**School of Law**

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**Australian Law Reform Commission Review of the Family Law System: Submission by Robyn Honey, Murdoch University**

I thank you for the opportunity to provide the following submission in response to the Australian Law Reform Commission‘s *Review of the Family Law System – Issues Paper* *(IP 48)* (the Issues Paper). This submission is made specifically with respect to Question 19 ‘What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity andcomprehensibility of the law for parties and to promote fair outcomes?’

This submission is organised into two parts. These are: a description and explanation of the changes that it is submitted could be made to the *Family Law Act* (the Act) to achieve the objectives stipulated in Question 19 (the Question); and an outline of the reasons offered in support of the suggested changes. The reasons offered in support of the suggested changes are also offered by way of general comment about matters that ought to be taken into account in deciding whether to change the relevant provisions and how best to do so.

1. *Four Suggested Changes*

It is submitted that Australia should follow the approach taken by the Supreme Court of England and Wales in *Radmacher v Granatino*,[[1]](#footnote-1) so that: a financial agreement will bind the parties who made it:

* so long as it was ‘freely entered into by each party with a full appreciation of its

implications’; and

* ‘unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement’.[[2]](#footnote-2)

In this case the Supreme Court was concerned to reverse the common law rule against nuptial contracts. Accordingly, it defined ‘unfair’ by reference to criteria appropriate to the common law of contract. In the context of the *Family Law Act*, it is appropriate that unfairness should be defined by reference to the factors drawn from the Act and, possibly, from other comparable Australian statutes.

Furthermore, it is submitted that, insofar as the provisions governing binding financial agreements are intended to promote the autonomy of the parties, this should be a *relational* conception of autonomy and the agreements should be treated accordingly. For instance, it is submitted that the law should be changed to allow the court to set aside an agreement in cases where material changes have occurred after the agreement (but during the relationship) as a result of which a party will otherwise suffer hardship.

Therefore, it is suggested that the following four changes should be considered.

1.1 *Binding financial agreements must be entered into freely*

Principles of autonomy require that a person should be legally responsible only for those undertakings that she/he freely chose to make. Financial agreements made under the *Family Law Act* have more serious implications than ordinary contracts, because, if they are binding by virtue of s 90G: they have the effect of ousting the Court’s discretionary jurisdiction under s 79; and may be enforced as if they had been made by order of the Court.[[3]](#footnote-3) In view of this, it is imperative to ensure that a financial agreement is supported by the informed, rational and independent consent of each party.

As Part VIIIA currently stands, there is no explicit requirement that, in order to be binding, a financial agreement must have been freely made. The inference of consent, which is usually drawn from the fact that a party has signed an agreement, is unreliable in the context of a spousal relationship[[4]](#footnote-4) - especially in view of s 90G(1A). The application of common law and equitable defences (such as duress, illegitimate pressure and undue influence) by virtue of ss 90KA and 90K(1)(b) helps to insure that financial agreements which were not freely made can be set aside and thus may be prevented from being binding. However, these defences are problematic.[[5]](#footnote-5)

It is submitted that s 90G(1) could be changed, so that a financial agreement is binding (so as to oust the jurisdiction of the Court) only if it was entered into freely. Furthermore, if a contract was not entered into freely, the Court should have the power to set it aside *inter partes*. This might be effected by changing ss 90G(1) and 90K(1)(b).

Suggested changes:

* Section 90G(1) should be changed from:

‘(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;

so that it reads:

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

              (a)  the agreement is entered into freely by all parties; and

(b) the agreement is signed by all parties;’

* Section 90K(1)(b) should be changed from:

‘A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that: ...

(b) the agreement is void, voidable or unenforceable’,

so that it reads:

‘A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that: ...

 (b) the agreement was not entered into freely;’

1.2 *Binding financial agreements should not be unfair*

It is suggested that ‘unfairness’ should replace legal unenforceability as a basis upon which the Court may set aside an otherwise binding financial agreement. To this end, s 90K(1)(b) could be changed, so that the word ‘unfair’ is substituted for the words ‘void, voidable or unenforceable’.

Suggested change:

Section 90K(1)(b) should be changed from:

‘A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that: ...

 (b)  the agreement is void, voidable or unenforceable’,

so that s 90K(1)(b) would read:

‘A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that: ...

 (b) the agreement was not entered into freely;

(bb) the agreement is unfair’.

Furthermore, the term ‘unfair’ might be defined by reference to criteria, which set the parties’ behaviour in making the agreement in a relational context.

Suggested change:

For example, s 90K(1B) might provide that:

‘For the purposes of paragraph (1)(b):

(a) in determining whether a financial agreement is unfair, the court is to have regard to the following:

* 1. whether the financial agreement is a financial agreement before marriage, a financial agreement during marriage or a financial agreement made after breakdown of a de facto relationship/ divorce;
  2. the relative bargaining power of the parties;
  3. whether or not a party was not reasonably able to protect her interests because of her age or physical or mental condition;
  4. the form of the financial agreement and the intelligibility of the language in which it is expressed;
  5. whether or not, and if so when, independent legal or other expert advice was obtained by a party;
  6. the extent to which the provisions of a financial agreement and their legal and its practical effect was accurately explained to a party and whether or not a party understood those provisions and their effect;
  7. in respect of the making of a financial agreement- a party to the agreement engaged in conduct that was, in all the circumstances:
     1. Misleading;
     2. Unconscionable;[[6]](#footnote-6) or
     3. Constituted illegitimate pressure.’[[7]](#footnote-7)

1.3 *Financial agreements should be vitiated by statute only*

Currently, financial agreements may be set aside on the basis that they are void, voidable or unenforceable at common law or in equity.[[8]](#footnote-8) This approach is problematic.[[9]](#footnote-9) It is submitted that the safeguards in s 90K(1) (as amended) should be offered in place of common law and equitable defences. Accordingly, s90KA should be expressed to be subject to s 90K(1).

