



FAMILY LAW SECTION

Representing Family Lawyers Throughout Australia



SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT

CIVIL LAW AND JUSTICE LEGISLATION AMENDMENT BILL 2015 - EXPOSURE DRAFT

This submission has been prepared by the Family Law Section of the Law Council of Australia in response to the Consultation Paper and Exposure Draft Bill released by the Attorney-General on 30 April 2015.

The Law Council of Australia is the peak national organisation of the legal profession representing approximately 60,000 practitioners across the country. The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

For ease of reference we have set out below a table of comparative provisions as they apply to married and de facto couples:

Title	Married	De Facto
Simplified outline	90AL	90UAA
Object of this Part and principles underlying it	90AM	90UAB
Requirements with respect to provisionsrelating to maintenance	90E	90UH
When Financial Agreements are binding	90G	90UJ
Conditions relating to legal advice for Financial Agreement or Termination Agreement to be binding	90GA	90UJA
Court declaring Financial Agreement or Termination Agreement to be binding	90GB	90UJB
Effect of death of party to Financial Agreement	90H	90UK
Maintenance of spouse party who marries or enters into de facto relationship	90HA	90UKA
Termination of Financial Agreement	90J	90UL
"Exceptional nature"	90K(1)(d)	90UM(1)(g)
"Unsplittable interest"	90K(1)(g)	90UM(1)(j)

Sections 90AL/90UAA – Simplified outline

1. The Family Law Section notes that the use of Outline and Object provisions is an increasing trend in legislative drafting and no doubt is intended to serve a purpose. That being said, it is important, particularly given what is said below by way of comment in respect of the interrelationship between Objects and substantive provisions, that the introduction of Outline and Object provisions does not contradict the substantive provisions or introduce the potential for further interpretative confusion.
2. Subject to that caveat, the Family Law Section supports the proposed Outline, save in one respect.
3. The proposed use of the phrase "*at a time before the marriage breaks down*" highlights some potential inconsistency in drafting as between different provisions of the Act, and the need to understand that the power of a court to alter interests in property, if it is just and equitable to do so, is not constrained to property in existence at the date that a marriage breaks down, but extends to the property existing at the date the orders are made and regardless of the fact that it may have been acquired post separation (see for example *Farmer v Bramley* [2000] FamCA 1615 regarding a post separation lottery win). The same applies in respect of property acquired post breakdown of a de facto relationship. The relevant sections in the Act provide as follows:
 - Section 90B refers to property and financial resources "*before divorce*".
 - Section 90C refers to property and financial resources "*during the marriage*".
 - Section 90D refers to property and financial resources "*had or acquired during the former marriage*".
4. The Object provision in s90AL is now proposed to refer to "*before the marriage breaks down*".
5. Leaving aside the differences in terminology, none of those sections acknowledge that often courts exercising the jurisdiction in marriage or de facto cases, make orders altering interests in property acquired after the date of breakdown and after the date of divorce.
6. The Family Law Section recommends seeking uniformity between the proposed Object and ss90B-D and s90UB-UD in this regard, and acknowledging that property acquired post breakdown and or divorce can be dealt with by these Financial Agreements.
7. The same issue also needs to be dealt with in s90AM(1)(a) and its reference to "*before the breakdown*" (and see similar reference in the comparable sub-paragraph of s90UAB).

