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Family Law Council

5 November 2004

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Family Law Council: Review of binding financial agreements provisions in Parts VIII and VIIIA of the *Family Law Act 1975*

Terms of Reference

The Hon Daryl Williams AM QC MP, in a letter dated 27 January 2004, asked the Council to undertake a review of the provisions for binding financial agreements in Parts VIII and VIIIA of the *Family Law Act 1975*.

The terms of reference are that Council:

- a) consider whether the original intention of the legislature is being fulfilled given that the purpose of the provisions relating to binding financial agreements was to allow people to have greater control and choice over their own affairs in the event of marital breakdown¹
- b) review the extent to which binding financial agreement provisions are being used to defeat the legitimate interests of creditors
- c) consider alternatives to the current amendments, including whether the legislation should *only* allow agreements relating to maintenance to come into effect in cases of marriage breakdown, and

¹ 'The aim of introducing binding financial agreements is to encourage people to agree about how their matrimonial property should be distributed in the event of, or following, separation'. Senator Patterson, 2nd Reading Speech, *Family Law Amendment Bill 2000*

2 That Council have regard to:

- a) the issues identified by the Family Court in *Australian Securities Investment Commission and Rich and Rich* (No. SY 5067 of 2002),² and
- b) relevant amendments contained in the *Family Law Amendment Act 2003* which passed both Houses of Parliament on 5 December.³

Summary of Advice

Council's conclusions in response to the Terms of Reference are that:

- (a) the provisions relating to binding financial agreements do allow people greater control and choice over their own affairs in the event of marital breakdown
- (b) while there may be isolated instances where attempts may be made to use these provisions to defeat the legitimate interests of creditors, there are appropriate checks and balances in place or soon to be implemented to deal with these cases, and
- (c) any additional change in this area is considered to be premature at this time, given the changes that have already been made to the *Family Law Act 1975* and the foreshadowed changes to that Act, along with changes to the Bankruptcy legislation all of which aim to protect the interests of third party creditors.

Council also examined the application of Stamp Duty relief in this area. It appears that the treatment of applications for exemption pursuant to financial agreements may vary between States depending on whether it relates to an intact marriage or not.⁴ Council recommends that the possible use of financial agreements in intact relationships to avoid stamp duty be brought to the attention of State and Territory Attorneys-General.

1 Introduction

The opportunity for couples to make binding financial agreements was included in the *Family Law Act* on 27 December 2000. In the second reading speech it was noted that:

The settlement of the financial affairs of couples following separation has remained basically unchanged since the Act commenced in 1976. However, the Australian community - and its attitude to marriage - has undergone substantial change during that time. The changes in this bill will attempt to bring the Act into line with prevailing community attitudes and needs.

Binding financial agreements will be of particular benefit to people who are entering subsequent marriages as well as to people on the land and those who own family businesses.

² (2004) Fam LR 31.667

³ Current provisions are at **Attachment 1**.

⁴ Section 90 of the *Family Law Act* provides an exemption from State and Territory stamp duty for deeds or other instruments made pursuant to court orders and s. 90L does the same for financial agreements. The application of the exemption varies between jurisdictions. For example section 68 of the *Duties Act 1997* (NSW) applied to parties of a marriage that is dissolved or annulled, or the Chief Commissioner considers that the marriage has broken down irretrievably or will be dissolved or annulled (the same principle applies in South Australia), whereas in Victoria the *Duties Act 2000* (Vic) contains broad exemptions for parties to a marriage or 'domestic relationship' ie de factos (See CCH 44-755).

The aim of introducing binding financial agreements is to encourage people to agree about how their matrimonial property should be distributed in the event of, or following, separation. Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown. Financial agreements will be able to deal with all or any of the parties' property and financial resources and also maintenance. An agreement may cover how property would be divided or how maintenance would be paid. Particular assets, such as rural properties, would be able to be preserved.⁵

The policy rationales for the changes can be summarised as:

- Greater *control* over property for parties to agreements....
- Greater *choice* for parties to agreements to order their own financial affairs
- *Reduced conflict* (and with it, *reduced emotional and financial cost*) on marriage breakdown
- The need for the Family Law Act to *reflect changed community attitudes and needs*.⁶

In summary the new Part VIIIA provided for agreements to be made either in contemplation of marriage, between married couples, or between divorced couples (see **Attachment 1**). The legislation did away with the need for couples to go to court to seek approval for a property settlement.⁷

A financial agreement does not require couples to have their agreement registered with the court. If the agreement is made in accordance with the requirements in the Family Law Act and there are no grounds for setting aside the agreement then the Family Court will have no jurisdiction to interfere with the agreement.⁸

2 Applications by a third party: *ASIC v Rich & Rich*

The *ASIC v Rich & Rich*⁹ case highlighted circumstances where a financial agreement could be used to the detriment of third parties. The effect of the financial agreement in this case was that assets were moved from ownership by the husband to the wife which was very likely to be to the detriment of various third parties. The agreement took effect while the parties were still married.