Suggested change:

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

should read:

                  ‘Subject to s90K(1), 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 …’.

1.4 *There should be some safeguard against serious substantive unfairness*

As matters stand, the existing safeguards against unfairness in financial agreements are directed exclusively at procedural unfairness; that is, unfairness in the way that an agreement is made. Subject to an exception which gives very limited protection with respect to the effect of financial agreements on children,[[10]](#footnote-10) the Act does not address the danger of serious substantive unfairness – that is, unfairness arising from the content of an agreement. It is clear that this was deliberate.

However, the public policy objectives of the Act will not be advanced if parties are enabled to be driven (albeit in part by their own unwise choice) into poverty.[[11]](#footnote-11) Furthermore, it is unacceptable and not in keeping with the spirit of the Act that an agreement which will cause one party to a marriage to endure real hardship should be enforced as though it had been made by order of the Family Court. For the reasons outlined in 2.2, it is submitted that the Act ought, within the system that it puts in place, provide safeguards against serious substantive unfairness. At the very least, the requirements contained in s 90G ought not to be relaxed for agreements which ‘offend ordinary notions of fairness’.[[12]](#footnote-12)

Accordingly it is submitted that s 90G(1A) should provide that, for the purposes of s 90G(1)(c), it will not be ‘unjust and inequitable if the agreement were not binding’, if it is proven that a party to the agreement will suffer hardship if the agreement is enforced.

Suggested change:

Section 90G(1A) could be changed as follows:

‘A financial agreement is binding on the parties to the agreement if: …

(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 …; and

(ca) for the purposes of (1)(c), it will not be unjust and inequitable if the agreement were not binding, if it is proven that a party to the agreement will suffer hardship if the agreement is enforced.’

Furthermore, in keeping with the relational nature of such agreements, the parties’ obligations evolve as the relationship progresses. Accordingly, it is appropriate to make some accommodation for the prevention of significant and unforeseen substantive unfairness, which emerges after the agreement has been executed.

At a minimum:

* the fact that a material change has occurred after the date that the agreement is executed ought not to be specifically excluded from consideration in a decision as to whether it is unjust and inequitable that a financial agreement not be enforced (ie even though s 90G(1)(b)(c) and (ca) have not been complied with). After all, the event which constitutes the change in circumstances may be the very thing that compliance with the statutory safeguards would have prevented. For example, the eventuality in question may have been one of the things about which a legal practitioner might have warned.
* a court should have the power to set aside a financial agreement, if as a result of a material change in circumstances, a spouse party will otherwise suffer hardship. Such agreements may thereby be precluded from becoming binding.

Suggested changes:

* Delete from s 90G(1A)(c) the words ‘disregarding any changes in circumstances from the time the agreement was made’, so that it reads as follows:

‘A financial agreement is binding on the parties to the agreement if: …

(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 …; and

* Include in s 90K(1) a new paragraph (da), so that it reads as follows:

Section 90K(1) … ‘(da)  since the making of the agreement, a material change in circumstances has occurred and, as a result of the change, a party to the agreement will suffer hardship if the court does not set the agreement aside.’

1. *Reasons in Support of the Suggested Changes*

It is submitted that the suggested changes would assist to improve the clarity andcomprehensibility of the law with respect to binding financial agreements. They would also promote fair outcomes for parties. These advantages are discussed separately below.

2.1 Improving clarity and comprehensibility

The suggested changes would assist to improve the clarity andcomprehensibility of the law, because:

* a single statutory criterion of ‘unfairness’ would be simpler than the multiple statutory criteria which currently exist;
* an exclusively statutory regime would have the advantage that the enforceability of financial agreements could be assessed without the necessity of traversing the entirety of the common law and equitable rules of contract. Practitioners and the judiciary would be relieved of the requirement that they grapple with common law and equitable doctrines, which are themselves unclear and are not well suited to application in a family law context; and
* a statutory regime could be tailored to fit its intended purpose and would be more easily mastered by family law specialists.

2.11 *A single criterion*

As matters stand, the factors pursuant to which a court may decline to enforce a financial agreement,[[13]](#footnote-13) or which may prevent a financial agreement from being binding,[[14]](#footnote-14) include whether: the agreement was obtained by fraud (including non‑disclosure of a material matter);[[15]](#footnote-15) the agreement is void, voidable or unenforceable;[[16]](#footnote-16) the agreement is signed by all parties;[[17]](#footnote-17) and each spouse party was provided with independent legal advice. [[18]](#footnote-18) It is submitted that consolidating these into a single criterion of ‘unfairness’ would be conducive to simplicity and comprehensibility. An agreement which has been set aside for unfairness pursuant to s 90K(1) could not be binding by virtue of s 90G.

2.12 *Statutory, not common law*

As matters stand, the question of whether a financial agreement is valid, enforceable or effective is determined in accordance with the common law and equitable principles of contract.[[19]](#footnote-19) Moreover, a financial agreement may be set aside on the basis that it is ‘void, voidable or unenforceable’.[[20]](#footnote-20) Thus, the enforceability of a financial agreement may be affected by any one of a range of common law and equitable doctrines, including: misrepresentation; duress; undue influence; and unconscionable dealing.[[21]](#footnote-21) Indeed attempts to set aside financial agreements on the basis of common law and equitable doctrines are common.[[22]](#footnote-22) Consequently, legal practitioners who draw up financial agreements and who advise as to the enforceability of such agreements are obliged to be abreast of a wide array of common law and equitable doctrines.