Sections 90AM/90UAB – Object of this Part/Division and Principles Underlying it

8. The Family Law Section notes that some guidance as to the likely interpretation of the interrelationship between an Objects provision and the substantive legislative provisions, can be gleaned from the Family Court’s earlier decisions about s60B and its relationship with Part VII of the *Family Law Act 1975* (“**the Act**”).
9. The Full Court of the Family Court in *Maldera & Orbel* [2014] FamCAFC 135 had occasion to look at the role and significance of s60B. In that case, the Full Court (comprised of Ainslie-Wallace, Ryan and Aldridge JJ) noted that the proper approach to the role of preambles was considered by the High Court in *Wacando v The Commonwealth* (1981) 148 CLR1 at page 23 per Mason J (as he then was). The Full Court respectively disagreed with the earlier decision of the Full Court of the Family Court in *B & B: Family Law Reform Act 1995* (1997) FLC 92-755 “*to the extent that that decision held that s60B does more than provide context, indicate the legislative purpose of the Part and operate as an aid to construction of the Act*”¹. The Full Court noted that s60B could not be used to change the ordinary and clear meaning of other sections of the Act. It is in the context of these remarks in *Maldera*, that our comments in relation to sub-paragraph (2) are made.
10. The Family Law Section supports sub-paragraph (1).
11. The Family Law Section makes the following comments in relation to a number of phrases in sub-paragraph (2) that cause concern:
12. In sub-paragraph (2)(a), the phrase “*without involving a court*” may be seen as superfluous or perhaps even contradictory to the process of enforcement of an agreement. A party who wishes to rely upon a Financial Agreement, bears the onus of establishing that there was an agreement, that it constitutes a Financial Agreement within the meaning of the Act, and that it is binding upon the parties. Proving those steps (where there is a dispute) necessarily involves a court determination. Therefore, even where parties have taken responsibility and made a binding Financial Agreement, it is often the case that they must involve a court for the very purpose of being able to rely upon it and enforce it.
13. In respect of sub-paragraph (2)(b), the Family Law Section recommends deletion of the word “*informed*”, deletion of the phrase “*in good faith*” and deletion of the phrase “*and be enforceable*”. In each case, the words in question appear only to add confusion where none might otherwise exist, and may lead to further litigation about interpretation of those non-defined terms.
14. The Family Law Section also has concern about the phrase “*because of certain exceptional circumstances*” as it does not uniformly reflect the provisions contained in s90K/90UM. Only s90K(1)(d) and 90UM(1)(g) refers to circumstances of an “*exceptional*” nature, and there are no such wordage or words of limitation in respect of the other sub-paragraphs in s90K(1) nor such wordage or words of limitation prefacing the contents of s90KA.

¹ *Maldera and Orbel* [2014] FamCAFC 135 at ¶74.

15. The Family Law Section recommends that s90AM(2)/90UAB(2) should read as follows:

- “2. *The principles underlying this object are that:*
- (a) *prospective, current or former parties to a marriage should be able to take responsibility for resolving the matters described in paragraph (1)(a) and (b); 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 the earlier agreement; or*
 - ii. *a court sets the agreement aside.”*

Sections 90E/90UH – Requirements with respect to provisions in Financial Agreements relating to the maintenance of a party or a child or children

16. Given the recognition that these provisions can make a NIL provision, the Family Law Section recommends that the Act could simply delete sub-para (1)(b) and the proposed paragraph (2) entirely.

17. By way of example, s90E would then simply read :

“90E A provision of a financial agreement that relates to the maintenance of a spouse party to the agreement or a child or children is void unless the provision specifies the party, or the child or children, for whom maintenance provision is made.”

18. If it was considered necessary to retain sub-para (1)(b) and (2), the Family Law Section recommends that sub-paragraph (2) be amended to read:

- “2. *Any amount, or proportion described in paragraph (1)(b) may be nil or of nil value in relation to a person, or in circumstances, specified in the agreement.”*

Sections 90G/90UJ – When Financial Agreements are binding

19. The Family Law Section supports the drafting of the general rule provisions in s90G/s90UJ.

20. Whilst perhaps a matter of semantics, we are not sure whether the Court can make an “order” that “declares” something. A court makes an “order” or a “declaration”. It might be preferable were sub-paragraph (1)(b)(ii) to read:

- “(ii). *a court has made a declaration under [s90GB/90UJB] that the agreement is binding; and”*

Sections 90GA/90UJA – conditions relating to legal advice for Financial Agreement or Termination Agreement to be binding

21. The Family Law Section supports the proposed new s90GA/s90UJA but offers the following comments:

- (a) The word "may" in sub-para (1) creates uncertainty, given the use otherwise in 90G of "if and only if". The Family Law Section recommends that the word "may" be deleted.
- (b) In sub-paragraph (2), and because of the changing reference throughout the history of the legislation since 2000 to "certificates" as distinct from a "statement", the Family Law Section recommends that in the third line it be amended to read:

"...provided with a signed certificate or statement by a legal practitioner that..."