The Family Court found that it had no jurisdiction to set aside a binding financial agreement at the request of a third party. In particular O’Ryan J made the following observations:

It is submitted that whilst it is undoubtedly unique, a binding financial agreement is a form of contract and should be interpreted in accordance with the law of contract. The law of contract generally recognises that an agreement may be valid as between the parties, yet void in whole or in part, as against a third party. I accept this submission. However, it does not follow that this Court has

⁵ Senator Paterson: see http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=668109&TABLE=HANSARDS

⁶ Belinda Fehlberg, and Bruce Smyth, ‘Binding Pre-Nuptial Agreements in Australia: The First Year’, *International Journal of Law, Policy and the Family*, 16, (2002), 127-140, at 128

⁷ Garry Watts, ‘Binding Financial Agreements: Possibilities and Pitfalls’, (2002) 76 *Australian Law Journal* 89-91

⁸ Professor Patrick Parkinson, ‘Setting Aside Financial Agreements’, (2001) 15 *Australian Journal of Family Law*, 26-50

⁹ (2004) Fam LR 31.667

jurisdiction to deal with any applications by a third party in relation to the financial agreement.¹⁰

No express part of Part VIIIA purports to authorise the institution of a proceeding pursuant to s.90K by a third party who is affected, or claims to be affected, by, or as a consequence of the operation of a contract to which the part applies.¹¹

In summary, no part of the definition of “matrimonial cause” authorises the institution of proceedings by ASIC pursuant to s.90K.¹²

The grounds on which a financial agreement can be set aside are detailed in the Family Law Act at sections 90K and 90KA. The agreement can be set aside for fraud, misrepresentation and other common law reasons relating to breach of contract. But the provisions were limited to fraud etc as between the parties to the agreement, not to a third party. The intention here was to protect either of the parties who had made the agreement.

3 Amendments to the *Family Law Act 1975*

As a result of the *ASIC v Rich & Rich* case the *Family Law Amendment Act 2003* expanded the jurisdiction of the court to deal with applications by third party creditors to set aside financial agreements. A financial agreement can now be set aside if it has been entered into for the purpose of defeating or defrauding a creditor of either party or with reckless disregard for the interests of a creditor of either party.

4 Family Law Amendment Bill 2004: Family Law and Bankruptcy

The Council also noted recent legislative developments concerning bankruptcy and family law (see **Attachment 2**). The Explanatory Memorandum of the Family Law Amendment Bill 2004 (FLAB 2004) notes that Part 19 of the Bill contains amendments to implement three recommendations of the *Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax* which was provided to the former Attorney-General and the Assistant Treasurer in 2002.

The Bill includes amendments to clarify the standing of third party creditors to intervene in family law property proceedings, and to seek to have property orders set aside or overturned after they have been made.

An amendment is also included which enables third parties to apply to the court for an order or injunction preventing the disposition of property pending an application to set aside or overturn a property order. These provisions build upon amendments to expand the rights of third parties in relation to binding financial agreements which were made in the *Family Law Amendment Act 2003*.¹³

An amendment is also contained in the Bill that makes provision for notice to affected third parties in matters involving property orders.

A further amendment provides for a separation declaration to be made for financial agreements under Part VIIIA of the Family Law Act to help ensure that such agreements are

¹⁰ Ibid. 31.689

¹¹ Ibid.

¹² Ibid. 31.690.

¹³ See s.4 definition of ‘matrimonial cause’, a new s.4A, and amendments to s.90K, see Attachment 1.

entered into by couples for the distribution of property as between the spouses on marriage breakdown rather than for purposes such as avoiding creditors.¹⁴

In respect of what have been called the ‘Jodie Rich Amendments’¹⁵ and the amendments described above proposed in FLAB 2004 one commentator has concluded that

As far as the law in relation to financial agreements is concerned, the amending and proposed legislation ensures that any attempt to use such agreements to defeat creditors will fail if creditors come to the Family Court to enforce their rights. It must also be remembered that the amendments apply even if the intention is not to defeat creditors, so long as, on an objective test, the creditor could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.¹⁶

and stressed in particular the apparent breadth of the new section 90K(3):

[i]t appears to give the Court absolute power so long as the order does not infringe the “just terms” provisions of paragraph 51(xxxi) of the Constitution.¹⁷

5 Bankruptcy and Family Law Legislation Amendment Bill 2004

In addition to action being taken in the Family Law Act there has also been a legislative initiative proposed to the *Bankruptcy Act 1966* to implement a number of key recommendations made in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax.

Relevantly the objects of this Bill are stated as being to:

....