Furthermore, the law with respect to several of these doctrines (and to their relationship with one another) is unsettled. For example, it is currently unclear what degree and nature of coercion constitutes duress. It is uncertain whether duress is limited to ‘unlawful threat or conduct’[[23]](#footnote-23) or extends to encompass ‘other illegitimate or improper, yet lawful, threats or conduct’.[[24]](#footnote-24) This matter is not easily resolved, due to the diversity of contexts in which duress is used. Commercial disputes require a robust approach to claims of coercion. A more nuanced approach to pressure is necessary when it occurs in a relational context. This was one of the factors which saw a dispute over a binding financial agreement taken to the High Court in *Thorne v Kennedy*.[[25]](#footnote-25) So long as the common doctrine of duress applies to both commercial disputes and to financial agreements,[[26]](#footnote-26) it can be expected that the difficulty of stretching one doctrine across the contextual divide between commerce and family law will hamper Courts in achieving fair outcomes.

The equitable doctrine of undue influence is another defence that is frequently pleaded in relation to binding financial agreements.[[27]](#footnote-27) As Lord Browne-Wilkinson said ‘the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes.’[[28]](#footnote-28) Unfortunately, the law of undue influence is also controversial. Indeed, it has been described as being ‘in a mess’.[[29]](#footnote-29) There are at least three distinct conceptions of ‘undue influence’[[30]](#footnote-30) in operation currently,[[31]](#footnote-31) which has led to a serious lack of coherence in the case law. In Australia, two distinct versions of the doctrine are in contention. The first, which was until recently the prevailing view, characterises undue influence as a breach of a ‘fiduciary-like’ duty.[[32]](#footnote-32) The second conception of undue influence, which gained prominence in Australia after *Commercial Bank of Australia Ltd v Amadio[[33]](#footnote-33)* as a means of distinguishing between undue influence and unconscionable dealing, is that (like duress) undue influence vitiates a transaction on the basis that the claimant’s consent to that transaction was so badly impaired that the transaction ought not to be enforceable against her/him. In this context, the impairment typically consists of a serious lack of autonomy. This version of undue influence was recently endorsed by the High Court in *Thorne v Kennedy*.[[34]](#footnote-34) In this case, the transaction was a financial agreement made pursuant to the *Family Law Act*. It was held by the majority to be unenforceable, because the plaintiff (the wife) had not ‘brought a free choice’ to signing of the agreements (one made before marriage and the other made shortly after marriage). Rather, her choices ‘were subordinated to the will of [her husband].’[[35]](#footnote-35) It is not clear whether *Thorne v Kennedy* has overruled the law as stated by Dixon J in *Johnson v Butress*.[[36]](#footnote-36) The former was a case of actual undue influence, whereas the latter was a case of presumed undue influence.

The doctrinal differences between these two versions of undue influence are significant: the former is an equitable wrong, whereas the latter more closely resembles an ‘unjust factor’ as that term is understood in the law of unjust enrichment. Moreover, these differences have practical implications that may be decisive in a given case. For instance, a failure to appreciate one’s own separate interests may be ‘cured’ by independent legal advice. However, as we saw in *Thorne v Kennedy*, a want of autonomy may not be. Although, the decision in *Thorne v Kennedy* is to be welcomed, the confusion that will ensue until the law of undue influence is settled is not conducive to ‘clarity and comprehensibility’ of the law with respect to financial agreements.

In addition, uncertainty about the relationships between these several doctrines is also a matter of concern. The relationship between undue influence and duress is contentious; as is the relationship between undue influence and unconscionable dealing. Furthermore, questions about the relationship between the equitable doctrine of unconscionable dealing and the statutory prohibition against unconscionable conduct in s 90K(1)(e) of the Act were adverted to by the plurality in *Thorne v Kennedy*.[[37]](#footnote-37)

As the Supreme Court of England and Wales insisted in *Radmacher v Granatino,*[[38]](#footnote-38)a financial agreement should not be binding if it was not freely entered into. It is submitted that an explicit statutory requirement, such as that which is suggested at 1.1, would achieve the objective that the doctrines of duress and undue influence (as that doctrine was enunciated by the plurality in *Thorne v Kennedy*[[39]](#footnote-39)) are intended to achieve, without importing into the Act the doctrinal ‘baggage’ that these defences carry in the common law. Concerns about exploitative or ‘unconscionable’ conduct can be dealt with by s 90K(1)(e). Thus, it is submitted that, were the enforceability of financial agreements to be determined exclusively on the basis of compliance with statutory requirements, as determined by reference to explicitly stated and context specific statutory criteria, the law with respect to these matters would be both clearer and more comprehensible.

This solution would enable family law practitioners and judges to use concepts like coercion, pressure, exploitation, misrepresentation and want of autonomy in the way that is best suited to achieving fair outcomes with respect to binding financial agreements and without becoming tangled in broader doctrinal debates. It would also significantly narrow the ambit of inquiry for family law practitioners. Family law specialists could focus their attention on the issues which beset financial agreements, without having to traverse the all of the factors which can vitiate contracts (in general) at common law and in equity. This would go some way towards affording practitioners a reasonable degree of confidence when drafting financial agreements and giving advice about the enforceability of such agreements.