- (c) The Family Law Section supports the change proposed by sub-part 4 of the table, to amend the legislative requirement for advice (provided after commencement of the proposed legislation) to "*the effect of the agreement on the rights of that party under this Act*". Whilst the Family Law Section acknowledges that some stakeholders do not support the removal of the reference to provision of advice concerning "*the advantages and disadvantages*", (taking the view that the removal might suggest a lowering of standards as to the advice required) it is the view of the Family Law Section that advice on those matters must necessarily arise by virtue of the requirement to give advice on the effect on the Agreement on rights of a party under the provisions of "*the Act*". By way of example, the decision at first instance of Aldridge J in *Abrum & Abrum [2013] FamCA 897* is an example of the Court's views on the scope of the advice to be given.
- (d) In respect of the table setting out "extra conditions for agreements made after 3 January 2010", the Family Law Section repeats the comment above about the need to reference both "certificates" as well as to "statements".
- (e) The Family Law Section repeats and emphasises a concern it has raised (see attached letter dated 7 October 2010 from the Chair of the Section of the Law Council to the then Attorney-General, the Hon Robert McClelland MP at pages 2 – 4) that the proposed amendments do not provide a 'deeming provision' once it is proved that a Statement of Independent Legal Advice has been given. The Family Law Section is concerned that the amendment as drafted, still permits a Court to go behind the giving of the Statement and examine the content of the advice. The absence of such a deeming provision contains a very significant risk for parties who want to make Financial Agreements. That is, whilst a wife for example might have a competent lawyer who properly advises her, the husband may have a negligent lawyer who whilst giving a signed Statement does so in a manner that fails to meet the statutory obligations such that the requirements of the legislation for independent legal

advice are not given causing the Agreement to be non-binding. The wife suffers because of the negligence of the lawyer for the other party in such an example. The Family Law Section again recommends that a deeming provision be introduced. This could be achieved by adding the following words at the end of each of parts 1 and 2 in sub-paragraph (3) of 90GA/90UJA:

“...in which event it shall be deemed for the purpose of this section that the statement/certificate provided fulfilled the requirements of independent legal advice about the agreement.”

Section 90GB/90UJB – Court declaring Financial Agreement or Termination Agreement to be binding

22. Having regard to the comment above about *'declarations'* as distinct from *'orders'*, the Family Law Section recommends the reference be simply to an application for a declaration, and the making of a declaration by the court.

23. The Family Law Section opposes the proposed wording of sub-paragraph (2) that introduces a test not currently within the legislation, namely that an order/declaration be made unless satisfied that the failure to meet the relevant conditions “**materially prejudices**” the interests of a party to the Agreement. A reasonably settled interpretation has emerged from the case law regarding the wording currently found within 90G(1A)(c), requiring a court to be satisfied that it “*would be unjust and inequitable if the agreement were non-binding on the spouse parties to the agreement*” (disregarding any change in circumstances from the time that the agreement was made). Examples of the interpretation of that existing legislative provision can be seen in the decisions at first instance of Aldridge J in *Abrum & Abrum [2013] FamCA 897* and the decision of Rees J in *The Estate of the Late Ms Fan & Lock [2015] FamCA 300*.

24. The Family Law Section recommends that s90GB/90UJB read as follows:

- “(1) This section applies if:
- (a) a spouse party makes an application (**the enforcement application**) to a court for a declaration that a financial agreement or a written agreement to terminate a financial agreement, is binding on the parties to the agreement; and
 - (b) not all of the relevant conditions in Section 90GA for the agreement to be binding are met.
- (2) The court must make the declaration if 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).”

Principles to be applied by a Court making declaration

- (3) To avoid doubt, section [90KA] applies in relation to the enforcement application.

Sections 90H/90UK – Effect of death of party to Financial Agreement

25. The Family Law Section supports the proposed amendment.
26. The Family Law Section also supports the application of the proposed amendments to s90H/s90UK to only those Financial Agreements made on or after the commencement of the amending legislation, given that many Financial Agreements in the past have been made in direct contemplation of the potential effect of the currently existing provisions, such that to try and amend them retrospectively may cause as many problems as it otherwise might purport to cure.