- (b) prevent the misuse of financial agreements as a means of avoiding payment to creditors; and
- (c) address longstanding issues concerning the interaction between family law and bankruptcy.¹⁸

In describing how object (b) will be achieved the Explanatory Memorandum notes that:

1. The Bill also proposes amendments to ensure that a bankrupt cannot use financial agreements under Part VIIIA of the Family Law Act to defeat the claims of creditors. One amendment will exclude financial agreements from the definition of ‘maintenance agreement’ in the Bankruptcy Act to ensure that trustees can use that Act’s ‘clawback’ provisions to recover property transferred prior to bankruptcy pursuant to such an agreement. A further amendment will introduce a new act of bankruptcy which will occur when a person is rendered insolvent as a result of assets being transferred under a financial agreement – this will mean that the person’s bankruptcy will be taken to have

¹⁴ See Gerard Breen, and Vaughn Williams, ‘The Three Bankruptcy Reforms: An Analysis/Support’, *Australian Insolvency Journal*, April/June 2004, 4-9

¹⁵ See Paul Doolan, ‘Asset Protection on Relationship Breakdown’, 22, LexisNexis Seminar, Sydney, 12 August 2004

¹⁶ Martin Bartfeld QC, ‘So Long Mr Harper’ Third Parties in Family law Property Proceedings’, presented at the, 8th Annual Family Law Intensive, Leo Cussen Institute, Melbourne 1 May 2004, unpublished, p.10. The paper includes a very useful background commentary and analysis.

¹⁷ *ibid*, p.9.

¹⁸ The Explanatory Memorandum notes that: (1) Schedule 1 contains amendments designed to clarify the interaction between family law and bankruptcy, (2) Schedules 3 and 4 contain amendments designed to prevent people using financial agreements under Part VIIIA of the Family Law Act to defeat the claims of creditors..

commenced at the time of that transfer which will extend the ‘relation back’ period.

This will allow the trustee to claim property transferred under the agreement as divisible property in the bankrupt’s estate.¹⁹

While both Bills lapsed because of the recent Federal election, Council assumes that the Bills will be re-introduced given the Government’s re-election.

6 Council’s consideration of the issues

Council agreed it would approach the review on the basis that it would offer you advice about the efficacy of the amendments, and about the arguments concerning the possible repeal of the power to make a binding financial agreement relating to spousal maintenance that takes effect during marriage. A Committee was formed to progress the reference.²⁰

(i) The incidence of misuse of financial agreements

The Family Law Council agreed that 1(b) of the Terms of Reference– ‘the extent to which binding financial agreement provisions are being used to defeat the legitimate interests of creditors’ - was largely an empirical question.

It was noted that it would be difficult for Council to provide an answer to this in the absence of a consultative process involving surveying liquidators to get an indication as to the number of cases where creditors are facing this situation. A further complication was identified - how to ascertain the number of financial agreements that may lay dormant for many years to come. The observations of previous researchers in this field remain valid today:

The lack of a central repository for storage of agreements, combined with the short time that the legislation has been in force, limits both access to data and the amount of data available. Difficulties in researching this area may also reflect the rarity of pre-nuptial agreements as a form of social behaviour, as well as the often-acknowledged difficulties of researchers studying financial arrangements within couple relationships... All this means that family lawyers... are important sources of information about how the new legislation is working.²¹

As to the incidence of financial agreements coming before courts it appears to Council that there have not been any recent applications under the new provisions. It was considered that it may take five years for this to be properly assessed. It was noted that in the Department’s dealing with the bankruptcy sector there were no suggestions that fraudulent financial agreements remained a major concern after the ‘Jodie Rich’ amendments.

¹⁹ The Explanatory Memorandum for the Bill is at **Attachment 3**.

²⁰ Comprising Mr Kym Duggan (Convenor), Justice Susan Morgan, Professor Patrick Parkinson, and Mr Garry Watts. The Committee was assisted by the Hon. Justice O’Ryan participating in the discussions. The Hon. Justice O’Ryan was the presiding judge in *Australian Securities Investment Commission v. Rich and Rich*.

²¹ Fehlberg and Smyth, above n 6, at 133-134.

(ii) Council's consultations

The Committee agreed that it should focus its attention mainly on the two other issues.

(1) Does the current law, as amended in 2003, strike the right balance between the sanctity of contract between spouses as against the interests of creditors? and

(2) Should the parties be able to make an agreement concerning either periodic or lump sum spousal maintenance which is operative when the marriage has not broken down?

The main issue in relation to the second question is that property could be transferred from one spouse to another by way of lump sum maintenance for reasons other than the purposes of the Family Law Act.