2.13 *Tailored to purpose*

If financial agreements were freed from equation with common law contracts, the rules for financial agreements could be shaped to best fit the purpose that they were designed to serve.

2.131 *They would be premised assumptions and norms appropriate to family law (not commerce)*

It is submitted that the suggested changes would facilitate the development of specialised defences best suited to determine the enforceability of agreements in the context of family law. The law of contract and the equitable principles which supplement it were formed in the market place, using the norms applicable to bargain and exchange. In this context, it is usually appropriate to assume that contracting parties are rational self-interested individuals, dealing with one another at arm’s length and with an appreciation that their interests are not aligned. Each party has their ‘guard up’ and is free to walk away from negotiations if they do not like what is on offer. These assumptions are quite inappropriate a family law context. ‘The effects of social, cultural and economic context on bargaining capacities are wide-ranging particularly in the family context.’[[40]](#footnote-40) Accordingly, ‘[d]ecision making is not necessarily self-interested or atomistic, and may be influenced by context, personal connections and interdependencies’.[[41]](#footnote-41) In interpreting the vitiating factors listed in s 90K and the criteria used to determine whether an agreement is ‘unfair’, the court could to take a functional and contextual approach. The meaning of terms such as ‘freely’, ‘unfair’, ‘unconscionable’ and ‘illegitimate’ could be shaped by social norms that are appropriate to parties who are in, or who are contemplating, a (de facto/de jure) marriage relationship. They could be interpreted way that is responsive to the public policy considerations that pervade family law in general and that underpin the *Family Law Act* in particular. For example, this degree of specificity could facilitate the court to develop a framework of interpretive principles, which is sensitive to the particular type of financial agreement in question; that is, which takes account of whether the agreement in question was made: in contemplation of marriage; during but before breakdown of the relationship; or after breakdown and in contemplation of the dissolution of the marriage.

2.132 *They could take account of the statutory context of binding financial agreements as an alternative to s 79*

The general law of contract protects contracting parties’ interests on the basis that, should the contract fail, the losing party loses entirely and no other avenue of recourse is open to him.[[42]](#footnote-42) This premise informs the rules of contract law and, in particular, operates as a limiting force on the development and application of defences. Binding financial agreements, however, are not ordinary contracts. They are creatures of statute, which exist chiefly as a mechanism for solving a particular problem – the distribution of matrimonial property upon breakdown of the relationship. Importantly, they are not the only mechanism for solving this problem. Binding financial agreements stand alongside, s79, which empowers the Court to settle property interests upon dissolution of marriage and which is arguably the primary mechanism for doing so. Thus, financial agreements offer an *alternative* way to settle matrimonial property.

Therefore, insofar as binding financial agreements serve to oust the Court’s jurisdiction, they are premised upon the availability of an another mechanism for solving the very same problem. Put simply, if a financial agreement is set aside, the disappointed party is not left empty-handed. In that situation, the distribution of the couple’s assets falls to be undertaken by the Court pursuant to s 79. When a financial agreement is set aside, the disappointment of the losing party is limited to the fact that the decision as to what is an appropriate distribution of the matrimonial property will be made by the Court rather than in accordance with the agreement. This is an important distinction between binding financial agreements and ordinary contracts and this distinction should inform the law which applies to them.

In view of this fundamental difference between a binding financial agreement and an ordinary contract, it is not appropriate that parties who wish to set aside a financial agreement should be left to the defences available under the ordinary law of contract. It is submitted that, as these defences were created in a context which required that they should be very restricted, they are not ‘fit for purpose’ in the context of financial agreements made under the Act.

2.133 They could operate in a way that fosters *relational* autonomy

The implementation a system of financial agreements was motivated by a desire for certainty and greater autonomy. In its Report on *Matrimonial Property*, the ALRC commented that ‘[s]ome spouses and intending spouses wish to feel that they have control over their financial affairs … [and] seek a greater degree of certainty than is provided by a discretionary system’.[[43]](#footnote-43) The recommended changes were intended to promote a liberal understanding of autonomy, in that they sought to empower spouses to obtain certainty and a ‘feeling of control’ in relation to their affairs. By 2015, the rhetoric employed in the Explanatory Memorandum to the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* (the 2015 Bill) evinced a neo-liberal conception of autonomy – which stressed ‘the individual’s duty to make responsible, self-reliant choices …’.[[44]](#footnote-44) It is difficult to reconcile the tenor of the 2015 Bill with the rationale of the 1975 Act.[[45]](#footnote-45) However, even in ‘promot[ing] the right to freedom from interference’ and ‘empower[ing] families to take responsibility for their own affairs without interference …’, legislators did acknowledge that it was *families*, rather than individuals, whom it was sought to liberate and empower.[[46]](#footnote-46)

It is submitted that insofar as the promotion of autonomy is a legitimate goal of these provisions, it ought to be a *relational*, rather than an individualistic, conception of autonomy which is promoted.[[47]](#footnote-47) ‘[R]elational theory focuses on the relationship of the parties and, within this framework, [takes into account] such of the context to the agreements as is relevant to the parties’ relationship.[[48]](#footnote-48) ‘The actor is conceived as embedded in his or her cultural, social, economic and familial role, with a wide range of considerations, including emotions and relational connections, which may influence personal choices.’[[49]](#footnote-49) If financial agreements are understood as promoting a relational conception of autonomy, it follows that this should inform and colour the interpretation of the legislative provisions by which they are implemented and the operation of the defences pursuant to which they may be set aside or declared not to be binding. This is not unrealistic. It is submitted that the reasons for judgment offered by Lady Hale (in dissent) in *Radmacher v Granatino* and by the plurality in *Thorne v Kennedy* may serve as examples of a relational approach, in that their Honours paid attention to the relational context of the agreements in determining their enforceability.[[50]](#footnote-50)

