Graham **Perrett MP** FEDERAL MEMBER FOR MORETON

9 February 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary,

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

I would appreciate the opportunity to make a submission to the Senate Inquiry into the above Bill.

There are some aspects of this Bill that are very troubling to me and I would like to set out, for the benefit of the Committee, my concerns.

***Binding Financial Agreements***

The Bill attempts to make amendments around several aspects of the current regime for making a binding financial agreement.

The current provisions of the *Family Law Act* 1975 (FLA) allow people who are contemplating entering into a relationship; are currently in a relationship; or have ended a relationship; to enter into an agreement that determines the division of relationship assets and/or spousal maintenance that will be paid in the event that the relationship ends. These agreements, if binding, effectively oust the jurisdiction of the courts and the individual's rights under the FLA.

There is no requirement that these agreements be just and equitable. The bargain struck can be the worst and most unfair bargain in the world, but if all of the formal requirements are adhered to, it will be binding and there will be no protection available under the FLA.

While I respect that people should be free to enter into whatever bargain they want, we should be cognisant that the participants do not always enter such negotiations on a level playing field. There can be, and often is, a power imbalance between the parties.

There are many factors which can make the bargaining power unequal including language barriers and domestic violence. I note that in one of the leading cases[1] which considers these agreements one of the parties is an immigrant with English as a second language.

As legislators, we need to be very careful that we are not providing certainty to the powerful at the cost of the oppressed.

Prior to the provisions been inserted into the FLA in 2000, the notion of couples making an agreement outside of the protections provided by the FLA was considered to be against public policy.

The Bills Digest to the Bill that originally introduced the binding financial agreement provisions into the FLA refers to an article in the Notre Dame Law Review[2] from the Notre Dame University in the United States, commenting that:-

> *"The United States experience suggests that couples entering binding pre-marital agreements now argue more frequently about the interpretation of their agreements. Thus one basis for conflict appears to have been replaced by another. There is also some empirical evidence suggesting that pre-marital agreements usually work to women's disadvantage due to their economically weaker position compared with men and there is further evidence to suggest that significantly more women than men have challenged the terms of pre-nuptial agreements."*

The then Chief Justice of the Family Court, Alastair Nicholson in an address on matrimonial property law reform[3] given around the time of the insertion of the original provisions in 2000 made several comments about binding financial agreements including:-

- *"...the great difficulty about them is that the bargaining power may not be equal";*
- *"In the case of violent or abusive marriages there may be extreme pressure to enter into such an agreement and I doubt that the provision for independent advice is likely to overcome such pressure."*
- Referring to a requirement to seek legal advice. *"Many lawyers are not expert in family law..."*
- And somewhat prophetically, *"These options have the capacity to introduce greater predictability but if such certainty is at the cost of justice, then Australians will pay dearly for so-called reform."*

All of these concerns are still valid when considering the current Bill which seeks to amend the provisions regulating binding financial agreements in the FLA.

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[1] *Hoult & Hoult* [2013] FamCAFC 109

[2] Hedieh Nasheri, 'Prenuptial agreements in the United States: a need for closed control',1998 *International Journal of Law, Policy and the Family,* 12 at 318; Sandford Katz, 'Marriage as Partnership', 1998 *Notre Dame Law Review,* 73, pp 1251-1274.

[3] Alastair Nicholson, *Proposed Changes to Property Matters under the Family Law Act: an Address,* Bar Association of NSW, 20 May 1999, p. 15.

***Legal Advice:***

The Bill seeks to change the level of legal advice required before entering into a binding financial agreement.

The Explanatory Memorandum to the Bill says that the amendment will 'substantially simplify the obligation on legal practitioners by limiting the requirement for independent legal advice to the effects of the agreement on the rights of the party under the Act'.

The provisions setting out the extent of legal advice required before entering into a binding financial agreement have been amended before. On each of those occasions the amount of legal advice required has been reduced. Further reducing the level of legal advice required, whilst it may make it easier for the lawyers, may not adequately protect a vulnerable party entering into a binding financial agreement.

***Spousal Maintenance:***

Spousal maintenance, where it is included in a binding financial agreement, forms part of the overall bargain struck between the parties.

The Bill seeks to amend the provisions of the FLA to provide that despite a binding financial agreement continuing to operate after the death of a party to the agreement, any provision in the agreement providing for spousal maintenance would terminate unless the agreement specifically provides for it to continue.

This is particularly concerning when it is also proposed to lower the amount of legal advice required before the parties enter into such an agreement.

A further amendment is proposed to the spousal maintenance provisions in binding financial agreements that the spousal maintenance will cease when the person receiving the maintenance enters into a de facto relationship or remarries.

This poses several issues. Undoubtedly disputes will flow from this proposed amendment. What criteria will determine if and when a de facto relationship has commenced? Entering into a de facto relationship does not automatically mean that there is another means of support for the person receiving the maintenance, leaving the person who was previously receiving the agreed spousal maintenance with no financial support.

Both of these provisions result in the receiver of the spousal maintenance receiving less than was bargained for when the agreement was made. As spousal maintenance is in most cases provided to women, these provisions will cause further hardship for women leaving relationships.

A further amendment to the spousal maintenance provisions, which is said to clarify the current provisions, will provide that the amount attributable to spousal maintenance can be nil. The effect of this amendment is that it provides for parties to waive spousal maintenance where parties are not dependant on Government assistance. This provision will be retrospective. Extreme caution should be exercised when provisions are to be retrospective. Particularly, I would suggest, when a requirement of entering into the

agreement was to seek legal advice, which advice would have been based on the previous provision.

I appreciate your consideration of my submission.

Yours sincerely,

**Graham Perrett MP**
**Federal Member for Moreton**
**Shadow Parliamentary Secretary to the Shadow Attorney-General**