The Committee invited comments from a range of key stakeholders concerning the terms of reference and a proposed amendment.²²

Comments were received from the Family Court of Australia which addressed the second question.²³

The Chief Justice agrees with your suggestion that the operation of maintenance agreements should be restricted to circumstances in which the parties are genuinely estranged or otherwise living apart.

The Family Law Section of the Law Council provided an analysis of the two questions, particularly relevant excerpts are set out below:²⁴

(1) Does the current law, as amended in 2003, strike the right balance between the sanctity of contract between spouses as against the interests of creditors?

Under the law as it stood prior to the *Family Law Amendment Act 2003*, transfers pursuant to financial agreements under the FLA were afforded considerable protection in the event of bankruptcy. Only in circumstances of a clear intention to defraud creditors as set out in section 121 of the Bankruptcy Act would such transfers be at risk. The amendments to the FLA, as a consequence of the 2003 amendments, significantly increase the rights of creditors.

A financial agreement may now be set aside under paragraph 90K(1A)(aa) FLA

.....

FLS notes that the wording in paragraph 90K(1A)(aa) FLA is different to section 121 of the Bankruptcy Act which refers to the "main purpose" of the transfer rather than "a purpose".

Also see the expanded definition of "creditor" in subsection 90K(1A) FLA:

For the purposes of paragraph (1)(aa), *creditor*, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

Further, the definition of "matrimonial cause" in section 4 of the FLA has been extended to

²² The Family Court of Australia, the Federal Magistrates Court, the Family Law Section of the Law Council of Australia (LCA), the Business Law section of LCA, and ITSA. In addition a letter was sent to Senator David Johnston, who had expressed a particular interest in the matter. The Federal Magistrates Court, the Business Law Section of the Law Council, and ITSA have indicated that no submission would be made on this issue.

²³ Email from Ms Margaret Harrison, 4 May 2004.

²⁴ Letter from Mr Michael Foster, Chairman, 30 June 2004.

include:

third party proceedings ... to set aside a financial agreement.

The amendments to section 90K FLA apply to financial agreements entered into before the amending legislation was enacted, though it is yet to be seen how the Courts will interpret paragraph 90K(1)(aa).

It could now be the case that if parties to a marriage enter into a financial agreement prior to one of them embarking on, for example, a business venture, perhaps with the reluctance of the other spouse, and the business venture subsequently goes bad, then their financial agreement may be set aside some years later because a creditor or potential creditor of the business is seeking to recover. This then reopens the question of property settlement. Where does the non bankrupt spouse stand vis-à-vis creditors? It seems that parties to a marriage face greater risk than unrelated parties do under the Bankruptcy Act.

It is submitted that the amended section 90K FLA tips the scales in favour of creditors and does not allow parties to a marriage sufficient protection of their rights to manage their affairs. There is no argument that there should be a remedy to deal with a deliberate attempt to defraud creditors in circumstances where the non bankrupt spouse ends up with more than he/she could reasonably expect, but perhaps the amendments go too far.

(2) *Should the parties be able to make an agreement concerning either periodic or lump sum maintenance which is operative when the marriage has not broken down?*

At this stage FLS has no particular comment in response to this question....

7 Council's conclusions

(i) Maintain private ordering approach

On the basis of its own deliberations and the consultation process the Council concluded that there were two options. Firstly, do nothing further and wait for the effects of the recent amendments to become clearer. This would reflect the objective behind the amendments which was to allow parties to use financial agreements to settle their affairs without the need for intervention by a court.

Secondly, an amendment might be considered to circumscribe the potential for the (mis)use of agreements concerning maintenance. Such an amendment would be intended to restrict the operation of financial agreements to circumstances when couples are estranged or otherwise living apart - for example, when having a trial separation with a view to reconciliation.²⁵ As noted above, this approach was supported by the Family Court of Australia. The Family Law Section of the Law Council of Australia did not express a concluded view.

On balance Council was not persuaded there was a sufficiently strong case for this amendment and instead favoured maintaining the private ordering approach while monitoring the effects of both the current and foreshadowed amendments. There may be legitimate reasons why a financial agreement could be used to formalise the payment of money by way of maintenance where a relationship has not irretrievably broken down, and so as to help prevent such a breakdown.

²⁵ Council has prepared an amendment to illustrate what this might look like - see **Attachment 4**.

Council was persuaded that the amendments which have already been made to the Family Law Act, and which will be made to relevant legislation by the Bills which were introduced into Parliament in 2004, will remove any real likelihood that financial agreements could be used successfully to prejudice creditors who are willing to act on their legal rights. In particular, the proposed amendment to the Bankruptcy Act in the Bankruptcy and Family Law Legislation Amendment Bill 2004, which will remove binding financial agreements from the definition of a maintenance agreement within the Bankruptcy Act, will eliminate most of the potential for financial agreements to be used for illegitimate collateral purposes. The use of financial agreements and consent orders²⁶ for illegitimate collateral purposes should, however, continue to be monitored by the Government.