It is submitted that a relational approach is desirable, because it more closely accords with the way that the parties perceive their legal relations. More importantly, a relational approach is more likely to yield a fair outcome, because structural inequalities are more visible when an agreement is examined through a relational lens. Viewed from a relational perspective, there is justification for taking into account changes in material circumstances which occur after the agreement was signed. Relational contract theory maintains that ‘the obligations created by an agreement do not em**a**nate solely from the time that the agreement was signed; they arise as the relationship evolves.’[[51]](#footnote-51) As Thompson observes, ‘this is well suited to intimate contracts like prenups, where different understandings about terms or changing circumstances can dramatically alter the outcome of an agreement.’[[52]](#footnote-52) It is submitted that financial agreements are the ideal subjects for a relational analysis and judges of the Family Court have the skills to employ this approach.

A relational approach to financial agreements (and a relational concept of autonomy as it is promoted by such agreements) would be better facilitated by a legislative framework that is self-contained and sui generis, than by a system which adopts the general and indiscriminate principles of common law and equity. These rarely differentiate between contracts entered into between parties to a relationship of utmost intimacy and those which are created in a commercial context. Furthermore, a vitiating criterion of ‘unfairness’ - informed by a broad range of relationally significant factors - would be well suited (and readily be adapted) to the task of balancing the requirement of certainty and (relational) autonomy with the goals of achieving tolerably fair outcomes and preventing unnecessary hardship. For example, rules that are adapted to promote a relational conception of autonomy might be expected to deal with concerns of domestic violence, including psychological, emotional and financial abuse.[[53]](#footnote-53) Each of these constitutes a form of domestic violence, which is characterised by ‘an ongoing pattern of behaviour aimed at controlling one’s partner through fear …’.[[54]](#footnote-54) These issues go directly to the matter of consent. More specifically, they cast a shadow over the reliability of the usual presumption that compliance with the requisite formal requirements by a competent and informed adult indicates that the transaction is a manifestation of that person’s free choice. Therefore, for instance, in assessing whether:

* an agreement was ‘entered into freely’ (in the suggested s 90G(1)(a) and s 90K(1)(b)) for the purposes of determining whether an agreement may be set aside / may be binding; or
* ‘illegitimate’ pressure has been employed (in the suggested s 90K(1B)) for the purposes of assessing whether an agreement is unfair

it would be possible to take cognisance of the dynamics of the relationship and to bring to bear a heightened awareness of the signs of autonomy impairing abuse. Furthermore, where there is a proven history of abusive behaviour, it may be appropriate to presume impaired autonomy (that is, no free choice), so that the other party is charged with the onus of proving that the agreement was entered into freely.

2.2 Promoting fair outcomes

It is submitted that, as it stands, the law concerning financial agreements (at least in so far as it relates to the parties inter se) is concerned only with procedural fairness and not with substantive fairness. A financial agreement will be enforced against a party, even where there has been a material change of circumstances such that this will cause that party to endure hardship. The unflinching determination to enforce even substantially unfair financial agreements was exemplified in *Hoult v Hoult*.[[55]](#footnote-55) Strickland and Ainslie-Wallace JJ held that, in deciding whether it would be ‘unjust and inequitable’ if an agreement were *not* binding,[[56]](#footnote-56) it was permissible to consider only circumstances relevant to the making and performance of the agreement.[[57]](#footnote-57) Their Honours specifically rejected suggestions that the terms of the agreement or changes in material circumstances occurring after execution of the agreement might be taken into consideration.[[58]](#footnote-58) Indeed, their Honours went so far as to state that:

The point of the legislation is to allow the parties to decide what bargain they will strike, and provided the agreement complies with requirements of s 90G(1) they are bound what they agree upon. Significantly, in reaching agreement … they can literally make the worst bargain possible, but still be bound by it.[[59]](#footnote-59)

The language of bargain and exchange that is used here speaks to an attitude, which, it is submitted, is out of place given the nature of such agreements and the relational context in they are made.

The approach adopted by the majority in *Hoult* with respect to binding financial agreements stands in stark contrast to the principles which have traditionally guided the development of the law with respect to matrimonial property. In its 1986 Report on *Matrimonial Property*, the ALRC outlined three ‘underlying principles’ of its recommendations for the reform of Part VIII of the Act.[[60]](#footnote-60) One of these was ‘a just distribution’.[[61]](#footnote-61) The Commission stated that ‘the proper test of a just re-arrangement of the parties’ property and finances is whether the economic hardship arising from the breakdown of the marriage has been distributed as fairly as possible between the family members.’[[62]](#footnote-62) Concern for the need for distributive justice, which is evident in s 79 of the Act, ought not to be abandoned in Part VIIIA of the Act.

The prevailing approach to the enforcement of binding financial agreements is concerned exclusively with corrective justice.[[63]](#footnote-63) This approach stands in stark contrast to the principles, which guide the reallocation of property by the Court under s 79.[[64]](#footnote-64) The fundamental disparity between Part VIII and Part VIIIA diminishes the internal coherence of the statutory regime with respect to the settlement of matrimonial property. Indeed, where the settlement of property is concerned, the Act appears to have a ‘split personality’. It is submitted that the two mechanisms that are provided by the Act for the settlement of matrimonial property upon dissolution of the relationship ought to operate consistently with one another. At a minimum, the system implemented in Part VIIIA ought not to proceed on a basis that conflicts with the principles upon which the Act was based and upon which Part VIII continues to operate.

