3.3 The Joint Assets shall be equally divided between the parties and the parties shall be equally responsible for and indemnify the other against one half of all liability encumbering or incurred in acquiring the Joint Assets ...

Is there a Financial Agreement?

Sections 90B, 90C and 90D

- agreement in writing
- not spouse parties to any other binding agreement at the time of making the agreement
- expressed to be made under the relevant section

Section 90E – spouse maintenance

- void unless specify the '*amount provided for*' or '*proportion of value of property*'
- *Ruane & Bachmann-Ruane & Anor* [2009] FamCA 1101, para.95 (Cronin J); *Corney & Hose* [2010] FMCAfam 1462 (Altobelli J)

Amendment Bill

90E(1) ... void unless the provision specifies:

- (b) ~~the amount provided for, or the value of the portion,~~ the amount of proportion of the value of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

90E(2) Any amount, or proportion, described in paragraph (1)(b) may be nil in relation to a person, or in the circumstances, specified in the agreement.

Amendments are to apply retrospectively.

No amendment proposed to section 90F(1A) – revenue protection provision '*when the agreement came into effect*'

Sections 90H and 90HA

Whilst not having retrospective effect, the Amendment Bill proposes amendments in relation to spouse maintenance consistent with those in section 82.

Absent contrary provision, maintenance in a Financial Agreement will cease on:

- * the death of either party;
- * where the payee marries or enters into a de facto relationship.

Section 90G

Presently ...

... including *Wallace & Stelzer and Anor* [2013] FamCAFC 199 as to the transitional provisions and absence of need to comply with section 90G(1)(c) – annexing certificates

... including issue arising in recent proceedings in Canberra

90G(1)(b) ... provided with independent legal advice from a legal practitioner

90G(1)(c) ... provided with a signed statement by the legal practitioner

Amendment Bill

Amendment Bill proposes to start again by repealing section 90G entirely

and replacing with sections 90G, 90GA and 90GB

Section 90GA

General rule

- (1) For the purposes of this Act, a financial agreement made after 26 December 2000 is binding on the parties to the agreement if and only if:
- (a) the agreement is signed by all parties; and
 - (b) either:
 - (i) all the conditions in section 90GA (about legal advice relating to the agreement) that are relevant to the agreement are met; or
 - (ii) a court has made an order under section 90GB declaring that the agreement is binding; and
 - (c) the agreement has not been terminated (before, on or after the commencement of this section); and
 - (d) the agreement has not been set aside by a court (before, on or after the commencement of this section).

Note 1: This Part commenced on 27 December 2000.

Section 90GA – independent legal advice

'Note 1: The conditions all relate to the provision of independent legal advice to each spouse party before the agreement was made, but vary according to when the agreement was made.'

Historical requirements – see table

Current requirements:

'(a) the effect of the agreement on the rights of that party'

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

Proposed advice requirement

'the effect of the agreement on the rights of that party under this Act'

Plus: *'extra conditions'* to existing requirement to provide statement of independent legal advice to the other party:

1. each party is required to sign a document acknowledging that the required independent legal advice was provided prior to entry into the Agreement; and,
2. that written acknowledgment must be given to the other party.

important sub-sections

90GA(4) *'it does not matter whether or not'* the statements of advice and of acknowledgment of receipt of advice are annexed to the Agreement or form part of the Agreement

and in an attempt to do away debates such as in *Hoult* [2013] FamCAFC 109:

90GA(5) *'in determining whether an agreement is binding, a court is not to consider whether advice described in subsection (2) was actually provided'*

Section 90GB – saving provision

remains confined to non-compliance with section 90G

(2) the court must make the order if it is satisfied that it would be unjust and unequitable 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).

Hoult (Strickland and Ainslie-Wallace) – not to have regard to the terms of the Agreement and the fairness, or otherwise, of those terms

Abrum [2013] FamCA 897 (Aldridge J)

Setting aside Financial Agreements

Section 90K

Saintclaire [2015] FamCAFC 245 – the importance of pleadings

The central role of independent legal advice – despite any section 90GA(5)

The role of financial disclosure – *Abrum; Thorne & Kennedy* [2015] FCCA 484 (Full Court reserved)

Amendment Bill

Section 90K(1)(d) – repeal and introduction of differing tests as to ‘hardship’

if a Financial Agreement before separation, then hardship by reason of:

The occurrence, after the making of the agreement, of a material change in circumstances that relate to the care, welfare and development of the child of the marriage

If a Financial Agreement after separation, then hardship by reason of:

The arising, after the making of the agreement, of circumstances that:

(a) are of an exceptional nature; and

(b) relate to the care, welfare and development of the child of the marriage.

Section 90K(1)(d) – ‘hardship’

Whitford (1979) FLC 90-612

- loss of the right to institute proceedings and the consequences of the loss of that right

Pascot [2011] FamCA 945 (Le Poer Trench J)

- birth of a 3rd child not contemplated and ‘hardship’ inevitable

Saintclair [2013] (Ryan J)

- need to show a reasonable likelihood of a better outcome under section 79

Fewster & Drake [2015] FamCA 602 (Foster J)

- different outcome per section 79 sufficient

Application/operation of an Agreement

Section 71A

This Part does not apply to:

(a) *financial matters to which a financial agreement that is binding on the parties to the agreement applies;*

(b) *financial resources to which a financial agreement that is binding on the parties to the agreement applies.*

Enforcement – rule 20.02 and section 90KA

Abati & Cole [2015] FamCA 185 (McMillan J)

Garvey & Jess [2016] FamCA 445 (Carew J)

Section 75(2)(p)

the unexplored

to take into account *'the terms of any financial agreement that is binding on the parties to the marriage'*

it is the intention of the parties and the purpose of this Agreement that wife's interest and entitlement in and to the Separate Property including as a result of the operation of this Agreement, and the operation of this Agreement in respect of the Separate Property and those interests and entitlements, is not to be taken into account in determining any alteration of the interests of the parties in any other property, including pursuant to sections 79(4)(e) and 75(2)(p) of the Act.