(ii) Potential increased use of Financial Agreements after Capital Gains Tax relief

It should also be borne in mind that there is a significant tax disincentive to enter into a financial agreement. While roll-over Capital Gains Tax relief is available for the transfer of assets under orders of the Family Court and s.87 maintenance agreements, this relief is not available for transfers under s90B, 90C, or 90D financial agreements.²⁷

However, the capital gains tax status of financial agreements is currently being considered. In the event that transfers pursuant to financial agreements are granted exempt status this is likely to significantly enhance their attractiveness *vis-à-vis* consent orders, as they will then have the same tax exempt status as court orders, particularly consent orders.

(iii) Stamp Duty relief – anomalies

In Council's view, there is one area where financial agreements still have the potential to be misused. This is in relation to Stamp Duty relief under State law. Stamp Duty relief is available for the transfer of assets under orders of the Court, s.87 maintenance agreements and transfers pursuant to financial agreements. However it appears that the treatment of applications for exemption pursuant to financial agreements may vary between States depending on whether it relates to an intact marriage or not.²⁸

²⁶See *Official Trustee v Mateo* (2003) Fam LR, 30.122. Wilcox J at 31.134 notes that it '...seems not uncommon for a person to become bankrupt shortly after [consent orders]. There is an obvious possibility that a person who already insolvent, or fears future insolvency, will seek such Orders, possibly collusively with his or her spouse, primarily in an endeavour to put assets beyond the reach of creditors.'

²⁷ See s126-5(1)(a) and s126-15 of the *Income Tax Assessment Act 1936* (Cth).

²⁸ Section 90 of the *Family Law Act* provides an exemption from State and Territory stamp duty for deeds and other instruments made pursuant to court orders and s. 90L does the same for financial agreements. The application of the exemption varies between jurisdictions. For example section 68 of the *Duties Act 1997* (NSW) applied to parties of a marriage that is dissolved or annulled, or the Chief Commissioner considers that the marriage has broken down irretrievably or will be dissolved or annulled (the same principle applies in South Australia), whereas in Victoria the *Duties Act 2000* (Vic) contains broad exemptions for parties to a marriage or 'domestic relationship' ie de factos (See CCH 44-755). In Queensland Council is advised that "on 13 February 2002, the Minister approved an administrative arrangement under which ex gratia relief from transfer duty was provided for documents executed under a financial agreement or termination agreement on or from 27 December 2000. The administrative arrangement was established pending legislative amendment by the Commonwealth to s.90L of the Family Law Act 1975 (Cwlth) to cover these documents. Section 90L was amended by the Family Law Amendment Act 2003 (Cwlth) to exempt from duty the following documents: (a) a financial agreement; (b) a termination agreement; (c) a deed or other instrument executed by a person for the purposes of, or (d) in accordance with, an order or financial agreement made under Part VIIIA of the Family Law Act 1975 (Cwlth). As a result, the administrative arrangement no longer applies for documents that fall within the scope of s.90L, as the statutory exemption will apply. However, it is noted that the amended s.90L does not exempt from duty deeds or other instruments executed in accordance with, or pursuant to, a termination agreement. As a result, the administrative arrangement will continue to apply in these residual cases.", and further that "the exemption is to apply only when the marriage has broken up."(Queensland Office of State Revenue Emails- 11 and 25 October 2004).

In certain States, it may be possible for one spouse to transfer property to the other spouse by way of lump sum maintenance pursuant to a financial agreement and thereby to avoid stamp duty. You may wish to raise this with your State and Territory colleagues to see whether this is a matter of concern in those jurisdictions which allow stamp duty relief for such transfers within marriages which have not irretrievably broken down.

(iv) Court registration/confirmation of agreements – not supported

Council considered whether a scheme of court confirmation or registration of agreements would be beneficial. A confirmation scheme, which would take into account ‘bankruptcy ramifications’ of the agreement, was recommended in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Exposure Draft Bankruptcy Legislation Amendment (Anti-avoidance and other measures) Bill 2004*.²⁹

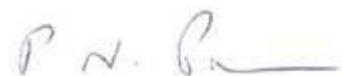
Council identified a number of drawbacks to such a proposal. It seems that for this to be effective it would need to involve a quite elaborate and inquisitorial court role. Such a scheme on its own would do little but reveal the incidence of agreements. It would undermine the private ordering philosophy underpinning financial agreements, which is to allow people to have greater control and choice over their own affairs in the event of marital breakdown. Injecting the court back into financial agreements would revert to the pre-2000 position where the Court was required to sanction each financial agreement.

Hence, Council concluded that at this time it would be both premature and potentially resource intensive to implement any such scheme.