More importantly, even on the assumption that the approach taken by the majority in *Hoult* and the rhetoric employed in the Explanatory Memorandum to the 2015 amendment Bill *do* accurately reflect the legislative intention with respect to binding financial agreements, it is submitted that the law does not adequately promote fair outcomes. Substantive unfairness, even where it is caused by subsequent events beyond the parties’ control or foresight, affords no basis for relief. It is submitted that, even though the system of binding financial agreements is intended to accord respect for the parties’ choices, it is not conducive to the achievement of fair outcomes that the law concerns itself only with procedural fairness and shuts its eyes to questions of substantive fairness as between spouses. Therefore, it is submitted that, at the very least, a financial agreement ought not to bind parties where the circumstances have materially changed (since the time that the agreement was made) in a way that that will cause significant hardship to one of the parties.

The move to stricter rules for the enforcement of binding financial agreements is usually justified on the basis that there is a need for greater certainty and predictability. However, this rationale is flawed. First, it is submitted that this is not a sound justification for laws which carry such an increased risk of facilitating the exploitation of vulnerable and/or trusting parties. Second, a degree of uncertainty is inevitable in relation to laws of this nature. The rules pertaining to financial agreements need to be flexible enough to provide a just outcome in a highly diverse range of circumstances. Flexibility necessarily diminishes predictability. Therefore, a very high level of certainty is probably not attainable with rules of this nature. Furthermore, it should be noted that, in any event, a higher degree of uncertainty will be inevitable, so long as financial agreements can be set aside by reason of the application of equitable defences, such as: undue influence and unconscionable dealing. This is because the equitable jurisdiction and its remedies are inherently discretionary. Finally, it is submitted that, in truth, the move away from judicial discretion and towards a system of strictly binding agreements is not really about certainty at all. It is about *the appropriate location of the power to decide* the settlement of matrimonial property. Section 79 confers that power on the Court; whereas Part VIIIA reserves it to the parties. This reflects a preference by legislators that matrimonial property is allocated by the parties themselves, rather than by the State. It is this, rather than a need for certainty, which lies at the heart of the argument for stricter rules for the enforcement of binding financial agreements

The suggested changes would also assist to promote fair outcomes for parties by striking an appropriate balance between the requirement for overall certainty (in the sense of the predictability of outcomes) and the need for fair outcomes in individual cases. Where parties do decide to enter into a financial agreement, then in keeping with liberal ideals, the agreement would be enforceable only if it was freely entered into. This means that agreements procured by coercion or illegitimate pressure could be set aside. Further, in keeping with the law of undue influence as articulated in *Thorne v Kennedy*, a financial agreement might be set aside, even where there has been no misconduct by the defendant, if the decision to transact was not made freely by the plaintiff.[[65]](#footnote-65) Finally, where the plaintiff does freely enter into the agreement, she/he could still be relieved of responsibility if the transaction is unfair. The question of whether or not a transaction is ‘unfair’ could be made reasonably certain by the imbuing that general term with a meaning that is suited to the statutory context in which it is used. This could be achieved by the provision of a closed list of criteria, which are modelled on provisions contained in other statutes, such as 76 of the *National Credit Code,* designed to address issues that commonly arise where contracts are made in situations of power imbalance. After all, why should it be that a party to a financial agreement is afforded less protection than a mortgagor? It is submitted that these changes would strike an acceptable balance between the need for predictable outcomes and the need for tolerably fair outcomes.

*Conclusion*

Given structural power imbalance which disadvantages women and the pervasive danger of domestic violence (in all its forms), any change which would exacerbate the existing problem would be a seriously retrograde step.[[66]](#footnote-66) The danger is that the system of binding financial agreements might have the effect of enabling a spouse’s impaired autonomy to be used to strip her of the protections afforded to her by law. This would not merely serve to compound a problem that the legislature has committed itself to address, it could enable Part VIIIA of the Act to become an instrument of abuse.

Having considered relational autonomy in context of prenuptial agreements, Thompson concluded that ‘for better or worse, and despite all its uncertainties, the law on prenups in *Radmacher v Granatino* is the best starting point when addressing issues of power in theory and practice. The discretion reserved for the judge to refuse to give effect to a prenup if unfair means there is scope for autonomy and power to be considered differently, for the context of the relationship to assume greater significance and for gendered power to be recognised.’[[67]](#footnote-67) It is submitted that the suggested changes, which have drawn on the *Radmacher v Granatino* principle, would reduce inconsistencies between the system of binding financial agreements and the operation of the Courts discretionary jurisdiction. They would increase clarity and comprehensibility, because a purpose built statutory solution could operate with greater precision and would be more predictable (particularly to specialists) than are the general doctrines of common law and equity. Finally, the proposed changes would facilitate a family law system which promotes autonomy as that concept is understood in a relational context. This would provide a more realistic and equitable system, which could provide fair outcomes while maintaining a tolerable degree of predictability for parties and practitioners.