Sections 90HA/90UKA – Maintenance

27. The Family Law Section supports those provisions, which will have effect in respect of Agreements made or after the commencement of the legislation, that would terminate provisions in a Financial Agreement dealing with maintenance where the recipient of maintenance "*marries*" again. This reflects the provisions of s82 and s90SJ of the Act insofar as it relates to cessation of orders for spouse maintenance and de facto spouse maintenance where the payee marries.
28. The situation is more problematic in respect of the proposed amendments, which would provide that maintenance cease where the spouse party "*entered into a de facto relationship*". This is for a number of reasons. First, neither s82 nor s90SJ, provide that where a court has made an *order* for maintenance of a party to a marriage or maintenance of a party to a de facto relationship, that those payments cease automatically if the spouse party enters into a new de facto relationship. To that extent, the proposed amendment goes beyond the provisions that apply where a court has made an order for maintenance, whether in respect of a marriage or a de facto relationship. That anomaly could on one view be addressed by making a similar change to the provisions of s82 and 90SJ of the Act.
29. Second, there is perhaps no more grey area than determining when, in accordance with s4AA of the Act, a "de facto relationship" exists. It is noteworthy that s90HA(1) and the similar provision in s90UKA, provide for cessation immediately upon entry into a de facto relationship (i.e: even of one days duration) and notwithstanding that the right to bring proceedings for alteration of property interests or maintenance arising from the breakdown of a de facto relationship, only arises if inter alia the provisions of s90SB are first met.
30. In principle, the Family Law Section supports the idea of maintenance provided for in the Financial Agreement terminating upon entry into of a de facto relationship, but is concerned by the inconsistency between the proposed change and the existing law in s82 and s90SJ, and the practical and legal difficulties of first establishing the existence of a de facto relationship and then the lack of any time period that such a

relationship must endure for before it qualifies as a terminating event for maintenance.

Sections 90J/90UL – Termination of Financial Agreement

31. The Family Law Section repeats, for “Termination” Agreements, the comments made above in paragraph 21 in the context of s90G, 90GA, 90UJ and 90UJA.

Item 13 – Transitional and saving provisions relating to sections 90G and 90J

32. The Family Law Section supports these amendments.

Subsections 90K(1)(d)/90UM(1)(g) – The proposed amendment to introduce the ‘exceptional nature’ test

33. The Family Law Section notes and repeats the submission made above in paragraphs 14-15 in the context of the use of the phrase “exceptional circumstances” in the proposed s90AM(2)(b)(ii) and the equivalent sub-section in 90UAB(2)(b)(ii).

34. The existing phrase in ss90K(1)(d)/90UM(1)(g) of the Act as to "*material change in circumstances*" has not been the subject of any interpretation by the courts that the Family Law Section is aware of. That existing phrase is one that has been the subject of much speculation and debate as to its possible breadth and concern as to its content.

35. The Family Law Section supports the proposed amendment to introduce an "*exceptional circumstances*" test, as its more limited scope will lessen the ambit of circumstances in which Agreements may be set aside.

36. The importance of certainty of these Agreements cannot be understated. Parties, if properly and independently legally advised, are free to strike such ever bargain as they wish within the terms of a Financial Agreement.

37. The Family Law Section is of the view that an exception such as provided for by the proposed new ss90K(1)(d)/90UM(1)(g) remain relevant and important over and above the usual equitable remedies that s90K/90UM otherwise provide.

Subsections 90K(1)(g)/90UM(1)(j) – Unsplittable interests

38. The Family Law Section supports the amendment which deletes this ground for setting aside of a Financial Agreement.

Further matters raised by the Consultation Paper

39. The Consultation Paper raised two further matters for consideration.

40. The first is whether parties to a Part VIIIAB Agreement may make provision for such an Agreement to continue to be enforceable notwithstanding that they subsequently marry each other.

41. The Family Law Section continues to support the position that parties to a Part VIIIAB Agreement should have available to them, the option, for such a Financial Agreement to continue and be enforceable notwithstanding that they subsequently decide to marry each other. See in this regard the submission contained on page 4 of the attached letter dated 7 October 2010 from the Chair of the Family Law Section of the Law Council of Australia to the Attorney-General, the Hon Robert McClelland MP.
42. The Family Law Section recommends that rather than introducing any time limitation to these matters (ie: requiring that a de facto Financial Agreement only convert to a marital Financial Agreement if the parties marry within say 5 years), this be a matter to be left to the autonomy of the parties, by a legislative amendment that enables parties who make a s90UB or s90UC Agreement to simply provide within the body of that Agreement that the parties covenant that the said Agreement continues to have effect and is binding upon them notwithstanding that they may in future marry each other.
43. Any such amendment would necessarily only be able to apply to Agreements made on or after the enacting legislation and not be retrospective in effect.
44. The second matter relates to Superannuation Agreements. The Family Law Section broadly supports the proposal for an amendment to the terms of s90MN(3), subject to consideration of the ultimate proposed wording of the Bill.
45. The Family Law Section would be happy to further discuss any of the issues raised in this submission.