Recommendations

1. That no changes other than those already proposed in legislation be made to the law concerning binding financial agreements at this time.
2. That time should be given to assess the effectiveness of the recent and proposed changes to the law on financial agreements, before considering any further amendments to protect creditors.
3. That the possible use of financial agreements in intact relationships to avoid stamp duty be brought to the attention of State and Territory Attorneys-General.

Yours sincerely



Professor Patrick Parkinson
Chairperson

²⁹ See <<http://www.aph.gov.au/house/committee/laca/bankruptcy/report.htm#fullreport>> at para 2.14

PART VIIIA—FINANCIAL AGREEMENTS

90A Definitions

In this Part:

dealt with includes the meaning given by subsection 90F(2).

marriage includes a void marriage.

90B Financial agreements before marriage

- (1) If:
 - (a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90C or 90D) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section;
 the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
 - (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the dissolution of the marriage, is to be dealt with;
 - (b) the maintenance of either of them:
 - (i) during the marriage; or
 - (ii) after the dissolution of the marriage; or
 - (iii) both during, and after the dissolution of, the marriage.
- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection between the same parties.

90C Financial agreements during marriage

- (1) If:
 - (a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90D) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section;
 the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
 - (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;
 - (b) the maintenance of either of them:

- (i) during the marriage; or
- (ii) after the dissolution of the marriage; or
- (iii) both during, and after the dissolution of, the marriage.

(2A) For the avoidance of doubt, a financial agreement under this section may be made before or after the marriage has broken down.

- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection, or a financial agreement made as mentioned in subsection 90B(1), between the same parties.

90D Financial agreements after dissolution of marriage

- (1) If:
 - (a) after a decree nisi dissolving a marriage is made, the parties to the former marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
 - (aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90C) is in force between the parties with respect to any of those matters; and
 - (b) the agreement is expressed to be made under this section;
the agreement is a *financial agreement*.
- (2) The matters referred to in paragraph (1)(a) are the following:
 - (a) how all or any of the property or financial resources that either or both of them had or acquired during the former marriage is to be dealt with;
 - (b) the maintenance of either of them.
- (3) A financial agreement made as mentioned in subsection (1) may contain matters incidental or ancillary to those mentioned in subsection (2).
- (4) A financial agreement made as mentioned in subsection (1) may terminate a previous financial agreement made as mentioned in that subsection, or a financial agreement made as mentioned in subsection 90B(1) or 90C(1), between the same parties.

90E Requirements with respect to provisions in financial agreements relating to the maintenance of a party or a child or children

A provision of a financial agreement that relates to the maintenance of a party to the agreement or a child or children is void unless the provision specifies:

- (a) the party, or the child or children, for whose maintenance provision is made; and
- (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

90F Certain provisions in agreements

- (1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
- (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.
- (2) To avoid doubt, a provision in an agreement made as mentioned in subsection 90C(1) or 90D(1) that provides for property or financial resources owned by a party to the

agreement to continue in the ownership of that party is taken, for the purposes of that section, to be a provision with respect to how the property or financial resources are to be dealt with.

90G When financial agreements are binding

- (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.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

- (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.

90H Effect of death of party to financial agreement

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

90J Termination of financial agreement

- (1) The parties to a financial agreement may terminate the agreement only by:
 - (a) including a provision to that effect in another financial agreement as mentioned in subsection 90B(4), 90C(4) or 90D(4); or
 - (b) making a written agreement (a *termination agreement*) to that effect.
- (2) A termination agreement is binding on the parties if, and only if:
 - (a) the agreement is signed by both parties to the agreement; 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 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.
- (3) A court may, on an application by a person who was a party to the financial agreement that has been terminated, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the

purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

90K Circumstances in which court may set aside a financial agreement or termination agreement

- (1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:
 - (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
 - (aa) 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 party; or
 - (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
 - (b) the agreement is void, voidable or unenforceable; or
 - (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
 - (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
 - (e) in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
 - (f) a payment flag is operating under Part VIII B on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
 - (g) the agreement covers at least one superannuation interest that is an unsplitable interest for the purposes of Part VIII B.
- (1A) For the purposes of paragraph (1)(aa), **creditor**, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.
- (2) For the purposes of paragraph (1)(d), a person has **caring responsibility** for a child if:
 - (a) the person is a parent of the child with whom the child lives; or
 - (b) the person has a residence order in relation to the child; or
 - (c) the person has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development.
- (3) A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.
- (4) An order under subsection (1) or (3) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (5) If a party to proceedings under this section dies before the proceedings are completed:
 - (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may

make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

- (b) if the court is of the opinion:
 - (i) that it would have exercised its powers under this section if the deceased party had not died; and
 - (ii) that it is still appropriate to exercise those powers;the court may make any order that it could have made under subsection (1) or (3); and
 - (c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.
- (6) The court must not make an order under this section if the order would:
- (a) result in the acquisition of property from a person otherwise than on just terms; and
 - (b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, *acquisition of property* and *just terms* have the same meanings as in paragraph 51(xxxi) of the Constitution.