1. [2010] UKSC 42. [↑](#footnote-ref-1)
2. [2010] UKSC 42, [75] (Lord Phillips, Lord Hope, Lord Rodger, Lord Walker, Lord Brown, Lord Collins and Lord Kerr). [↑](#footnote-ref-2)
3. Section 90KA(c). [↑](#footnote-ref-3)
4. See *Barclays Bank plc v O’Brien* [1993] UKHL 6**; [1994] 1 AC 180;** 4 All ER 417**, 424.** [↑](#footnote-ref-4)
5. See 2.12 below. [↑](#footnote-ref-5)
6. Accordingly, s 90K(1)(d) should be deleted. [↑](#footnote-ref-6)
7. This example was based on s 76 *National Credit Code* (Court may open unjust transactions) and the existing provisions of s 90K of the Act. [↑](#footnote-ref-7)
8. Section 90K(1)(b) and Section 90KA. [↑](#footnote-ref-8)
9. See 2.12 below. [↑](#footnote-ref-9)
10. Section 90K(1)(d), which protects against unfairness only where: it arises as a result of a material change in circumstance; the change in circumstances relates to the ‘care welfare and development’ a child; the child affected is a child of the marriage; and the effect of the change amounts to ‘hardship’. [↑](#footnote-ref-10)
11. Trent Dalton, ‘Widowed, divorced, all alone: older women in poverty crisis’ *The Australian* (16 October 2015) <https://www.theaustralian.com.au/national-affairs/plight-of-queenslands-older-women-exposed-in-doing-it-tough/news-story/e4caaa4ee17254341f83978ba2f5e117> (Accessed 12 May 2018). [↑](#footnote-ref-11)
12. See *Hough* (2013) 50 Fam LR 260[195]-[197] (Thackray J). [↑](#footnote-ref-12)
13. Section 90K. [↑](#footnote-ref-13)
14. Section 90G. [↑](#footnote-ref-14)
15. Section 90K(1)(a). [↑](#footnote-ref-15)
16. Section 90K(1)(b). [↑](#footnote-ref-16)
17. Section 90G(1)(a). [↑](#footnote-ref-17)
18. Section 90G(1)(b). [↑](#footnote-ref-18)
19. Section 90KA. [↑](#footnote-ref-19)
20. Section 90K(1)(b). [↑](#footnote-ref-20)
21. There is some reason for concern about confusion arising from the duplication caused by the operation of the equitable doctrine of unconscionable dealing alongside the statutory prohibition, in s 90K(1)(e), against unconscionable conduct. See *Thorne v Kennedy* [2017] HCA 49 [23]. [↑](#footnote-ref-21)
22. L Young, A Sifris, R Carroll and G Monahan, *Family Law in Australia* (LexisNexis Butterworths, 9th edn, 2016), 955. [↑](#footnote-ref-22)
23. *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149. [↑](#footnote-ref-23)
24. *Thorne v Kennedy* [2017] HCA 49 [27] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) citing J Beatson, ‘Duress by Threatened Breach of Contract’ (1976) 92 *Law Quarterly Review* 496, 497-498 and JP Dawson, ‘Economic Duress – An Essay in Perspective’ (1947) 45 *Michigan Law Review* 253, 287. [↑](#footnote-ref-24)
25. [2017] HCA 49. [↑](#footnote-ref-25)
26. Pursuant to s 90K(1)(b) and s 90KA. For another case in which duress was pleaded with respect to a binding financial agreement, see *Moreno & Moreno* [2009] FMCAfam 1109. [↑](#footnote-ref-26)
27. See, for example, *Saintclaire & Saintclaire* [2013] FamCa 491 (appealed in *Saintclaire & Saintclaire* [2015] FamCAFC 245) and *Pascot v Pascot* [2011] FamCA 945*.* [↑](#footnote-ref-27)
28. *Barclays Bank plc v O’Brien* [1993] UKHL 6**; [1994] 1 AC 180;** 4 All ER 417**, 424.** [↑](#footnote-ref-28)
29. W Swadling, ‘Undue Influence: Lessons from America’ in **C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment, Critical and Comparative Analyses*, Hart Publishing, 2013,** 111. This reference was to the doctrine of undue influence as it is used across the common law world, so that it is applicable to but does not specifically refer to the doctrine as it is used in Australia. [↑](#footnote-ref-29)
30. That is, the equitable doctrine of undue influence inter vivos. [↑](#footnote-ref-30)
31. R Honey, ‘Divergence in the Australian and English Law of Undue Influence: Vacillation or Variance?’ Chapter 14 in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016), 272. [↑](#footnote-ref-31)
32. The *locus classicus* of this understanding of undue influence *Johnson v Buttress* ( 1936 ) 56 CLR 113, 134 – 36 (Dixon J). [↑](#footnote-ref-32)
33. *Commercial Bank of Australia Ltd v Amadio* ( 1983 ) 151 CLR 447, 474 (Deane J) and 461 (Mason J ); and *Bridgewater v Leahy* ( 1998) 194 CLR 457, 478– 79 (Gaudron, Gummow and Kirby JJ). [↑](#footnote-ref-33)
34. *Thorne v Kennedy* [2017] HCA 49 [30]-[31] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) and, albeit measured by a more rigorous standard, [81] (Gordon J). [↑](#footnote-ref-34)
35. *Thorne v Kennedy* [2017] HCA 49 [57] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). [↑](#footnote-ref-35)
36. ### See R Bigwood, ‘The Undue Influence of ‘Non-Australian’ Undue Influence Law on Australian Undue Influence Law: Has *Johnson v Buttres*s Been Overruled, Sub Silentio?’ https://law.uq.edu.au/event/session/8364 (accessed 10 May 2018).

    [↑](#footnote-ref-36)
37. *Thorne v Kennedy* [2017] HCA 49 [23] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). [↑](#footnote-ref-37)
38. [2010] UKSC 42. [↑](#footnote-ref-38)
39. And consistent with *Radmacher v Granatino* [2010] UKSC 42. [↑](#footnote-ref-39)
40. Lucy Buckley, ‘Autonomy and Prenuptial Agreements in Ireland in a Relational Analysis’ (2018) *Legal Studies* 164, 166. [↑](#footnote-ref-40)
41. Lucy Buckley, ‘Autonomy and Prenuptial Agreements in Ireland in a Relational Analysis’ (2018) *Legal Studies* 164, 167. [↑](#footnote-ref-41)
42. It may be the case that the plaintiff also has a cause of action in tort or by virtue of a statute, but the law of contract cannot assume this. [↑](#footnote-ref-42)
43. ALRC, Report No 39, *Matrimonial Property*, AGPS, 1986, [64]. [↑](#footnote-ref-43)
44. Explanatory Memorandum, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, [18] and Lucy Buckley, ‘Autonomy and Prenuptial Agreements in Ireland in a Relational Analysis’ (2018) *Legal Studies* 164, 166. [↑](#footnote-ref-44)
45. The discretionary system for the settlement of matrimonial property was fundamental to the Family Law Act 1975 (Cth). Cf the *Explanatory Memorandum, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, [16] which refers to ‘The Bill promotes the right to freedom from interference with the family by ensuring a proper and effective system for financial agreements to empower families to take responsibility for their own affairs without interference of a court’. [↑](#footnote-ref-45)
46. Explanatory Memorandum, Family Law Amendment (Financial Agreements and Other Measures) Bill 2015, [16]. [↑](#footnote-ref-46)
47. See above 2.131. See, for example, C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press: 2000); J Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2001); Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice Issues of Power in Theory and Practice* (Hart Publishing: 2015) 139-164; and Lucy Buckley, ‘Autonomy and Prenuptial Agreements in Ireland in a Relational Analysis’ (2018) *Legal Studies* 164. [↑](#footnote-ref-47)
48. Thompson, *Prenuptial Agreements and the Presumption of Free Choice Issues of Power in Theory and Practice*, (Hart Publishing: 2015) 142. [↑](#footnote-ref-48)
49. Buckley, ‘Autonomy and Prenuptial Agreements in Ireland in a Relational Analysis’, 166 citing C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self,* 4. [↑](#footnote-ref-49)
50. See *Radmacher v Granatino* [2010] UKSC 42, [175] (Lady Hale) and *Thorne v Kennedy* [2017] HCA 49 [47] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). Their Honours endorsed the approach taken by Demack J at first instance, who ‘set out six matters which, in combination, led her to the conclusion that Ms Thorne had "no choice"**’**. [↑](#footnote-ref-50)
51. Thompson, *Prenuptial Agreements and the Presumption of Free Choice Issues of Power in Theory and Practice*, (Hart Publishing: 2015) 143. [↑](#footnote-ref-51)
52. Thompson, *Prenuptial Agreements and the Presumption of Free Choice Issues of Power in Theory and Practice*, (Hart Publishing: 2015) 143. [↑](#footnote-ref-52)
53. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia> (accessed 10 May 2018) citing A Morgan and H Chadwick, *Key issues in domestic violence*, Summary paper, no. 7, Australian Institute of Criminology (AIC), Canberra, December 2009, p. 1, viewed 28 October 2010, <http://www.aic.gov.au/documents/5/6/E/%7B56E09295-AF88-4998-A083-B7CCD925B540%7Drip07_001.pdf>. [↑](#footnote-ref-53)
54. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia> (accessed 10 May 2018) citing National Council to Reduce Violence against Women and Children (NCRVWC), *Background paper to Time for Action: The National Council’s plan to reduce violence against women and children*, *2009–2021*, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), Canberra, 2009, p. 13, viewed 28 October 2010,

    <http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/background/Documents/Background_Paper_to_Time_for_Action.PDF>;  Department for Planning and Community Development, *Family violence risk assessment and risk management framework*, Victorian Government, Melbourne, 2007, p. 21, viewed 19 September 2011, <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0006/581757/risk-assessment-risk-management-framework-2007.pdf> [↑](#footnote-ref-54)
55. (2013) FLC 93-546. [↑](#footnote-ref-55)
56. Pursuant to s 90G(1A). [↑](#footnote-ref-56)
57. (2013) FLC 93-546 [308]. [↑](#footnote-ref-57)
58. Cf (2013) FLC 93-546 [200] (Thackray J). [↑](#footnote-ref-58)
59. (2013) FLC 93-546 [310]. [↑](#footnote-ref-59)
60. ALRC, Report No 39, *Matrimonial Property*, AGPS, 1986, [350]. [↑](#footnote-ref-60)
61. Ibid [350]. [↑](#footnote-ref-61)
62. Ibid. [↑](#footnote-ref-62)
63. At least at least as between the parties. [↑](#footnote-ref-63)
64. Their Honours were quite aware of this, insisting that no reference might be made, in considering the enforceability of the agreement in question, to the factors which are relevant to the exercise of the Court’s discretion under s 79. [↑](#footnote-ref-64)
65. *Thorne v Kennedy* [2017] HCA 49. [↑](#footnote-ref-65)
66. *Family Law Act 1975* (Cth) s 43(ca) and ALRC Issues Paper (IP 48) - *Review of the Family Law System* [163]. [↑](#footnote-ref-66)
67. S Thompson, *Prenuptial Agreements and the Presumption of Free Choice Issues of Power in Theory and Practice* (Hart Publishing: 2015)201. [↑](#footnote-ref-67)