90KA Validity, enforceability and effect of financial agreements and termination agreements

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, and, in proceedings relating to such an agreement, the court:

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
- (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and
- (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

90L Financial and other agreements etc. not liable to duty

None of the following is subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only in relation to a Territory:

- (a) a financial agreement;
- (b) a termination agreement;
- (c) a deed or other instrument executed by a person for the purposes of, or in accordance with, an order or financial agreement made under this Part.

90M Notification of proceeds of crime orders etc.

- (1) If:
- (a) a person makes an application for an order, under this Part, with respect to:
 - (i) the property of the parties to a marriage or either of them; or
 - (ii) the maintenance of a party to a marriage; and
 - (b) the person knows that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or

(ii) a forfeiture application;

the person must:

- (c) disclose in the application the proceeds of crime order or forfeiture application; and
- (d) give to the court a sealed copy of that order or application.

(2) A person who does not comply with subsection (1) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

(3) If:

- (a) a person is a party to property settlement or spousal maintenance proceedings under this Part; and
- (b) the person is notified by the DPP that the property of the parties to the marriage or either of them is covered by:
 - (i) a proceeds of crime order; or
 - (iii) a forfeiture application;

the person must notify the Registry Manager in writing of the proceeds of crime order or forfeiture application.

(4) A person who does not comply with subsection (3) commits an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

90N Court to stay property or spousal maintenance proceedings affected by proceeds of crime orders etc.

(1) A court in which property settlement or spousal maintenance proceedings are pending must stay those proceedings if notified under section 90M in relation to the proceedings.

(1A) The court may, before staying proceedings under subsection (1), invite or require the DPP to make submissions relating to staying the proceedings.

(2) A court must, on the application of the DPP, stay property settlement or spousal maintenance proceedings under this Part if the property of the parties to the marriage or either of them is covered by:

- (a) a proceeds of crime order; or
- (b) a forfeiture application.

(3) A court must notify the DPP if the court stays property settlement or spousal maintenance proceedings under subsection (1) or (2).

(4) The DPP must notify the Registry Manager if:

- (a) a proceeds of crime order ceases to be in force; or
- (b) a forfeiture application is finally determined.

(5) For the purposes of subsection (4), a forfeiture application is taken to be finally determined when:

- (a) the application is withdrawn; or
- (b) if the application is successful—the resulting forfeiture order comes into force; or
- (c) if the application is unsuccessful—the time within which an appeal can be made has expired and any appeals have been finally determined or otherwise disposed of.

90P Lifting a stay

(1) A court that stayed the property settlement or spousal maintenance proceedings under section 90N must wholly or partially lift the stay if:

- (a) either party to the proceedings makes an application for the stay to be lifted and the DPP consents to such an application; or
- (b) the DPP makes an application for the stay to be lifted.

- (2) A court that stayed the property settlement or spousal maintenance proceedings under section 90N may, on its own motion, wholly or partially lift the stay if the DPP consents to such a motion.
- (3) Giving the Registry Manager written notice of the DPP's consent under this section is taken to be the giving of that consent, unless the court requires the DPP to appear in the proceedings. The notice may be given by the DPP or by a party to the proceedings.

90Q Intervention by DPP

- (1) The DPP may intervene in any property settlement or spousal maintenance proceedings in relation to which a court is notified under section 90M, or in any proceedings under section 90N or 90P in which the DPP is not already a party.
- (2) If the DPP intervenes, the DPP is taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

Part 19 – Interaction of Family Law and Bankruptcy

Family Law Act 1975

Item 143: At the end of section 79

167. This item adds a new subsection (10) to section 79. The intention of the amendment is to preserve the existing law and to make explicit reference to creditors' rights. Under the current law, a person whose interests are affected may apply to be a party to proceedings under this section. The amendments make clear that third party creditors may be persons whose interests are affected, and are given standing to apply to become a party to proceedings under this section.

Item 144: At the end of section 79A

168. This item inserts an additional subsection (4) in section 79A. Section 79A is the provision under which property orders made under section 79 may be set-aside. The amendment is intended to make clear that a third party creditor can demonstrate standing as a party in proceedings under section 79 where he or she can show that his or her interests are affected by the order under section 79 because he or she may not be able to recover his or her debt if the order is made.

Item 145: After section 79E

169. This item inserts a new section 79F providing for the notification of third parties who have interests as creditors in the commencement of proceedings to alter the property interests of parties under the Act. Procedures for the notification should be dealt with in the applicable Rules of Court. It is intended that a person who applies for an order under this Part or who is a party to the property proceedings would be required to give notice of the application to a person who is not a party to the proceedings but who has an interest in their subject matter.

Item 146: After section 90D

170. This item inserts a new section 90DA in Part VIIIA of the Act. The amendment provides that a separation declaration must be made in relation to a financial agreement (in relation to particular matters). The effect of not making a declaration is that the financial agreement would have no effect.
171. The provision is not intended to apply to agreements relating to spousal maintenance during marriage because the parties will not have been separated.
172. The separation declaration must be signed by at least one of the parties. It must state that the parties have separated and are living separately and apart at the declaration time and in the opinion of the parties making the declaration there is no reasonable likelihood of cohabitation being resumed.
173. Definitions are provided for what is meant by 'declaration time' and 'separated'.

Item 147: After subsection 106B(4)

174. This item inserts a new subsection (4A) which makes clear that a party, a creditor of a party or any person whose interests would be affected by the making of an instrument or disposition of property prior to the making of an order under section 79 may apply for an order to set aside or restrain the making of such an instrument or disposition.

Schedule 3—Amendments relating to maintenance agreements

2. Item 1 proposes to amend the definition of ‘maintenance agreement’ at subsection 5(1) of the *Bankruptcy Act 1966* (the Act) to exclude financial agreements entered into under Part VIIIA of the *Family Law Act 1975* (the Family Law Act). This will allow trustees to use the provisions in Division 3 of Part VI of the Act to recover property transferred by the bankrupt prior to the commencement of bankruptcy.
3. Division 3 of Part VI includes provisions which allow trustees to recover certain property transferred by the bankrupt prior to the commencement of his or her bankruptcy. These provisions do not apply to transactions arising from the bankrupt’s liability under a ‘maintenance agreement’ or ‘maintenance order’. A financial agreement made under Part VIIIA of the Family Law Act is a ‘maintenance agreement’ for the purposes of the Act.
4. A financial agreement can be made before or during the marriage or following separation. It is a binding agreement dealing with the distribution of property in the event of the marriage breaking down. It may also provide for the maintenance of either party to the marriage or their children. Financial agreements do not require approval by a court. Nor do they have to be registered with the court. They can only be set aside by the court in circumstances similar to those applying in contract law (such a fraud and undue influence). For these reasons, it is not appropriate that property transferred pursuant to such an agreement is excluded from the property available to pay creditors.
5. Item 2 provides that the amendment made by Item 1 will apply to all bankruptcies current on or after the commencement of the amendment.

Schedule 4—Amendments relating to financial agreements under the Family Law Act 1975

6. Item 1 proposes to insert a new act of bankruptcy, in paragraph 40(1)(o) of the *Bankruptcy Act 1966* (the Act), to apply where a person is rendered insolvent as a result of assets being transferred pursuant to a financial agreement under Part VIIIA of the *Family Law Act 1975* (the Family Law Act).
7. The new act of bankruptcy will apply only where the transfer under the financial agreement has the effect of rendering the person insolvent. This would apply only to transfers pursuant to financial agreements and not to other property distributions (for example, property settlements under section 79 of the Family Law Act).
8. Subsection 115(1) of the Act provides that the bankruptcy of a person shall relate back to, and be deemed to have commenced at, the time of the commission of the earliest act of bankruptcy within a period of six months before the presentation of the petition leading to the person’s bankruptcy. This amendment will allow the trustee to claim the property transferred pursuant to the financial agreement as divisible property in the estate.
9. Item 2 proposes to insert new subsection 40(7A) which makes it clear that, for the purposes of paragraph 40(1)(o), a transfer of property includes a payment of money and that a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to that other person.

10. Item 3 provides that the amendments made by this Schedule apply in relation to financial agreements entered into after the commencement of this amendment.

Restricting financial agreements to circumstances when couples are estranged or otherwise living apart

While not recommending action at this stage, Council examined how an appropriate amendment might circumscribe the potential for the (mis)use of agreements concerning maintenance is to restrict their operation to circumstances when couples are estranged or otherwise living apart.

It was suggested this could be achieved by adding the following italicised words to section 90C(2)(b) of the *Family Law Act* (with a similar amendment to s.90B):

90C Financial agreements during marriage

(1) If:

(a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and

(aa) at the time of the making of the agreement, no other agreement (whether made under this section or section 90B or 90D) is in force between the parties with respect to any of those matters; and

(b) the agreement is expressed to be made under this section; the agreement is a *financial agreement*.

(2) The matters referred to in paragraph (1)(a) are the following:

(a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;

(b) the maintenance of either of them :

(i) *following separation or otherwise when they are living separately and apart* during the marriage; or

(ii) after the dissolution of the marriage; or

(iii) both during, and after the dissolution of, the marriage.